FEB Federation of Enterprises in Belgium

BSC BRUSSELS SCHOOL of COMPETITION

Liège Competition and Innovation Institute

5th BSC & LCII COMPETITION DAY

Public restrictions of Competition: Challenges for Competition Authorities, Governments and Rule Makers

WELCOME

Thursday 28 May 2015, Brussels

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Welcome Words

Philippe LAMBRECHT

President, BSC

Secretary General and Board member, FEB

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SESSION I

Screening of "Anticompetitive" national legislations

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IMPACT ASSESSMENT: LESSONS FOR ADVOCACY IN COMPETITION POLICY?

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Introduction: Impact Assessment

- IA is seen as a useful tool in support of more efficient, effective, transparent and accountable policymaking
- Internationally sponsored (OECD, WB) and currently adopted in many EU countries and at EU level, within broader regulatory reform programmes
- The focus and depth of analysis change remarkably from country to country
- IA requires resources and transparency of regulatory processes: in many Civil Law countries it has failed so far

IA: Main Steps

Analysis of status quo

Identification of need for intervention

Analysis of alternative options

Consultation

Collection of information

Identification of preferred option

M&E indicators

Input to drafting

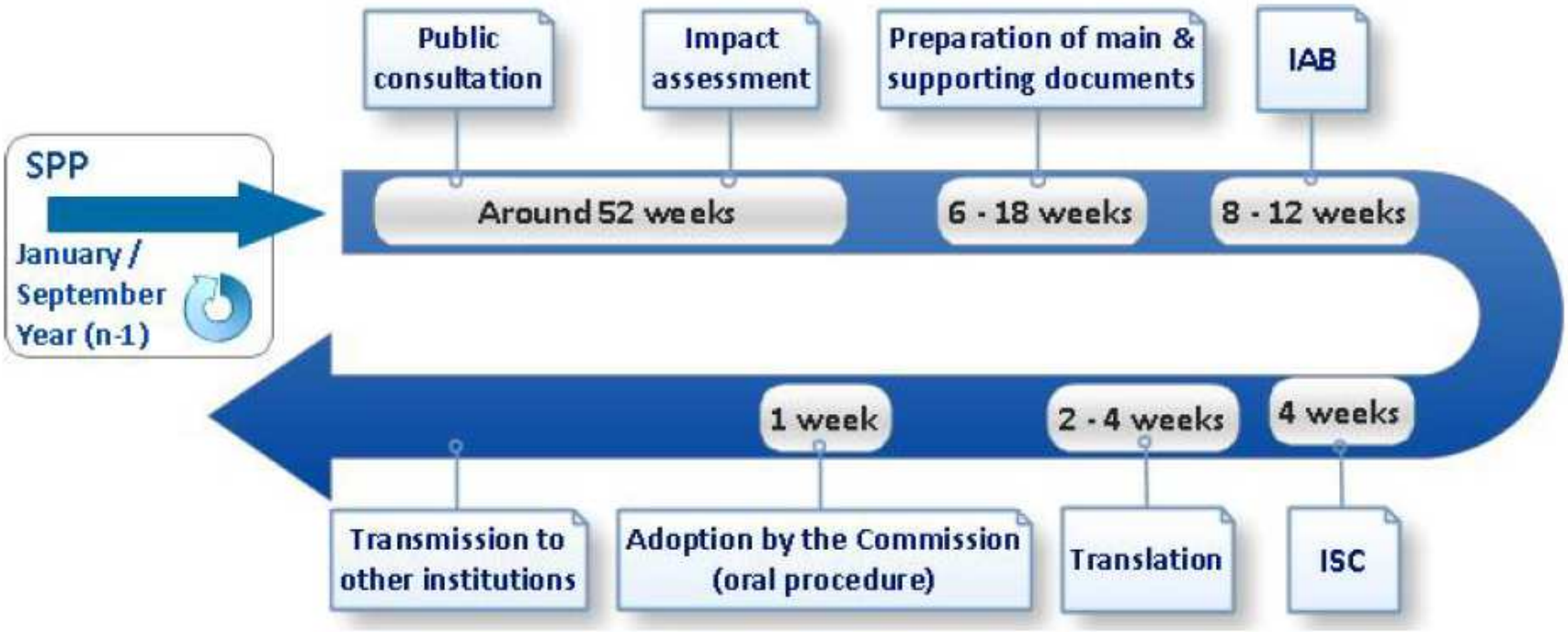
Introduction: the roots of RIA

- **RIA was introduced in 1981 in the US**
  - **Preceded by a long, fierce debate on the role of efficiency criteria in policymaking (Renda 2011)**
  - **Purpose was to control the bureaucracy and improve the business climate (Posner 2001; Livermore 2014)**
  - **The ultimate scope of CBA in RIA was rather narrow, and remains narrow notwithstanding proposed reforms**
  - **Given the narrow scope, and the fact that antitrust rules were outside the scope of federal agencies' regulations, competition assessment did not develop in the US**

Impact Assessment in the EU (1)

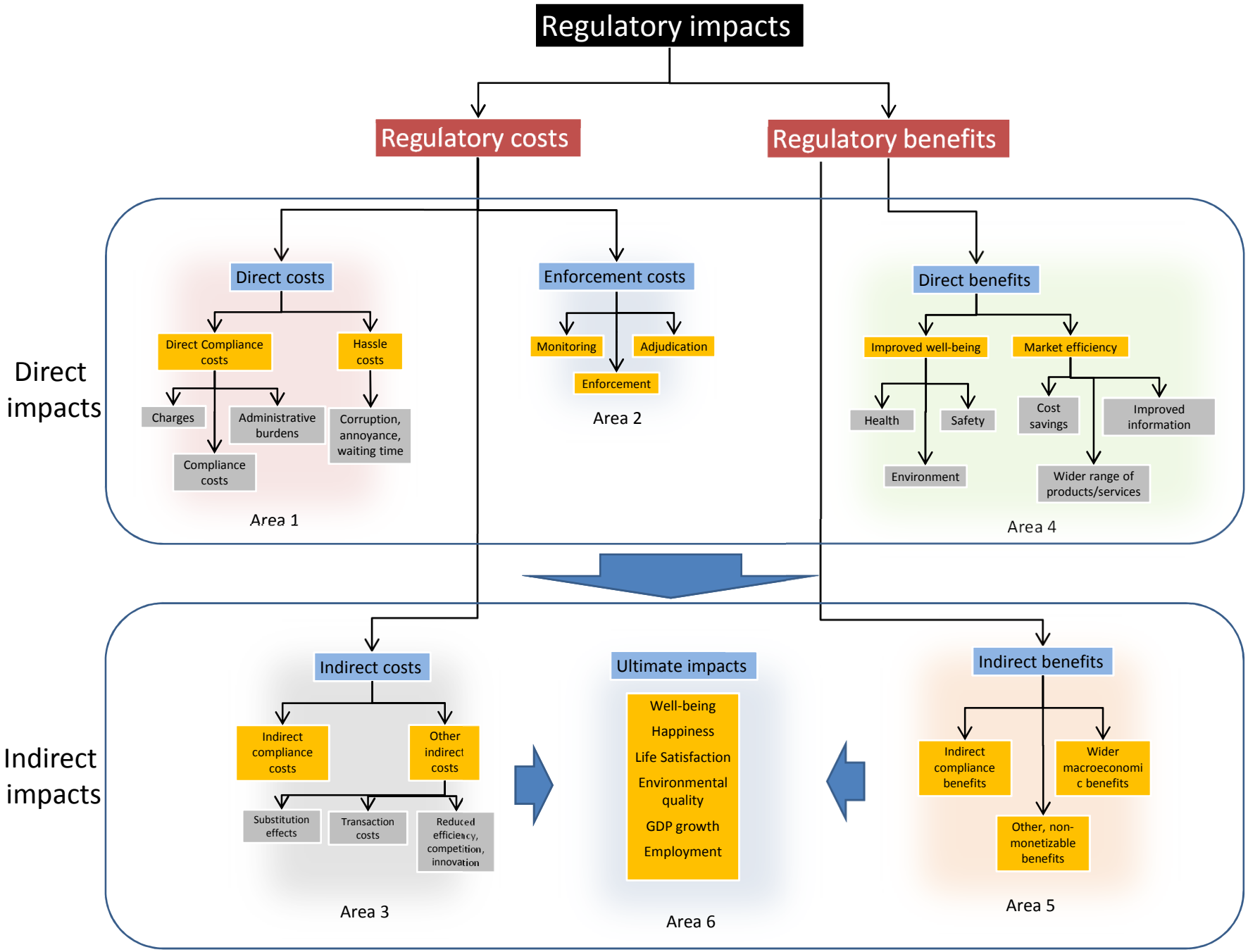
- 2002: communication on Impact assessment
- 2003: Inter-institutional agreement on better lawmaking
- 2005: Re-launch of the IA system ("growth and jobs")
- 2007: Impact Assessment Board
- 2010: Communication on smart regulation
- 2012: European Parliament creates an IMPA Directorate
- 2012: REFIT strategy
- 2014: Commission Vice President for better regulation
- 2015: RSB + New Better regulation Package

Impact Assessment in the EU (2)



Background

- **EU IA system was always grounded in CBA (?)**
  - **Emphasis on economic, social and environmental impacts**
  - **Principle of proportionate analysis**
- **Some problems have emerged over time**
  - **Difficult to capture costs, especially in enforcement phase**
  - **Absence of a real taxonomy of costs and benefits (rather, a detailed taxonomy of impacts)**
  - **Technical difficulty exacerbated by absence of templates, default schemes, dedicated guidance**
  - **Emergence of various practices in different DGs (e.g. on computational general equilibrium, on the SCM, etc.)**


Regulatory impacts
Regulatory costs
Regulatory benefits
Direct impacts
Direct costs
Direct Compliance costs
Hassle costs
Charges
Administrative burdens
Compliance costs
Corruption, annoyance, waiting time
Area 1
Enforcement costs
Monitoring
Adjudication
Enforcement
Area 2
Direct benefits
Improved well-being
Market efficiency
Health
Safety
Environment
Cost savings
Improved information
Wider range of products/services
Area 4
Indirect impacts
Indirect costs
Indirect compliance costs
Other indirect costs
Substitution effects
Transaction costs
Reduced efficiency, competition, innovation
Area 3
Ultimate impacts
Well-being
Happiness
Life Satisfaction
Environmental quality
GDP growth
Employment
Area 6
Indirect benefits
Indirect compliance benefits
Wider macroeconomic benefits
Other, non-monetizable benefits
Area 5

Overall assessment

- **Has IA improved EU policymaking?**
  - Mixed evidence on its usefulness and credibility
  - Several difficulties in implementing the tool
  - Need for analysis of the impact on legal systems
  - Very short-lived document!
  - More accountability for the quality of analysis and for the selection of proposals
  - Uncertainty on the methodology: CBA or what?
  - Too much emphasis on costs, rather than benefits
  - Difficulty to capture the full life of a legal rule

Competition assessment: from the OECD to the EU

Competition assessment (1)

- **Further assessment needed if a policy option:**
  - **Limits the number or range of suppliers**
  - **Limits the ability of suppliers to compete**
  - **Reduce the incentives of suppliers to compete**
  - **Limit the choices and information available to consumers**

***Note**: does this set of questions incorporate a "structuralist" view of antitrust? (e.g. competition "for" the market created by law would be rejected?)*

Competition assessment (2)

- **Key concepts explained in the guidelines:**
  - **Relevant market**
  - **Market power and its main factors/drivers**
  - **Entry barriers**

Competition assessment (3)

