

Discussion Points

Presented by the Business at OECD (BIAC) Competition Committee to the OECD Global Forum on Competition

Competition Law and State-Owned Enterprises

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Business at OECD (BIAC) appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its session on competition law and state-owned enterprises.

I. Introduction

1. Competition law authorities around the world face unique issues when reviewing transactions involving state owned-enterprises (SOEs). A SOE is a public enterprise, owned partially or completely by a state government rather than by private investors.¹ SOEs have become increasingly common on the world stage, and in 2014 represented 23% of the Fortune Global 500 list.² SOEs may pursue strategic goals other than or in addition to profit maximization (which is what private enterprises are presumed to pursue). For example, SOEs may be tasked with providing public goods (e.g., electricity and gas, or transportation), increasing employment, providing affordable services (e.g., postal services or telecommunications), and limiting private and foreign control of a national economy.³ SOEs are often an invaluable tool for economic development and the implementation of industrial policy and can serve as major sources of employment.⁴ Developed countries have historically and developing countries continue to use SOEs to mobilize capital and provide infrastructure.⁵

¹ David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479 (2003).

² Jan Stuesson, Scott McIntyre & Nick C Jones, *State-Owned Enterprises: Catalysts for public value creation?* 9 (PwC, Public Sector Research Centre, Apr. 2015), available at www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf.

³ Sappington & Sidak, *supra* note 1, at 479-480; Stuesson, *supra* note 2, at 14.

⁴ OECD, COMPETITIVE NEUTRALITY: MAINTAINING A LEVEL PLAYING FIELD BETWEEN PUBLIC AND PRIVATE BUSINESS 11 (2012), available at www.oecd.org/daf/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm; OECD, GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES (2015), available at www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm; OECD, WORKING PARTY ON STATE OWNERSHIP AND PRIVATISATION PRACTICES—COMPENDIUM ON SOE GOVERNANCE (Mar. 7, 2017), available at <http://biac.org/wp-content/uploads/2017/03/DAF-CA-SOPP20162-REV2-En.pdf>.

⁵ Stuesson, *supra* note 2, at 14.

2. This paper identifies procedural and substantive issues that competition law authorities may need to grapple with when reviewing mergers involving SOEs, offers suggestions for considering them, and addresses common issues arising in the application of competition laws to SOEs. It will include a discussion of procedural issues relating to threshold analyses and potential timing delays, and substantive issues relating to market concentration analyses and partial governmental ownership of SOEs.⁶

II. Merger Review: Challenges Raised by SOEs

3. Competition laws are typically drafted for general application, and do not frequently have specific provisions to review merger transactions involving a SOE. As a result, competition law authorities may need to consider how general rules apply in the specific SOE context.

A. Procedural Issues

4. Competition law authorities will likely face at least two key procedural issues when reviewing mergers involving SOEs. First, identifying which entities should be included in threshold analyses. Second, addressing timing delays that may arise where information is required from SOEs' affiliates.

1. Threshold Analyses

5. Many competition laws require the pre-closing notification of mergers where the parties to the transaction are sufficiently large so as to surpass a threshold contained in the law. Those thresholds often require that the size of the transacting parties be determined by reference to the parties and their affiliates.
6. When applying such thresholds, competition law authorities must determine which entities should be included. Since the ultimate owners of SOEs are often state governments, should all other SOEs owned by the state government be treated as affiliated and therefore be included in the threshold analysis? If competition law authorities include all of a SOE's sibling companies, the likelihood that the transaction would exceed the financial notification thresholds increases. Such an interpretation raises the question of whether the legislation was meant to address affiliation in the same manner for private and public owners.
7. The European Commission (EC) recently considered this issue in *EDF/CGN/NNB Group* when determining whether it had jurisdiction to review the transaction.⁷ In February 2016, the EC was notified about a proposed concentration under which Electricité de France S.A. (EDF) and China General Nuclear Power Corporation (CGN) would acquire joint control over a number of NNB entities, including NNB Holding Company (HPC) Limited, NNB Generation Company (HPC) Limited, NNB Holding Company (SZC) Limited, NNB Generation Company

⁶ For more information on how governments can foster competitive neutrality between SOEs and private corporations, including being subject to regular taxation, legislation and regulations, and facing market consistent access to debt and equity finance, see generally OECD, *supra* note 4. Competition authorities should take these concerns into consideration when substantively reviewing mergers involving SOEs.

