3. State-owned enterprises in the marketplace

According to the OECD Guidelines on Corporate Governance of State-Owned Enterprises (SOE Guidelines), where state-owned enterprises (SOEs) engage in economic activities, those activities must be carried out in a way that ensures a level playing field and fair competition in the marketplace. While there is consensus on this recommendation in principle, obtaining a level playing field is sometimes more complicated in practice, particularly when SOEs combine economic activities with non-trivial public policy objectives. The SOE Guidelines include a number of recommendations for how the legal and regulatory framework for SOEs can meet this challenge. Noting that the reviewed countries have reported the least changes in their legal regulatory frameworks and national practices relevant to ensuring competitive neutrality in the presence of SOEs over the past five years, this chapter provides several examples of national approaches to competitive neutrality and enhancing public procurement rules.

Main trends

Less than one-fourth of the reviewed countries have reported changes in their legal regulatory frameworks and national practices relevant to ensuring competitive neutrality in the presence of SOEs over the past 5 years. As elaborated below, several countries have pursued competitive neutrality to a certain degree in various ways through ownership, competition, public procurement, tax and regulatory policies or a combination of these policies. Further measures to ensure market consistency of debt and equity financing, suitable complaints handling, enforcement and implementation mechanism in consistency with international commitments are recommended.

It should also be noted that where state enterprises are compensated for their public service obligations companies should account separately for economic and non-economic activities. Separation of accounts allows for monitoring of public funds provided by the government for public service obligations. In the case of an internationally-active SOE this type of transparency and disclosure is important as regulators and other market actors need to ensure that the SOE does not depart from commonly accepted corporate norms or, if they do, that the nature of their operations is fully disclosed prior to their market entry (OECD, 2020b).

National developments

Commitment, rules or institutions to address aspects or elements of competitive neutrality in the presence of government-controlled businesses

In the **Czech Republic**, the elements of competitive neutrality are determined through the antitrust regulation– Act No. 143/2001 Coll., on Protection of Economic Competition, Coll. of Laws of the Czech Republic and Act No. 256/2004 Coll., on Business Activities within Capital Markets, Coll. of Laws of the Czech Republic, which have been regularly updated over the past 5 years.

In **France**, public companies are required to be subject, like any other company, to EU competition rules, which impose a certain degree of competitive neutrality. In compliance with these rules, some public companies are active in a competitive market. In this context, French law may impose elements of competitive neutrality. For example, a public operator in charge of providing a network must be independent of any other public company and must be neutral to the companies operating the network, whether public or private. The French government is required to respect the EU rules in this area and adapt its regulations in line with developments in EU law. Thus the law 2018-515 dated 27 June 2018 for a new railway pact strengthens the rules of independence of SNCF Réseau with regard to railway undertakings (and in particular of the public company SNCF Mobility) in accordance with the provisions of the Directive 2012/34 establishing a single European railway area.

In the case of **Israel**, the government has issued decisions on privatisations or corporate debt offerings in order to improve competitiveness and transparency in the market over the past five years. These are based on the Government Companies Law which defines how privatisation processes are executed and approves the ownership agency Government Companies Authority (GCA) – which is likewise established by the Law to carry out the decision.

In **Latvia**, in order to enhance corporate governance of SOEs and to implement the SOE Guidelines, a new law on SOE governance entitled “Law on Governance Shares” was adopted in 2015. The new law provides updated principles of SOE governance replacing previous regulations. The Law has established “Guidelines on elaboration of mid-term operational strategy of State-Owned Enterprises” which require SOEs to clearly differentiate financial, operational and non-financial goals (public policy goals), estimate and draw costs of non-financial goals (public-policy goals). Regarding requirements on SOEs’ rates of return, operating margins and other financial performance metrics, the Cross Sectoral Centre of Co-

ordination (state ownership coordination entity), in co-operation with capital shareholders, works on methodology related defining targets for financial performance, taking into account the SOE's public policy goals, commercial activities and main service area (healthcare, culture etc.).

In **Switzerland**, in late 2017, the Federal Council approved the report entitled "State and competition: Impact of government-controlled companies on the competitive marketplace (État et concurrence: impact des entreprises contrôlées par l'État sur les marchés concurrentiels)".