- **Practical assessment:**
  - **What is the impact on the cost of meeting the regulation?**
  - **What is the impact on the exit of firms?**
    - **Will these costs/requirements lead some businesses to exit the market?**
    - **Which businesses are more likely to exit? For instance, can we conclude whether small or large businesses will exit?**
    - **Can we conclude if businesses with older vintage of production facilities will leave?**
    - **In some cases, it could be relevant to make a distinction between the incumbent, dominant supplier and competing firms, which should be encouraged to grow.**
    - **Does the regulation limit growth opportunities of existing competitors?**
    - **Does the regulation favour the incumbent over existing competitors?**
  - **What is the impact on the anti-competitive behaviour of firms?**
    - **Will it increase the incentive for anti-competitive behaviour of firms (collusion, etc.)?**
    - **Has there been collusion in the history of the sector?**

Competition assessment (4)

- **Practical assessment:**
  - **Impacts on entry**
  - **Impacts on prices**
  - **Non-price impacts on consumers**
  - **Impacts on upstream and downstream markets**

Competition assessment (5)

- **Practical ways to mitigate anticompetitive impacts**
  - ***Tailored transition periods/provisions when adopting new legislation***
  - ***Economic incentives rather than regulation to deal with externalities***
  - ***Ensuring adequate consumer information rather than mandatory product characteristics.***
  - ***Voluntary rather than mandatory product specifications***
  - ***Reliance on competition law/competition enforcement rather than sector specific regulation to deal with inappropriate competitive behaviour***

Policy coherence

- **Involving competition authorities in the design of legal rules?**
  - **At the European Commission level, this is done by including DG COMP in IA steering groups**
  - **Alternatively, there could be a possibility to intervene during the inter-service consultation**
  - **Rarely amendments voted by the EP and Council can be subject to such a competition scrutiny**
  - **Most often, consultation impacts are highlighted by stakeholders during consultation rounds**
  - **With the new EU better regulation package, there will be more opportunities to consult on draft IAs (inception IAs)**

Ex ante IA in competition policy?

- **It is done for ex ante regulatory intervention, but not for individual antitrust cases**
- **Potential advantages?**
  - **Modeling market evolution with and without a specific antitrust decision?**
  - **Incorporating subsequent enforcement patterns (e.g. follow-on private legislation)?**
  - **Capturing effects in neighbouring markets and at overall societal welfare level, including distributional impacts**

Ex ante IA in competition policy?

- **Feasible?**
  - **A good example is the IA on the White Paper on antitrust damages actions, which incorporates legal analysis, microeconomic modelling, law and economics and public law and economics (e.g. competition between legal systems) to suggest the scenario that is most likely to be aligned with the public interest**

Conclusion (1)

- **IA is potentially useful in competition law, just as competition assessment is important in IA**
  - **Both have to improve to be really useful to policy**
  - **IA has to incorporate stronger analysis of incentives, analysis of cumulative and distributional impacts, and where possible a general equilibrium analysis**
  - **Competition assessment in IA should abandon a purely structuralist view of competition and move from a static efficiency approach to a dynamic efficiency approach**

Conclusion (2)

- **A more useful start? Experimenting with ex post evaluation of competition policy decisions**
  - **Difficult to establish counterfactual**
  - **Unclear what the impact on the antitrust authority's legitimacy would be**
  - **Biggest problem: no scholarly contribution has ever managed to convincingly prove that antitrust has significant macroeconomic impacts**

SCREENING OF ”ANTICOMPETITIVE” LEGISLATION: BEST PRACTICES AND INTERNATIONAL EXPERIENCE

Mona CHAMMAS, *Competition Division, OECD*
Rainer BECKER, *Deputy Head of Unit, DG COMP, EC*
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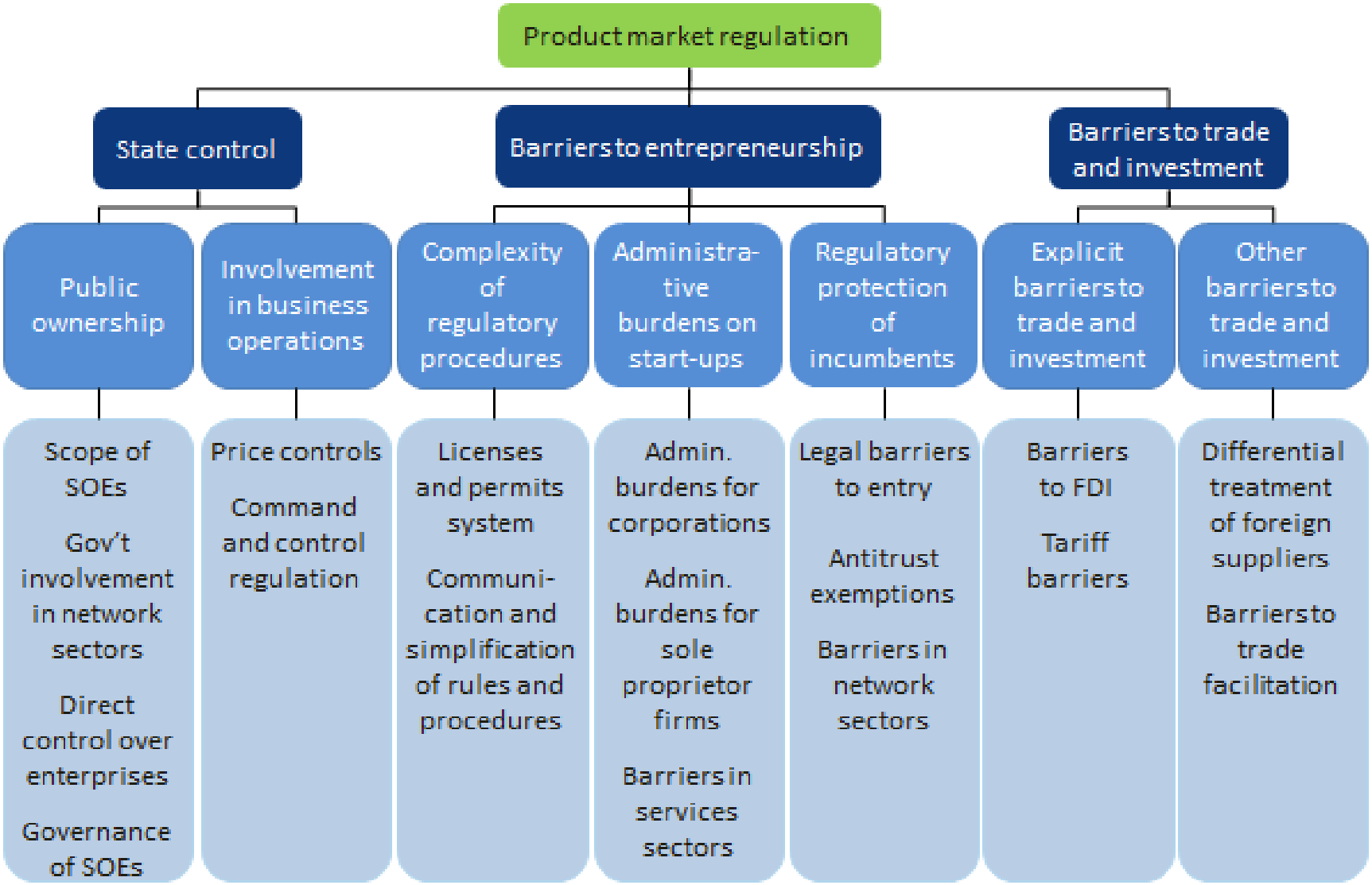
ANTICOMPETITIVE LEGISLATION

OECD Competition Assessment Toolkit & PMR Indicators

Mona Chammas
OECD Competition Division
Brussels, 28 May 2015

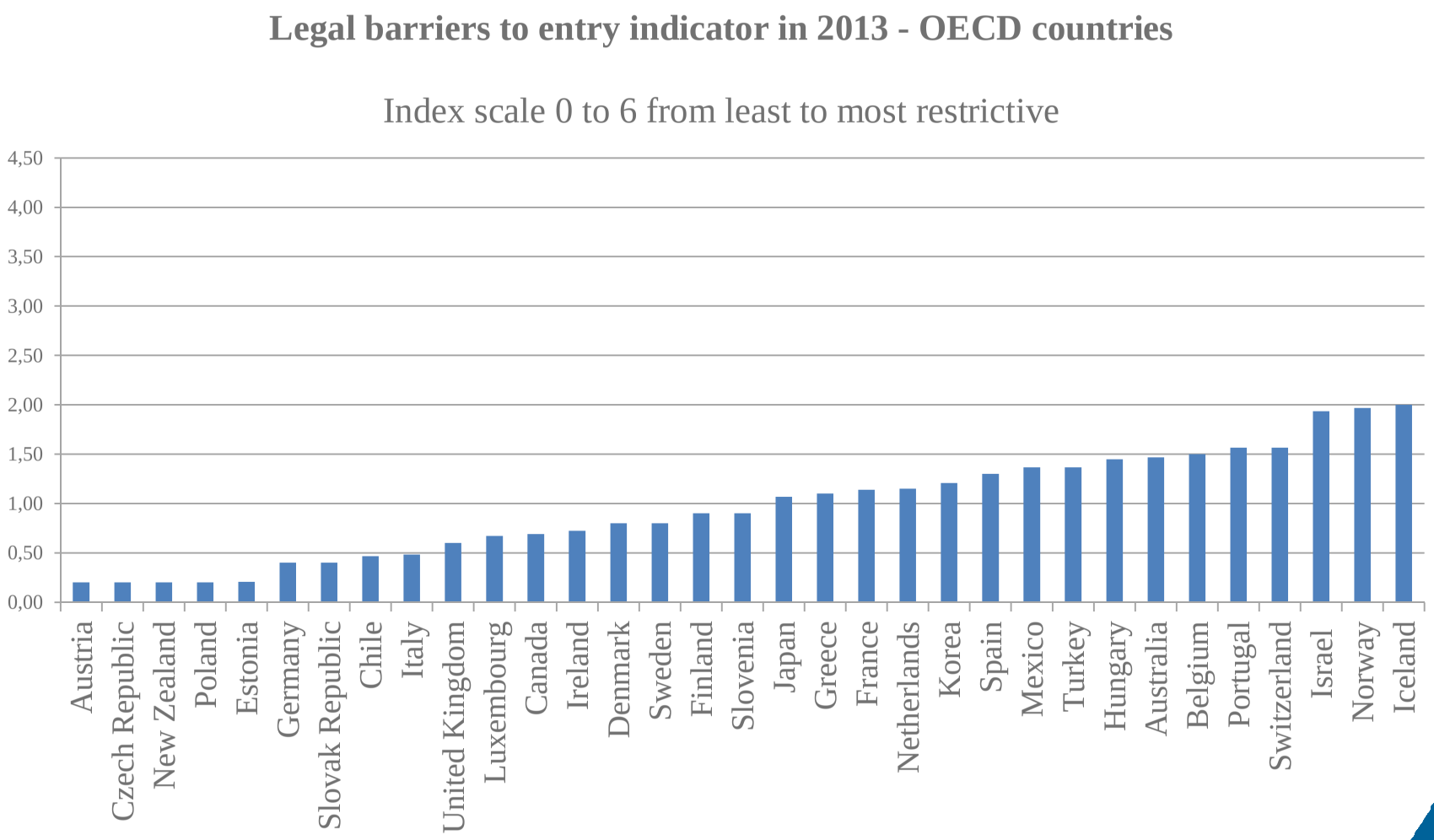
OCDE
DES POLITIQUES MEILLEURES POUR UNE VIE MEILLEURE

OECD PMR indicators



http://www.oecd.org/eco/growth/indicatorsofproductmarketregulationhomepage.htm#indicators