⁷ Case M.7850—EDF/CGN/NNB Group of Companies, Comm'n Decision, (Mar. 10, 2016) (summary at 2016 O.J. (C 151) 1, available at http://ec.europa.eu/competition/mergers/cases/decisions/m7850_429_3.pdf).

(SZC) Limited, NNB Holding Company (BRB) Limited and NNB Generation Company (BRB) Limited (collectively, the NNB Group). EDF is the parent company of the EDF Group, which among other things, operates eight nuclear power stations in the United Kingdom and 19 nuclear plants in France. EDF is a publicly traded company that the French government holds a greater than 80% equity share of. CGN is a Chinese SOE that is 90% owned by the Central Chinese Assets Supervision and Administrative Commission (Central SASAC) and is involved in the development, construction and operation of nuclear and renewable energy plants primarily in China. The NNB Group consists of three holding companies investing in limited companies responsible for the design, development, construction and operation of new nuclear power plants.⁸ After reviewing the proposed concentration, the EC issued its decision not to oppose the concentration on March 10, 2016.

8. As a threshold issue, the EC had to consider whether it had jurisdiction to review the proposed transaction. The EC had to assess whether EDF and CGN exceeded the financial notification thresholds. To exceed the financial thresholds, the EC had to determine whether CGN and the Central SASAC were a part of the same controlling undertaking. In other words, if CGN was independent from the Central SASAC, then CGN's financial turnover would not exceed the notification thresholds and the transaction would not be notifiable.⁹
9. Article 5(4) and Recital 22 of the EU Merger Regulation, and the Jurisdictional Notice, provides that two undertakings (including SOEs) will not be considered to be under the same controlling undertaking if they have a decision making power independent from each other and the relevant state.¹⁰ When considering "independence," the EC considered CGN's autonomy from China when making strategic decisions, business planning, and budgeting, as well as the ability for China to coordinate commercial conduct by facilitating or imposing coordination between SOEs.¹¹ The EC also analyzed China's laws regarding SOEs, and noted that the Central SASAC oversaw large SOEs which had "bearings on the national economic lifeline and state security," and had the power to appoint and remove senior management, conduct assessments of SOEs' managers and approve mergers or strategic investment decisions.¹²
10. Ultimately, the EC determined that the Central SASAC participates in major decision-making, selects senior management, and can interfere in the strategic investment decisions of the entities that it controls. Within the energy sector, and in particular with respect to nuclear power, the EC determined that China could facilitate coordination amongst active market participants.¹³ Thus, the EC held that CGN and the Central SASAC were part of the same controlling undertaking and that the financial turnover of all companies active in the

⁸ *Id.* ¶¶ 1-5.

⁹ *Id.* ¶ 33.

¹⁰ *Id.* ¶ 30.

¹¹ *Id.*

¹² *Id.* ¶ 38.

¹³ *Id.* ¶¶ 42-44.

energy industry controlled by the Central SASAC should be included in its calculation.¹⁴ By including such entities, both EDF and CGN and the relevant SOEs exceeded the financial thresholds and the EC had jurisdiction to review the proposed transaction.¹⁵

2. Information Requests and Timing Delays

11. In the context of an ongoing merger review, competition law authorities routinely issue requests for information (RFIs) to the parties involved in the transaction. In transactions involving private enterprises, competition law authorities will ask the parties themselves for further information about their sibling enterprises but will not typically issue RFIs to the sibling enterprises. In the context of SOEs, competition law authorities may wish to obtain additional or detailed information about the sibling enterprises of the SOE.
12. Competition law authorities may ask the merging SOE questions like “please list all of your affiliates,” “please tell us about the business activities of all of your affiliates,” “please tell us if any of these affiliates compete with the business you are acquiring” on an initial basis. These types of questions may be very difficult for an SOE to answer because it is unlikely that the SOE has direct access to information about its sibling SOEs.
13. Either directly or indirectly requesting such information may lead to delays in obtaining regulatory approval. Competition law authorities should carefully consider whether the information they are requesting is truly necessary to analyze the transaction or whether it is based on a desire to learn more about particular SOEs. Delays in regulatory approval can have significant implications in the context of a multi-jurisdictional review (i.e., where multiple regulatory approvals are required to close the transaction), including a negative economic reaction from the market as a result of a protected review.
14. It is not always possible to overcome procedural problems associated with information collection. That is, a competition law authority’s question to a SOE about its sibling SOEs may remain unanswered because the SOE does not have access to information from its sibling entities. In these circumstances, competition law authorities must decide whether to pause their review process (recognizing that such a pause may be indefinite) or identify other ways to acquire relevant information that might permit the authority to conclude its review. One innovative solution to this problem comes from Canada. In Canada, mergers subject to notification cannot close until a waiting period has expired. As a matter of practice, at the conclusion of this waiting period, the Competition Bureau grants comfort letters to merging parties, advising that it does not intend to oppose the merger in the courts.
15. In mergers involving SOEs where the SOE has not provided all information about sibling SOEs requested by the Competition Bureau, the Competition Bureau has adopted the informal practice of permitting the waiting period to expire but not issuing the typical comfort letter. This practice permits merging parties to close their transaction, without the Bureau having to indicate its position about whether or not it might have grounds to oppose