In **Turkey**, in 2013, along with the Law No. 6461 on Turkish Railroad Transportation Liberalization, the operations of the Turkish Railroads Company (TCDD), which is an SOE (public economic institution), were divided into two: TCDD and Transportation Co. and railroad transportation was liberalised. TCDD became responsible for railroad infrastructure to meet public policy objectives and Transportation Co. became responsible for commercial train operations. Operations of Transportation Co. began in 2017.

Public procurement rules affecting procurement by SOEs and SOEs' role as suppliers to other public sector institutions

Costa Rica has expressed a commitment to reform its public procurement practices to reduce the use of the exception allowing direct public procurement involving SOEs. In the course of the OECD Accession process, the government has submitted a comprehensive draft legislative proposal (Bill No. 21.546) that envisages a full reform of the Procurement Law to achieve greater efficiency and competition in all public procurement procedures, including for SOEs. A second, more narrowly focused draft legislative proposal has also been submitted to Congress to address the specific concerns raised with respect to exemptions allowing SOEs to engage in or benefit from direct contracting. The Government has indicated its intent to support the more targeted bill in the shorter term with an aim to secure enactment by early 2020, while the more comprehensive reform is expected to take longer to enact. These legislative proposals are being preceded on the operational level by the introduction of an electronic platform for public procurement designed to rationalise procedures, reduce the potential for discretionary decision-making and corruption, help the State and take advantage of purchasing economies of scale. (OECD, 2020a).

In **France**, public procurement law was amended by Order 2015-899 of 23 July 2015 aimed at transposing the 2014 Directives on the award of public contracts. State-owned enterprises, which were previously covered by Order No. 2005-649 of 6 June 2005 on contracts awarded by certain public or private persons not subject to the Public Procurement Code, are henceforth subject to the same regime as the State and public authorities.

In **Germany**, in 2016, the Act against Restraints of Competition (Competition Act– GWB) was amended based on European Procurement Law Directives (Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU). The amendment incorporates specific case law established by the European Court of Justice that allowed exceptions for SOEs from public procurement law obligations. The former case law is now codified in Sec. 108 of the Competition Act. Sec. 108 defines circumstances under which a cooperation of government authorities as contractors and enterprises controlled by a government authority may be exempt from the restraints of the Competition Act ("in house" exception).

In **Hungary**, the new Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement was implemented in the new Hungarian Act CXLIII of 2015 on Public Procurement. The purpose of the Act is to require contracting authorities to ensure fair competition throughout the public procurement procedures. The Act was amended on 1 April 2019, where the obligation to publish certain documents of public procurement procedures through the Electronic Public Procurement System (EKR) was established.

In **Latvia**, SOEs are in principle subject to the same competition related laws and requirements as any other private company. There should be no differences in taxation of SOEs, access to financing and their operations in the marketplace, relative to other enterprises. SOEs are required to participate in public

procurement procedures on the same terms as any other private company. However, the Public Procurement Law is not applicable in the following cases: if the customer (usually public body) has control over supplier's (usually SOE) strategic goals and decisions; if the supplier's turnover is made of no less than 80% of specific customer's service deliveries; and if there is no direct private capital shares or investments in supplier's equity. When an SOE receives any financial aid from the state, the procedure must meet criteria set in the Law on Control of Commercial Transactions Support.

References

OECD (2020a), Corporate Governance in Costa Rica, OECD Publishing, Paris, forthcoming.

OECD (2020b), Transparency and Disclosure Practices of State-Owned Enterprises and their Owners, Paris, forthcoming.

OECD (2018), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices, http://www.oecd.org/corporate/ca/Ownership-and-Governance-of-State-Owned-Enterprises-A-Compendium-of-National-Practices.pdf

OECD (2015), *OECD* Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264244160-en.

OECD (2011), *Corporate Governance of State-Owned Enterprises*: Change and Reform in OECD Countries since 2005, OECD Publishing, Paris, https://doi.org/10.1787/9789264119529-en.

Rubens Fontes Filho and Francisco Alves (2018), Control mechanisms in the corporate governance of state-owned enterprises (SOEs): A comparison between Brazil and Portugal, http://www.scielo.br/pdf/cebape/v16n1/en_1679-3951-cebape-16-01-1.pdf.