PMR - Legal barriers

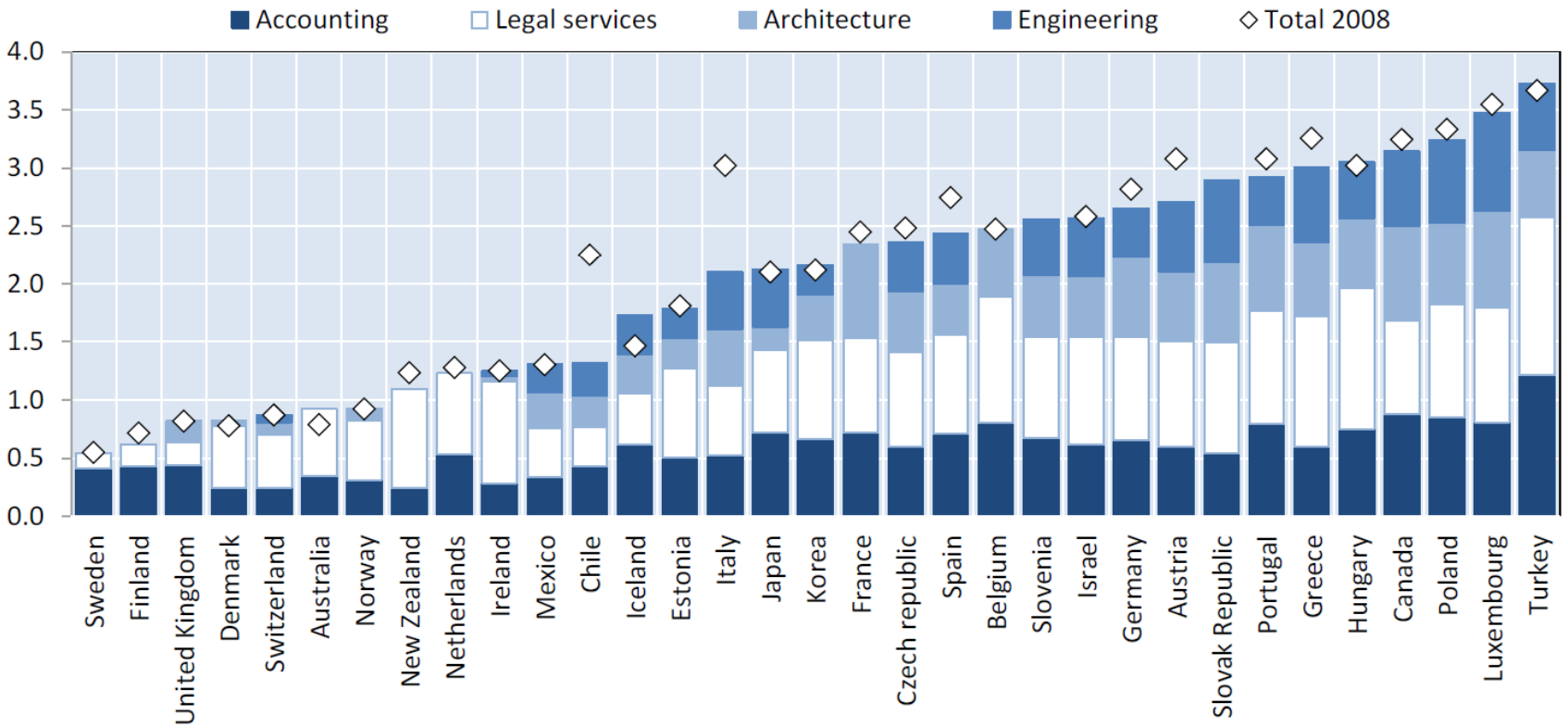


PMR – Professional services

Figure 13. Regulation of professional services

Index scale 0 to 6 from least to most restrictive

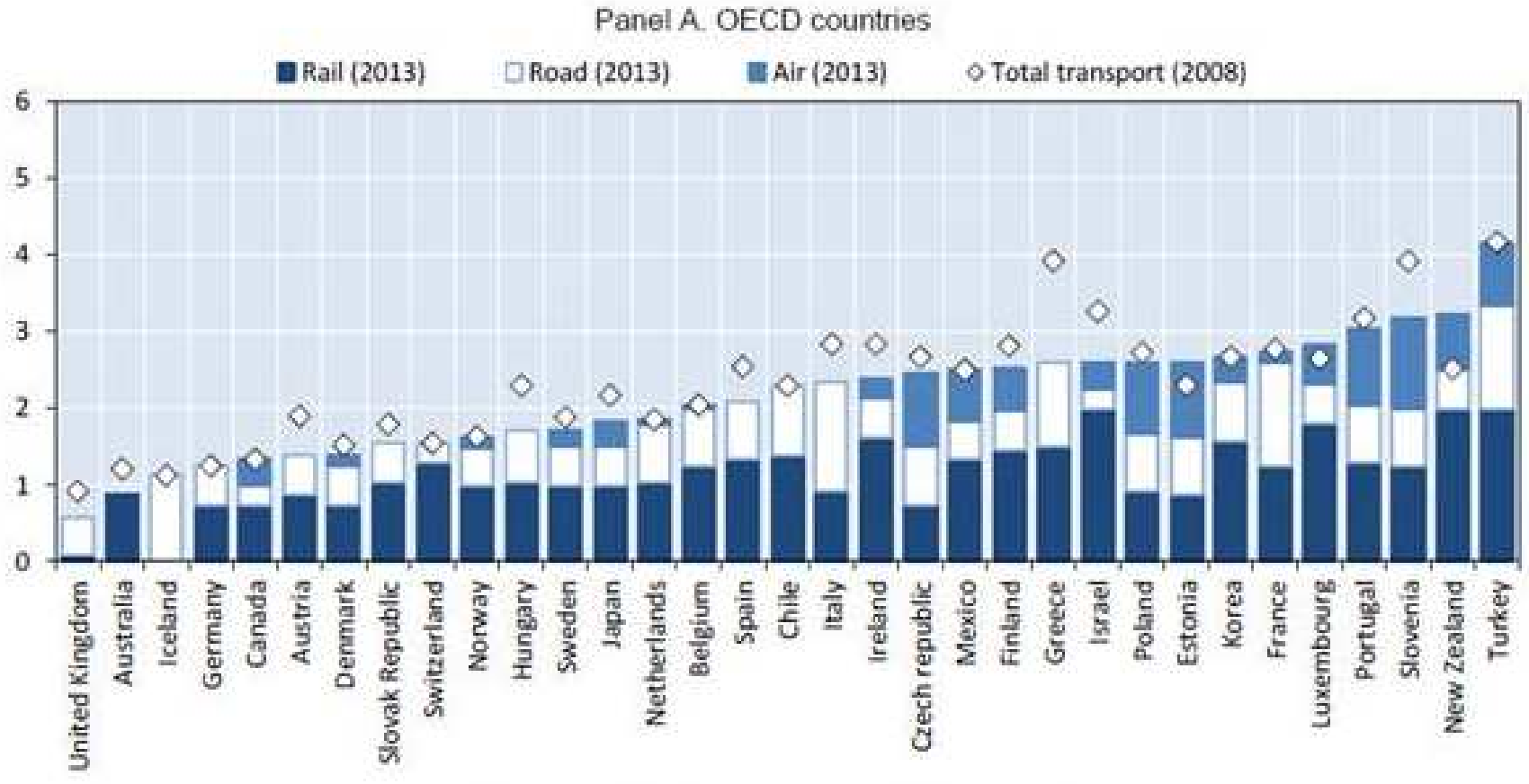
Panel A. OECD countries



PMR – Sectorial restrictions (transport)

Figure 12. Regulation of transport sectors

Index scale 0 to 6 from least to most restrictive



Competition Assessment Toolkit

OECD Competition Assessment Toolkit:

Tools for the diagnostic of **regulations**' impact on competition

More info: http://www.oecd.org/competition/assessment-toolkit.htm

Competition Assessment Toolkit

- Competition law and enforcement: usually directed at business companies' practices

  ≠ Toolkit: directed at *governments*' interventions

- Competition policy review: often focuses on effectiveness of competition law and enforcement

  ≠ Toolkit: focuses on *legislation/regulations*, whether and how they impact competition

Competition Assessment Toolkit

COUNTRY CASE STUDIES

Romania will be using the Toolkit to conduct an assessment of regulatory constraints on competition in three sectors

Greece used the Toolkit to conduct an assessment of competition-distorting rules and provisions in four sectors

Mexico is using the Toolkit to help identify regulations and policies that unnecessarily restrict competition

Greece:

Led to official reform recommendations in *tourism, retail, food and building materials.*

→ Gain: €5 billion

Mexico:

Toolkit used for thorough assessment of the regulatory environment in the *energy sector*.

→ Enhance competition & competitiveness

Screening of anticompetitive legislation

5th BSC-LCII Competition Day

Brussels, 28 May 2015

Rainer Becker
Acting Head of Unit
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The views expressed in this presentation are strictly personal

Outline

1. Competition 'screening' (reacting to) by DG COMP of national legislation:
   a) Article 106 proceedings (ex-officio, complaints)
   b) Less formal contacts with MS
   c) *Amicus curiae* interventions
2. Competition screening of draft legislation within the Commission:
   a) Services self-screen using the newly adopted 'Competition Toolbox' of the Better Regulation Guidelines
   b) Interservice Consultations: examples of DG COMP action
3. Inter-institutional competition screening by DG COMP of amendment proposals to draft legislation in EP/Council

2. Screening draft legislation inside Commission

Lead DG drafts first version while self-screening using the 'Toolbox' (Evaluation)

'Informal talks' (Interservice Coordination/ Steering Groups) between lead DG, DG Comp and other DGs. Impact Assessment

DG Comp is formally consulted via an interservice consultation

The Commission's proposal reflecting all comments is adopted.

Interservice consultations of DG Comp

Launch year	Avis négatif	Avis positif	Avis positif avec commentaires	Total
2012	3	1232	350	**1585**
2013	3	1667	235	**1905**
2014	3	2235	857	**3095**
2015	0	531	89	**620**
Total	**9**	**5665**	**1531**	**7205**

3. Inter-institutional screening

Parliament and Council change the text proposed by the Commission

DGs get informed about proposals through the GRI (Inter-institutional Relations Group)

DG Comp discusses with other DGs, discussions at Cabinet level

The lead DG participates in the trilogue on behalf of the Commission

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Q & A SESSION

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COFFEE BREAK
15’

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SESSION II

Competition law tools against public restrictions of competition

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RECENT CASE LAW ON ARTICLE 106 TFEU: NEW MEANS OF ACTION?