¹⁴ *Id.* ¶ 49.

¹⁵ *Id.* ¶ 51.

the merger in the courts. This solution is possible because the Competition Bureau is not legally obligated to issue a decision at the conclusion of its review; such a solution may not be available (or consistent with custom) under other merger review regimes.

B. Substantive Issues

16. Competition law authorities may face two key substantive issues. First, identifying which entities should be included in market concentration analyses. Second, addressing the implications of merger review where a state government does not own 100% of the SOE.

1. Evaluating Market Concentration

17. Market concentration is an important part of competition law authorities' substantive analyses of a merger transaction. In the context of a transaction involving a SOE with sibling enterprises that have overlapping products and/or services, competition law authorities must decide whether the sibling enterprises should be considered as part of the SOE's market concentration or as rivals. When determining whether a SOE's sibling enterprises are rivals, the following factors should be considered at both the parent and sibling level: whether strategic decisions, business planning and budgeting are independent, and whether commercial conduct can be coordinated. Competition law authorities must consider and apply a principled approach to ensure all transactions are reviewed consistently and fairly.

2. When State Governments Own Less Than 100% of a SOE

18. While SOEs are often wholly-owned by state governments, there are many SOEs where the state government owns less than 100% of the SOE. Competition law authorities should carefully assess whether economic incentives of SOEs that are less than 100% owned by state governments are any different than private businesses, even though state government ownership exists.

19. For example, a state government that owns a majority share of a SOE, but also has minority private shareholders entitled to minority shareholder protections (e.g., the enterprise will operate in a way that does not favor any individual shareholder) may be obligated by its minority shareholder protection requirements to behave like any other private enterprise, despite majority control by the state government. By contrast, a state government that owns a significant minority share of a SOE, but also has the ability to appoint a majority of the board of directors and otherwise direct the affairs of the SOE, may not have economic incentives that are akin to a private enterprise, and competition law authorities may determine it relevant to examine the ability, incentive and likelihood of coordination by the SOE with its sibling SOEs. Other factors that might indicate that the SOE has no ability or incentive, and is not likely to coordinate with, its sibling SOEs include factors indicating the SOE's independence from the state government, including for example the lack of power to appoint and remove senior management, the lack of power to approve budgets, and the lack of power to approve mergers or strategic investment decisions.

III. Conclusion

20. As SOEs become increasingly prevalent in world markets, competition law authorities will undoubtedly confront the unique challenge of reviewing transactions in which they are involved.
21. Procedurally, a common inquiry will be whether sibling entities owned by a state government should be included in the threshold analysis. This issue was considered in *EDF/CGN/NNB Group*, where the EC assessed CGN's level of autonomy and the ability of the Chinese government to facilitate coordination, ultimately finding that the sibling entity revenues in the energy industry should be included in the threshold analysis. Another procedural issue that may arise is a timing delay in regulatory approval, which could have significant consequences in a multi-jurisdictional review. Competition law authorities should be cautious when issuing RFIs to SOEs and/or their sibling enterprises, keeping in mind that SOEs may not have direct access to the information being requested and there may be significant delays in obtaining it.
22. Substantively, authorities will often have to assess whether an SOE's sibling enterprises should be considered part of the SOE's market concentration. Applying *EDF/CGN/NNB Group* to the question of which sibling entities can be considered rivals, authorities should assess whether strategic decisions, business planning and budgeting are independent, and whether commercial conduct can be coordinated. Finally, competition law authorities should tailor their examinations depending on the extent to which a state government controls a certain SOE. For example, a higher level of scrutiny would be appropriate if circumstances suggest that the SOE lacks independence or that the government exercises de facto control over the SOE.