Philippe CHAUVE, *Head of Task Force,* DG COMP, EC
José Luis Buendia Sierra, *Partner,* GARRIGUES

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Addressing state measures that distort competition: Where the Greek lignite case revives Article 106

5th BSC-LCII Competition Day

Brussels, 28 May 2015

Philippe Chauve
Head of the Food Task Force
DG Competition
European Commission

The views expressed in this presentation are personal and do not commit the European Commission

Article 106 TFEU

- Applied in combination with other articles
  - 101TFEU: Ahmed Saeed C-66/86
  - 102 TFEU: many cases
  - others (34/37TFEU for goods, 45TFEU for workers, 56TFEU for services, etc)
- There is a State measure
- In favour of Public undertakings or Undertakings with special or exclusive rights
- The measure is "contrary to the rules contained in the Treaties"
- Not justified by SGEI (106(2) TFEU)

Standard approach for 106 and 102 or 101 TFEU under the case law before "Greek Lignite"

The State Measure

–Creates unavoidable risk of abuse (Arts.106 (1)& 102)

- conflict of interests;
- manifest inability to meet demand;
- Excessive pricing, etc

➢ *Identifying an abusive conduct*

–Encourages the conclusion of anticompetitive agreements (Art.106 (1) &101)

- At least one of the parties should be public or privileged undertaking

➢ *Identifying agreements*

The Court repeatedly stated that "the mere creation of a dominant position by granting exclusive rights is not as such incompatible with Article 102TFEU"

The legal test in Greek Lignite

- **No need for conduct** on the part of the public/privileged undertaking for an infringement of Art. 106/102

- Sufficient to establish a potential **anticompetitive consequence** resulting from the State measure

- In this case: the State measure (privileged access to lignite in upstream market) created **unequal conditions of competition/inequality of opportunity** by allowing the public undertaking to maintain, strengthen or extend its dominant position in the (downstream) wholesale electricity market

The legal test in Greek Lignite

- The test of anticompetitive consequence applies where the special/exclusive rights and the anticompetitive consequence are:
  - in **different markets** (vertically or horizontally related) or
  - in the **same market**

- If in the same market: the inequality of opportunity should go **beyond the mere creation of dominance** (it should, for example, lead to strengthening or maintaining a dominant position)

Greek lignite expands the scope for intervention

Now there are two possible types of intervention

- Identification of an abusive conduct or of agreements: recalled by the Court recently in "Slovak Post"
- Identification of an anticompetitive consequence

A logical evolution of the Case law?

- Conflict of interest: *France v Commission, ERT, Raso, Motoe*
- Inability to meet demand *Höfner and Elser*
- Unfair trading terms: *Merci, TNT Traco*
- Excessive pricing: *Merci, Crespelle, Deutsche Post*
- Discrimination: *Merci, Corsica Ferries I, GT Link*

Under-taking

- Extension of Dominance/Reservation ancillary service: *RTT/GBInno, Telecom services Directive, Ambulanz Glockner*
- Monopoly itself: *Corbeau*
- Prohibiting Imports: *Dusseldorp*
- Advantage: *Connect Austria*

State

European Commission

Thank You For Your Attention!

- Court of Justice ruling in "Greek lignite"

"infringement of Article [106] (1) EC in conjunction with Article [102] EC may be established irrespective of whether any abuse actually exists. All that is necessary is for the Commission to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue." (para. 46).

" it is not necessary to identify an abuse other than that which results from the situation brought about by the State measure at issue" (para 47)

⇒ No need to identify an 102 abuse
But some kind of equivalent to an abuse, by effect

- Court of Justice ruling in "Greek lignite"

"It also follows that the General Court erred in law in holding that the Commission, by finding that DEI, a former monopolistic undertaking, continued to maintain a dominant position on the wholesale electricity market by virtue of the advantage conferred upon it by its privileged access to lignite and that that situation created inequality of opportunity on that market between the applicant and other undertakings, had neither identified nor established to a sufficient legal standard the abuse to which, within the meaning of Article 82 EC, the State measure in question had led or could have led DEI."

Public Restrictions on Competition
5th BSC-LCII Competition Day, Brussels, 28 May 2015

Enforcement of Article 106(1) TFEU after the *Greek Lignite* Case

Dr. Jose Luis Buendía Sierra

GARRIGUES

Introduction

- What does Article 106(1) TFEU say?
  - Prohibition addressed to Member States (in a broad sense)
  - State measures distorting competition (106+102 cases) or State measures breaching other Treaty provisions (106+free movement cases)
  - Linked with special/exclusive rights or public undertakings
- Excluded
  - *De iure*: other State measures distorting competition but not related to categories above
  - *De facto:* State aid (?) and secondary legislation
- Categories of enforcement
  - Direct enforcement by the EC: Article 106(3)TFEU → the EC decides → up to the MS to go to the ECJ
  - Indirect enforcement: enforcement of Article 106(1)TFEU before national courts → preliminary question before the CJEU (Art 267 TFEU)
  - NCAs cannot apply Art 106(1)TFEU against national measures → *cul-de-sac* (dead-end)
- Effective enforcement?

Direct enforcement by the EC

- Special procedure under Art 106(3)TFEU
  - EC adopts decision compulsory for MS if Art 106(1)TFEU has been infringed → Up to MS to go to ECJ
- Procedure largely similar to State aid and antitrust procedures, but
  - Complainant would normally not have *locus standi* to challenge before the GC the refusal to deal by the EC (*Max Mobil, Vivendi*)
  - Results on the EC having full discretion to set its priorities in enforcement of Art 106(1)TFEU
- How has the EC used this discretion during the last years?
  - Very few decisions (4-5) adopted → an average of one case every two years
  - Vast majority of complaints rejected for alleged lack of EU interest
  - *German and Slovakian mail* cases (2004 and 2008) and Greek Lignite case(s) (2008 and 2009), action of the EC addressed at policing the borders of liberalization directives
  - French *Livret bleu* case (2008) the EC blurred the dividing line between exclusive rights and State aid (see also the 'Almunia package' on State aid to SGEI)

Direct enforcement by the EC (ii)

- Judicial review in the *Greek lignite (DEI)* case:
  - GC Judgment of 20/9/2012 (T-169/08 and T-421/09) → "*behavior beats effects*"
    - Need to identify an actual or potential abuse (behavior) in order to apply 106+102
    - The mere inequality of conditions (effects) is not enough.
  - AG Opinion of 5/12/2013 → return to the orthodoxy
    - The extension of a monopoly from one market to another due to a State measures is – due to its effects – automatically prohibited.
    - No need to identify actual/potential abuses.
  - ECJ Judgement of 17/07/2015 (C-553/12P) → "*effects beat behavior*"
    - Not only confirms the orthodox interpretation of AG, but leads the 'effects doctrine' to its logical consequence: *any State measure* producing anti-competitive consequences
    - "*All that is necessary is for the CE to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue*".
    - A system of undistorted competition can only be guaranteed if equality of opportunity is secured → it the measure distorts competition it is contrary to 106 + 102
- Judicial review in the *Slovak hybrid mail* case:
  - GC Judgement of 25/03/2015 (T-156/08) → Confirms ECJ, "*effects beat behavior*"

Direct enforcement by the EC (iii)

- Are the above cases the only infringement of Art 106(1)TFEU by all MS? Are - at least - the main ones?
  - Obviously not
  - The EC has not acted in many other complaints under Art 106(1)TFEU → at least some of them as important as the cases decided
  - True, in some cases the EC uses 'traditional' infringement procedures, but in many other cases it does not act for opportunity reasons
  - Art 106(1)TFEU is addressed to MS → if the EC does not act, nobody would do in its place
  - One can not really say enforcement of Art 106(1)TFEU by the EC is effective
- How to make it more effective?
  - In a context of budgetary restrictions, exclusive right might become popular substitute of State aid
  - Both type of cases should be subject to similar requirements
  - The EC should be subject to a similar obligation to act on individual cases

Indirect enforcement by the ECJ

- Indirect enforcement by the ECJ: preliminary rulings under Art 267 TFEU
  - Only hope if the EC and NCAs do not/cannot take action → possible in theory, difficult in practice
  - To be fair, main ECJ cases on Article 106(1)TFEU were preliminary rulings ('91 cases), but at the time the EC was also doing its job (telecom liberalization). Times have changed
  - The EC can rely on them for building new cases
- Comments on the preliminary rulings
  - Is indirect enforcement more effective than direct enforcement?
    - More judgments by the ECJ than EC decisions on Art 106(1)TFEU (proportion of 3/1) - Including indirectly related, the proportion goes to 7/1
    - Probably the vast majority of Art 106(1)TFEU cases do not lead to preliminary questions → difficult to persuade national courts
  - In theory the ECJ always apply a 'substantive review' approach – with nuances (like with the other EU provisions addressed to MS)
  - The ECJ does correctly its job, but cannot fill alone the enforcement gap created by EC limited action

Conclusions

- Despite existence of Art 106(1)TFEU in the EU Treaties, control of State anti competitive action remains very difficult
- The EC has not show a real interest in Art 106(1)TFEU
  - Almost systematically rejects complaints based on Art 106(1) for lack of 'EU interest'
  - Complainants normally do not have *locus standi* to contest such refusal to deal
- The ECJ contributes indirectly to enforcement of Art 106(1)TFEU through preliminary rulings under Art 267 TFEU
  - But many cases before national courts never reach the ECJ
  - And NCAs are in general powerless when confronted with Art 106(1) cases
- Given the nature of the provision – setting the limits of MMSS intervention in the market – it is clearly up to the EC to play a more active role
- This would be logical and consistent with the EC stand on the closely related area of State aid

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SELF-REGULATED PROFESSIONS AND COMPETITION LAW

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advocaten avocats attorneys

Self-regulated professions and the competition rules

5th BSC-LCII Competition Day, 28 May 2015

Hans Gilliams

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Overview

- Scope
- Public regulation or self regulation?
- Self regulation and the competition rules
- Take aways

Scope

- **Out of scope**: public rules relative to a profession
  - Exclusive/special rights to exercise a profession
  - Professional qualifications, public regulation of certain activities
- "Profession"
  - "liberal" professions
  - Others: real estate agents, land surveyors, customs agents, optometrists…
- Two issues:
  - Choice between "public" and "self" regulation
  - When/how can self regulation conflict with the competition rules

Public regulation or self regulation? (1/2)

- A political choice….
  - "Professionals are best placed to decide which rules are (not) appropriate for them"
  - Conflicting interests: consumers, new entrants, providers of competing services

- … subject to some legal constraints
  - Complete delegation of rule-making authority prohibited
    - Public authorities must retain the power to adopt decisions in the last resort (i.e. do more than automatically declare binding rules adopted by a profession (CNSD, ECJ 1998 and GC 2000; C-386/07 ECJ 2008)
    - Adoption of the rules by at least a majority of government representatives, and/or on the basis of public interest criteria defined by government (Reiff, ECJ 1993 and Delta Schiffahrts, ECJ 1994)

Public regulation or self regulation? (2/2)

- Lobbying for public regulation is not entirely without risk
  - BCA fined several undertakings and the trade association in the cement sector for delaying the approval and market entry of a competing product (Cimenteries, BCA 2013)

Self regulation and the competition rules (1/3)

- Article 101 TFEU applies, subject to Wouters
  - "Association of undertakings"
  - "Agreement" or "decision of an association of undertakings"
  - No "service of general interest" qualification…
  - …. however, 'Wouters' exemption: the prohibition for lawyers to share fees with accountants is not subject to Article 101 if such a restriction is "*reasonably necessary for the proper practice of the profession, as organised in the Member State concerned*"

Self regulation and the competition rules (2/3)

- "…the proper practice, as organised in the member state"
  - Ensure consumers are provided with the necessary guarantees with regard to the quality of services offered (C-1/12, C-136/12)
  - Protection of road safety (C-184/13)

- Is the restriction reasonably necessary to achieve the objective?
  - Association reserves to itself a significant part of the compulsory training for accountants (C-1/12)
  - Fixing of minimum fees (C-136/12, C-184/13)

- Do the restrictive effects go beyond what is necessary?

Self regulation and the competition rules (3/3)

- Self regulation should be assessed in function of its potential to remedy market imperfections

1) Understand market imperfections: information asymmetry, externalities, barriers to entry, degree of concentration…
2) Assess the potential of rules to remedy imperfections and/or to achieve efficiencies
   - Private vs professional purchasers
   - One-time vs repeat services
3) Opt for least restrictive alternative
   - Should incumbent providers decide on need for and level of regulation without involvement of consumer representatives?

Sources of market failure

- Information asymmetry
  - → adverse selection (vicious circle of decreasing quality)
  - → moral hazard (no incentive to act in customer's best interest)
- Externalities
  - Negative externalities (selection of low-quality physicians results in health hazard)
  - Positive externalities (consumers may not want to pay for higher quality to the extent it benefits society at large)

Information asymmetry (1/2)

- How can **adverse selection** be addressed?
  - Distinguish between
    - Private vs professional purchasers
    - One-time vs repeat services
  - Minimum prices/*numerus clausus*: can they be expected to result in higher quality services?
  - Recommended prices / average prices
  - Restrictions on advertising
  - Mandatory information to be provided to customer at the outset
  - Professional qualifications, continuing learning requirements
  - “Charter” adhered to by all providers, or commitments re: sustainability, CSR
- What is “(too) low quality”?
  - Should service providers decide this? Why not involve consumer representatives?
  - “Gold plating” risk (barrier to entry)

Information asymmetry (2/2)

- How can **moral hazard** be addressed?
  - Rules that create an incentive to act in customer's best interests
  - "Conflict of interest" rules (for services that cater to conflicting interests: lawyers, economic consultants…)
  - "Independence" requirements
    - Mandatory self-employed status
    - Prohibition on fee sharing
  - Align financial interests of provider and customer: adjust fee in function of outcome; no cure no pay
  - Professional liability (how much malpractice is caught by self regulation and self enforcement?)

Externalities

- How can **negative/positive externalities** be addressed?
  - Professional qualifications, continuing learning requirements, required quality levels, liability…
  - … subject to gold plating risk
  - Should the (incumbent) providers of a service decide what is “minimum quality”? For all types of customers?

Take aways

- "*Trust me, I don't do it for the money*"
- Rules should address the interest of consumers, not the survival (or income level) of service providers
- Are we clear on the market failure(s) that a proposed rule is aimed at addressing?
- Have less restrictive alternatives been considered?
- Could we consider "co-regulation" instead of "self" regulation to increase the likelihood that the rules serve the interest of consumers?

Thank you for your attention

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UBER, AIR-BNB AND OTHERS: WHAT ROLE FOR COMPETITION LAW IN THE SHARING ECONOMY?

Alexandre DE STREEL, *University of Namur*

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Sharing Economy and Competition Law

Alexandre de Streel

Brussels School of Competition

28 May 2015

OUTLINE

1. Sharing Economy: Prosumers and Platforms

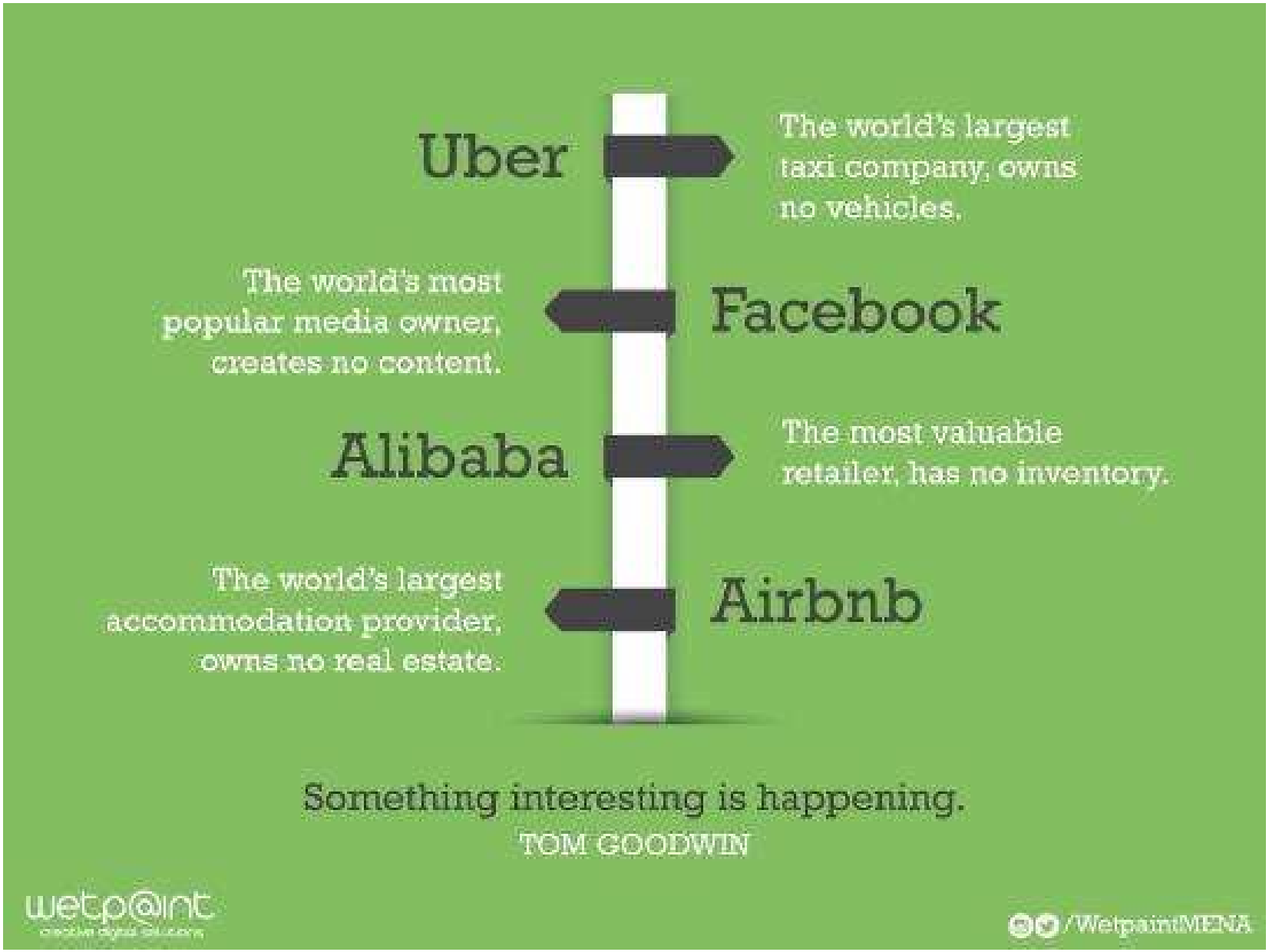
2. Entry of Prosumers and Sector Regulation

3. Activity of Platforms and Antitrust

4. Take-away

1. Sharing Economy: Business Models

	Market mediated		Non market mediated
	B2C	C2C	
Ownership	Business selling to consumers 	Consumers selling to consumers 	Giving 
Access	Business renting to consumers 	Consumers renting to consumers  	Sharing 



Differences between prosumers and the platform

1. Sharing Economy: Economic Effects

- SE Platforms reduce market failures
  - Transaction costs: reduction of intermediaries
  - Asymmetric information: more transparency, reduction of search costs, efficient reputation system and trust,
  - Market power: disruptive innovation, lower barriers to entry

- Hence reduce the need for regulation correcting those market failures

2. Entry of Prosumers and Sector Regulation

- Although regulation should be reduced, in practice, it is often kept (or even strengthened) to maintain market power (and its rents)

- Moreover, the implementation of current regulatory categories to prosumers is not always clear

- In case of sanctions, they are often not very effective and/or lead to geo-blocking

2. Entry of Prosumers and Sector Regulation: Ex ante review

- Competitive assessment
  - Opinion of the French Autorité de la Concurrence
  - Report of the German MonopolKommission

- Identification of market failures *given* the new technologies
- Rules should be limited to correct those market failures
  - and when their benefits outweigh their costs
- When rules are justified, they should be
  - technologically neutral (same service, same rule)
  - principles-based to accommodate innovation

2. Entry of Prosumers and Sector Regulation: Ex post review

Commission infringement Case

- Complain of Uber in 2015 against FR, DE, ES

- **Freedoms of movement**
  - Service (Art. 56 TFEU) or establishment (Art. 49 TFEU)

- For the prosumers
  - Restriction: quotas, price fixing
    - Discriminatory and equally applicable measure (C-55/94 *Gebhard*)
  - Justifications: less than before
    - Public interest
    - Proportionality

- For the platform

2. Entry of Prosumers and Sector Regulation: Ex post review

- **Competition rules**

- Art. 106(1) and 102 TFEU (Case C-553/12P *Greek Lignite*)
  - Special right: quota (C-475/99 *Ambulanz Glöckner,* Dir. 2002/77)
  - Dominant position
    - Collective with links as price regulation (*Piau*, *Almelo*)
    - Single
  - Anti-competitive effects/behaviours
    - Leverage from taxi to VTC markets (C-475/99 *Ambulanz Glöckner, Slovak Post)*
    - Unsatisfied demand (C-41/90 *Hofner*)
  - Affect trade between Member States (C-518/13 *Eventech*)

  - Can not be justified by SGEI: Art. 106(2) TFEU

Unsatisfied Demand

2. Entry of Prosumers and Sector Regulation: Ex post review

- **Competition rules**

- Art. 106(1) and 101 TFEU (Case 66/86 *Ahmed Saeed*)
  - Need of anti-competitive agreement?
  - Price regulation and unsatisfied demand

- Art. 4(3) TEU and 101 or 102 TFEU
  - National law encouraging or requiring anticompetitive behaviours, making them inevitable or transferring regulatory power

2. Entry of Prosumers and Sector Regulation: Ex post review

EU defence

- When a prosumer entry is contested before a National Court, she may raise the violation of EU law by national rules

- In case of doubt, preliminary ruling question to the Court of Justice

3. Activity of Platforms and Antitrust: Anti-competitive agreement

- Cartel between prosumers
  - Depend on the business models: Airbnb v. Uber

- MFN clause imposed by main OTAs (booking.com, Expedia, HRS) on hotels
  - MFN clause restricts competition, hence violates Art. 101(1) TFEU
    - Between platforms: can not translate lower commission into lower prices
    - Between hotels: can not differentiate prices across distribution channels
  - MFN can not benefit from Vertical block exemption
    - OTA have more than 30% on this market
  - MFN can not be exempted with Art. 101(3) TFEU
    - Can not be justified by efficiency gains
    - Few risk of free-riding as relationship-specific investments are low
    - Not indispensable, less distortive alternatives exist

3. Activity of Platforms and Antitrust : Abuse of dominant position

- Market structure depends of demand characteristics

Multiple platforms	Winner takes all
Capacity constraints (attention limits)	Degree of economies of scale
Scope of platform differentiation (depending of the heterogeneity of preferences)	Strength of direct and indirect network effects
Opportunities for multi-homing (depending of switching costs and tariff structures)	

- Abuse:
  - Protect dominance in rapidly evolving market
  - Leverage market power in related market

3. Activity of Platforms and Antitrust: Abuse of dominant position

- Market is dynamic and market power is unstable
  - "*recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power*"

    (Case T-79/12 *Cisco and Messaget v. Commission*, para 69)

- Possibilities of multi-homing
  - "*there are no technical or economic constraints which prevent users from downloading several communications applications on their operating device, especially as the software concerned is free, easy to download and takes up little space on their hard drives*"

    (Case T-79/12 *Cisco and Messaget v. Commission*, para 79)

4. Take Away

- Sharing Economy Platforms empower citizens (producers and consumers)
  - Some market failures are corrected by technology instead of rules
- Sector Regulation should be refitted
  - Ex ante with competitive assessment
  - Ex post with EU freedoms and competition rules
- Anti-competitive behaviours of Sharing Economy platforms should be condemned
  - Should standard antitrust rules also be refitted?

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Thank you !

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crids

CENTRE DE RECHERCHE **INFORMATION, DROIT ET SOCIÉTÉ**

Public Restrictions of Competition: A Case Study

5th BSC-LCII Competition Day

Prof. Damien Geradin

Brussels, 28 May 2015

Introduction

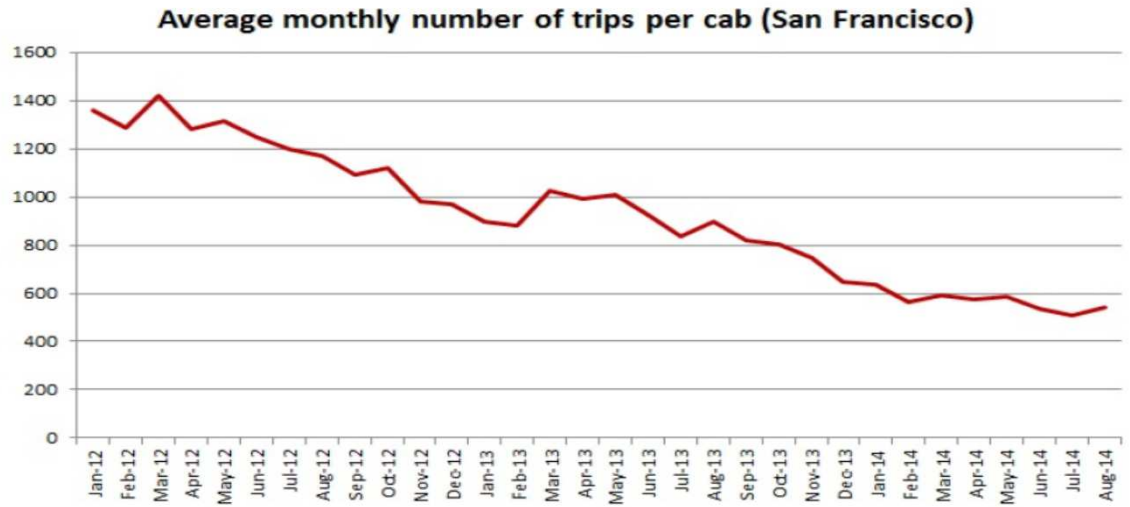
- Disruptive business models are always resisted by incumbent operators, especially when they are protected by regulation.
- Regulation should be used to address market failures, it often goes beyond what is needed and creates monopoly rents.
- Uber is one of many examples of what has been described as the “sharing economy”. The sharing economy is nothing new, but it has recently expanded due to the availability of peer-to-peer platforms.
- Uber’s entry in European cities has created a lot of tension and incumbent taxi operators have tried to block their operations through various legal (and not-so legal) means.
- In Belgium, the Commercial Court of Brussels has ordered Uber to cease its activities.
- Uber did not show up at the hearing and the question I am planning to address is whether it could have used EU law to avoid being banned.

The regulatory framework applying to taxi services in Brussels

- Taxi services are heavily regulated in the Brussels region:
  - Regulation applying to taxi companies and taxi drivers:
    - 1995 Ordinance relating to taxi services and car renting services with drivers.
    - 2007 Decree of the Government of the Brussels Region relating to taxi services and car renting services with drivers.
  - Regulation of taxi rates:
    - 2002 Ministerial Decree setting maximum prices for taxi transportation.
  - Regulation of the number of taxis in circulation
    - 2003 Decree of the Government of the Brussels Region fixing the maximum number of vehicules for which autorizations to exploit taxi services can be granted on the territory of the Brussels-Capital Region.
- This regulatory framework:
  - Creates significant barriers to entry.
  - But it also, imposes a heavy regulatory burden on taxi companies.

Uber enters the Brussels market

- Entry creates a lot of tension with incumbent taxi companies, which see themselves as being subject to « unfair competition ».
- The threat to their business is real: the profits of taxis where Uber became active decreased significantly.



Commercial Court of Brussels judgment of 31 March 2014

- Taxi Radio Bruxellois initiated a legal action asking the court to order Uber to stop its activities.
- Uber did not show up at the hearing and the court rendered a judgment whereby Uber:
  - By relying on drivers who do not have the autorisation required by the Ordinance of 27 April 1995 of the Brussels-Capital Region breaches « honest commercial practices ».
  - Is ordered to stop using drivers who do not have that authorization on pain of a penalty of € 10,000 per infringement.
- On 4 May 2015, the Tribunal of Police of Brussels condemned a Uber driver for breach of the taxi legislation.

Could EU law help Uber to overcome regulatory obstacles?

- EU law offers two main avenues to challenge anti-competitive public restrictions:
  - Article 4(3) TEU combined with Article 101 TFEU
    - But the EU courts' case-law requires the presence of a State measure, which strengthens or encourages anti-competitive agreements.
      - See, e.g., Case 136/86, *BNIC v. Yves Aubert*, [1987] E.C.R 4789, § 24
    - Articles 4(3) TEU and 101 TFEU cannot be used to prohibit pure State measures unrelated to any agreement between undertakings.
      - See, e.g., Case 231/83, *Cullet v. Leclerc*, [1985] E.C.R 305, § 17.
  - Article 106(1) combined:
    - With Article 102 TFEU
      - State measures must benefit public undertakings or companies that enjoy exclusive or special rights. Do taxi companies enjoy "special rights"?
      - Measures must strengthen or extend dominance. But are taxi companies (collectively) dominant?
    - With Articles 49 or 56 TFEU
      - But does the regulatory framework for taxi services discriminate directly or indirectly against operators established in other Member States"?
        - Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Sr v. Giuseppe Calafiori*, [2006] E.C.R. I-2941AC

The need for regulatory solutions

- The best approach is to adapt the regulatory framework to allow competition between taxi companies and new business models such as Uber or Lyft.
- The regulatory framework should be reassessed to:
  - Be competitively neutral (no category of service should be privileged).
  - Eliminate provisions that are no longer necessary due to competition or that prevent efficient behaviour.
    - For instance, price regulation may no longer be necessary once there is more competition in the market. It may also prevent efficient conduct, such as « surge pricing » during peak hours.
  - Provide compensation to incumbent operators which made irrecuperable investments (although this should be done without introducing further distortions of competition).

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COMPETITIVE NEUTRALITY, A NEW FRONTIER FOR COMPETITION POLICY?

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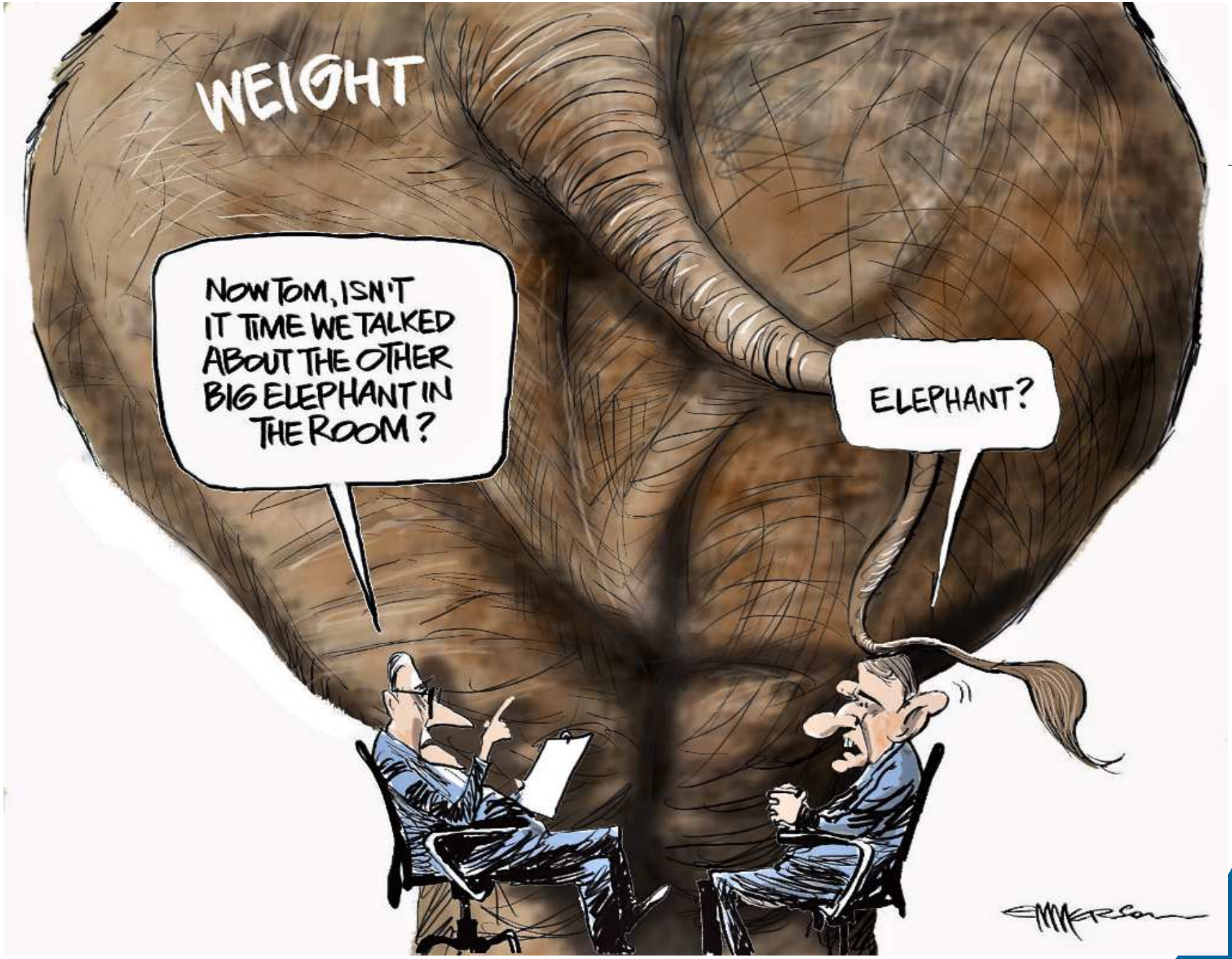
COMPETITIVE NEUTRALITY:
A new frontier for competition policy?

Mona Chammas
OECD Competition Division

Brussels, 28 May 2015
Conference on Public Restrictions of Competition

OECD
BETTER POLICIES FOR BETTER LIVES


WEIGHT
NOW TOM, ISN'T IT TIME WE TALKED ABOUT THE OTHER BIG ELEPHANT IN THE ROOM?
ELEPHANT?

OECD & COMPETITIVE NEUTRALITY

OECD mandate

The 2014 Ministerial Council "*supports the OECD's efforts to promote a global level playing field for business, involving non-member economies, including [...] competitive neutrality, responsible business conduct, international cooperation in regulatory policy and competition law enforcement*"

OECD Competition Committee June 2015

- 50+ heads of competition authorities
- Panel of experts
- OECD Secretariat (Competition Division)

Hearing:

Competitive neutrality through wider OECD lens:

Trade, tax, governance, investment, industry,…

Roundtable:

Competitive neutrality in competition enforcement

OECD Competition Committee June 2015

Roundtable output:

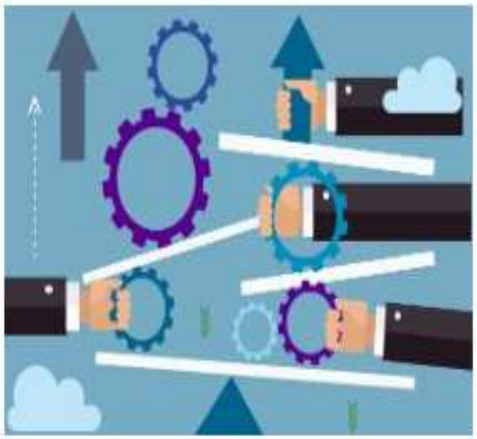
- OECD paper: scoping & issues
- Country contributions: national experiences & challenges
- Expert papers & presentations

To be published at:

http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm

› Bribery in international business
› Competition
› Abuse of dominance and monopolisation
› Cartels and anti-competitive agreements
› Competition enforcement practices
› Liberalisation and competition intervention in regulated sectors
› Mergers
› Pro-competitive Policy

Competitive Neutrality in Competition Enforcement



It is a fundamental principle of competition law and policy that firms should compete on the merits and should not benefit from undue advantages due to their ownership or nationality.

Governments can affect the way markets function sometimes to the detriment of free competition. They can set procurement/tax rules or regulatory regimes putting private companies at a disadvantage compared to state-controlled or supported firms, or yet, they can participate in a market by providing services directly or through state-owned/controlled firms. Ensuring a level playing field is therefore key to enable competition to work properly.

In **June 2015**, the OECD will be gathering competition experts and delegates to discuss the challenges arising from state interventions in the market and what competition authorities can do to address the distortions that such interventions can create.

The discussion will include first a Hearing with representatives of other policy communities. The Hearing will be an opportunity to hear about the competitive neutrality challenges faced by other policy community and about solutions that they have adopted to such challenges. The Hearing will be followed by a Roundtable discussion with expert panellists who will tackle issues such as how to define competitive neutrality, what state measures harm the competitive environment and what rules and tools can currently be used by competition authorities.

An issues paper by the Secretariat and notes by participating experts and delegations will set up the background of this debate and **will soon become available on this page**.

Further OECD references

- Competitive Neutrality in Competition Enforcement (2015)
- Guidelines on Corporate Governances of SOEs (2015 revision)
- State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field (2014)
- The Size and Sectorial Distribution of SOEs in OECD and Partner Countries (2014)
- International Playing Field between Public and Private Business: What Have We Learnt So Far? (2014)
- Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business (2012)
- Compendium of OECD recommendations, guidance and best practices bearing on competitive neutrality (2011)
- SOEs and the Principle of Competitive Neutrality: (i) Application of antitrust law to SOEs and (ii) Corporate governance and the principle of competitive neutrality (2009)
- Roundtables: Regulated Conduct Defence (2011) – Competition, State Aid and Subsidies (2010) – Competitive Restrictions in Legal Professions (2007) – Regulating Market Activities by the Public Sector (2004)

Competitive Neutrality 2.0

Scope:

- Any form of state-induced distortion of the playing field
- Not limited to SOEs

Focus:

- Insofar as matters to competition policy & enforcement
- Toolbox and open challenges

1. DEFINITION & RATIONALE
2. STATE MEASURES & DISTORTIONS
3. RULES & TOOLBOX
4. ENFORCEMENT CHALLENGES AGAINST CN DISTORTIONS

1. WHAT & WHY?

DEFINITION & RATIONALE

1. “Competitive neutrality” defined?

- Competitive neutrality =

Principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government’s contact, ownership or involvement in the market place, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant.

1. “Competitive neutrality” defined?

- Various distinctions: public v. private, foreign v. domestic, national v. local, one sector v. another, one specific company v. another.
- Should translate into an analytical and normative framework: to identify, assess and address state-induced distortions.
- Competition policy more familiar with concepts of equality, non-discrimination, open, fair and undistorted competition.
- Not about formal equality; about neutralising or at least minimising undue competitive inequalities.

1. Rationale?

- Why promoting a level playing field and undistorted markets?
- Goal in and of itself, or a means to achieving something else, bigger or higher?
  - ⟶ Economic rationale
  - ⟶ Political & policy rationale
- Why does it matter to competition policy?
  - ⟶ Interdependence

2. HOW TO DISTORT?

STATE MEASURES & DISTORTIONS

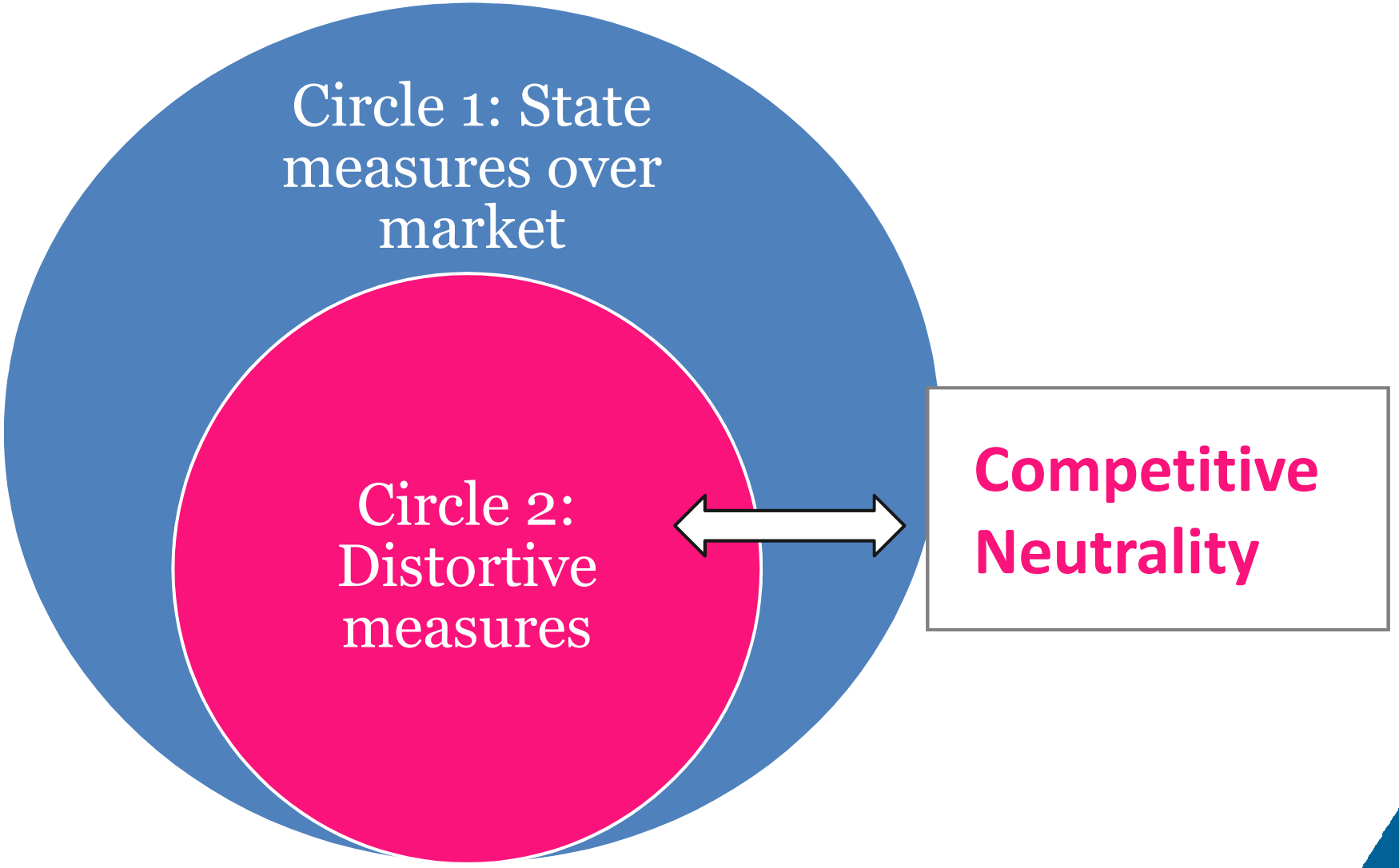
2. State measures & distortions

- Not every state intervention is a distortion.
- States may pursue different policy objectives through wide array of measures.
- Intervention often in essential industries.
- Resurgence of state activism.

CN driving questions:

- State intervention unduly distort the marketplace?
- Achieve policy goal ⟷ neutralise distortive effect?

2. State measures & distortions



2. State measures & distortions

Main state measures found in the market place, which may, depending on the circumstances, distort the competitive field (circle 2):

a) state ownership and control

b) subsidies & public services (entrusted companies)

c) regulation

d) industrial policy & state capitalism

(More info: see background slides)

3. HOW TO NEUTRALISE?

RULES & TOOLBOX

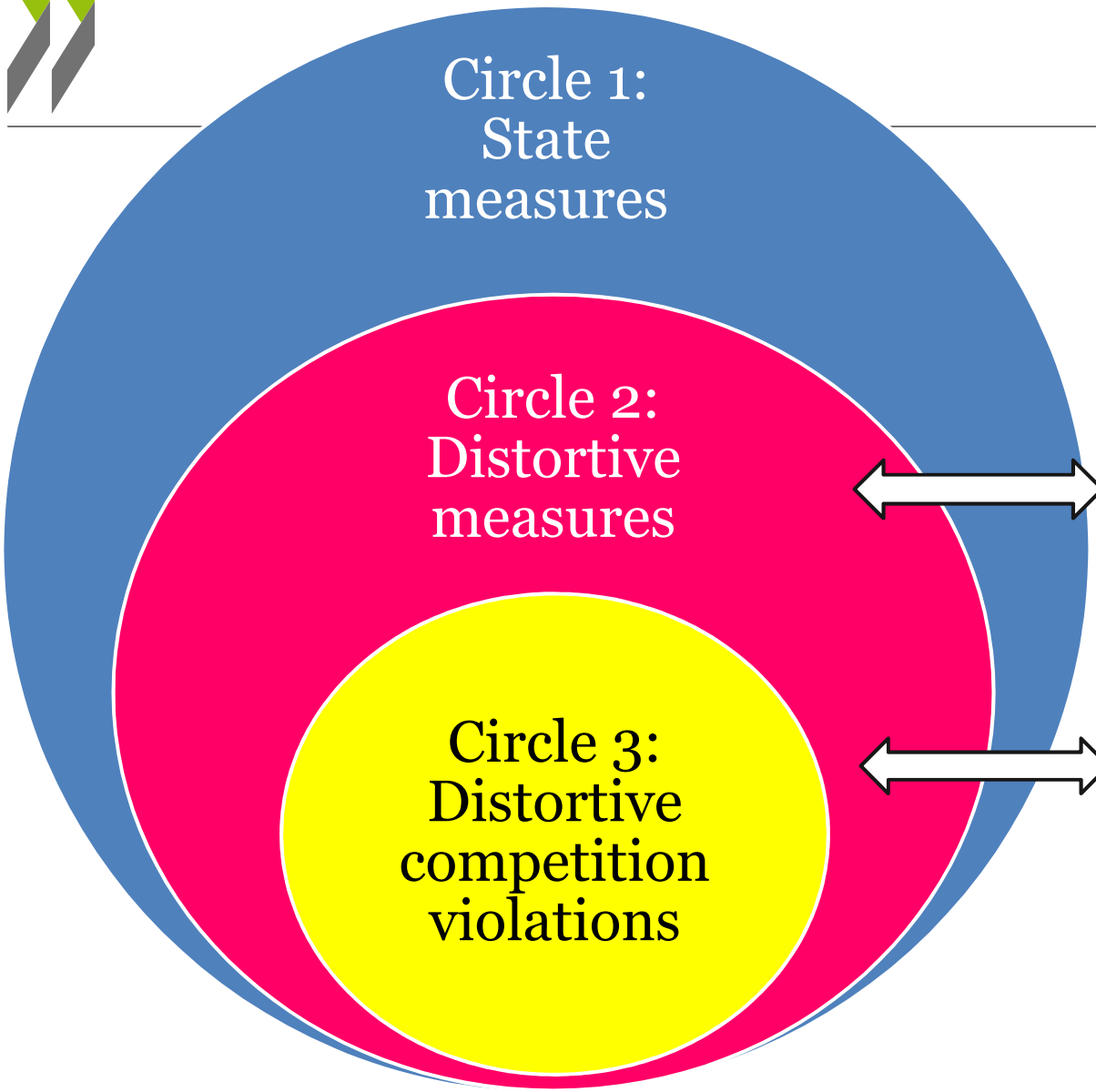
Neutralising competitive distortions

Rules and tools for competition authorities to establish jurisdiction over, and address, CN distortions?

Does CN distortion likely violate competition law?

- Yes: What challenges do competition authorities face in applying competition laws and enforcement powers against state-induced violations (circle 3)?
- No: What other legal grounds and tools could be relied on to remedy state-induced distortions (circle 2)?

(More info: See background slides)



Competitive neutrality

Other rules & tools restoring competitive neutrality

Competition law & enforcement

Neutralising Toolbox

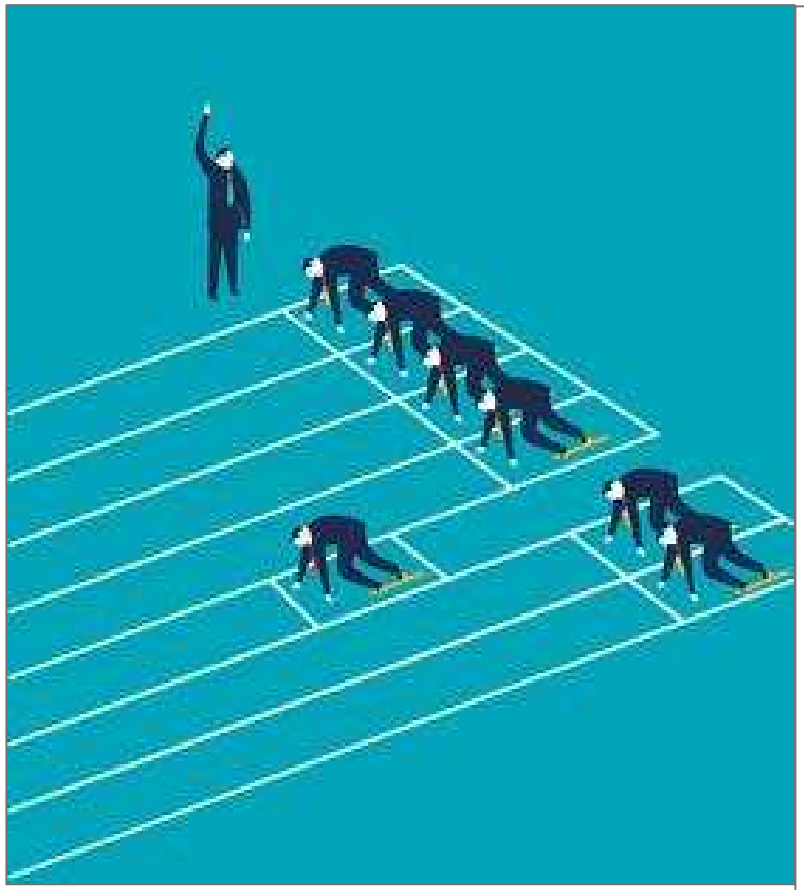
1. Broad competition law application & enforcement powers regardless of ownership, nationality, status, financing.
2. Advocacy
3. Market studies and remedies
4. Cooperation (domestic / int'l)
5. Enforce CN framework & regulatory impact assessment
6. Standing in court against state distortions
7. *Ex ante* and *ex post* subsidy control
8. Monitor public services and compensation
9. Review over public procurement and conflict of interests
10. Ensure independence and structural separation

Neutralising Toolbox (cont'd)

Toolbox challenges:

- Rules and tools do not exist everywhere
- Who should be entrusted with such tools?
- Lacking v. competing competences
- Cooperation channels v. confidentiality
- Investigation harder against the state?
- Political pressure & retaliation?

Neutralising Toolbox (cont'd)



The very challenge of ensuring competitive neutrality comes from the fact that it depends on the state's willingness and resources to create a toolbox and permit effective and unbiased enforcement, while the ultimate target of enforcement actions is the state itself.

This is where political will, good faith, independent enforcement and international stimulus cannot be underestimated in fostering competitive neutrality.

4. COMPETITION ENFORCEMENT vs. CN DISTORTIONS

SPECIAL CHALLENGES?

Competition enforcement challenges

Competitive neutrality is of critical importance to effective competition policy (and vice versa) but it also challenges its contours and limits when it comes to enforcing competition rules against the state.

Competition enforcement challenges

Competition concerns arise if state-entrusted economic player has:

a. Incentives to behave anti-competitively

- Not necessarily profit-maximising: more concerned about expanding sales and revenues (market share) even if unprofitable
- Sense of immunity, government protection and assistance

b. Ability to behave anti-competitively

- Deep pockets and cross-subsidisation
- Softer budget constraints (actual or perceived gov't guarantees)
- Special powers or privileges

Competition enforcement challenges

Are competition rules & standards well-suited?

- Modern antitrust standards based on logic of private profit-maximising firms
- Sensible competition analysis of merger, abuse, cartel bearing state element?
- Effective remedies, sanctions & redress vis-à-vis the State?

Enforcement challenges: abuse

Abuse of dominance

- Most common antitrust concern in state-induced context
- **Predatory pricing**: cost and recoupment standards?
- **Margin squeeze**: viable wholesale v. retail price based on cost patterns? (SA – Telkom)
- **Cross-subsidisation**: abuse as such or facilitator, theory of harm, legal standards?

+ Political and practical hurdles (Gazprom)

Enforcement challenges: mergers

Mergers

State among the parties

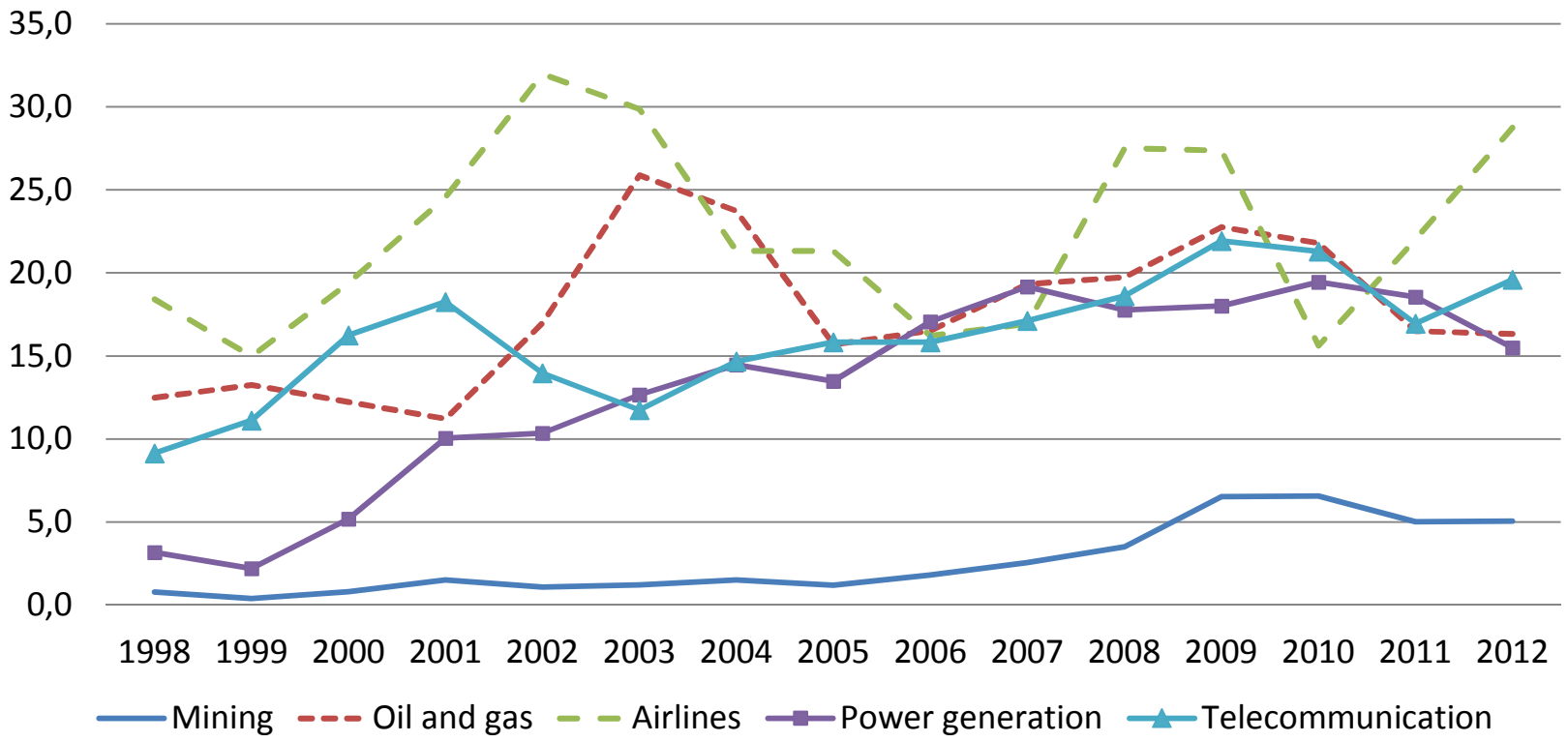
- Turnover calculation when SOE (SNCF/Eurostar)
- Single v. distinct entities
- Control over:
  - Privatisation?
  - (Re)nationalisation?
  - Strategic minority shareholding & activism? (Renault)
  - PPPs?

→ State aid v. merger control

Enforcement challenges: mergers

International M&As with a state-owned acquirer

(% of deal numbers)



Source: OECD (2014), OECD (2014), Corporate Governance Working Paper No. 14

Enforcement challenges: mergers

Mergers

State as influencer/intruder

- Political interference v. merger control? (FR/EU: GE/Alstom, SP/EU: E.ON/Endesa, IL: resignation over gas JV)
- Merger notification exemptions (Hungary)
- FDI restrictions
- Gun jumping?

Enforcement challenges: mergers

Substantive challenges

- General interest grounds (S.A.)
- Trade-offs & Counterfactuals (e.g. PSC)? By whom?
- Consumer welfare v. total welfare?
- Barriers analysis:
  - Merger-specific v. state-induced barriers?
  - Entry, exit, change?

Enforcement challenges: cartels

Cartels

- Singularity: one or several, SOE coordination?
- Asymmetry of information: sensitive or not, +/- lenient?
- Evidentiary standards: object to effect-based or BoP shift when state/public policy interest? (e.g. airline alliances, professional boards)
- Dilemma: neutrality-enhancing cartels

Enforcement challenges

Effective remedies?

Whom:

- Remedy powers against company and/or state? (EU)
- State action defence ⟶ go after the state?

What/How:

- Remedy COMP harm or CN distortions +broadly?
- Design & monitoring obstacles?
- Ex officio or litigation?

Going further:

- Parallel market study & measures?
- Compliance
- Advocacy

Enforcement challenges

Effective sanctions?

- Calculation: quid if turnover based?
- Allocation of responsibility
- Deterrence: quid if fines back into public budget?

→ Fining policy suited to punish & deter anti-competitive conduct by privileged or state-controlled companies?

Enforcement challenges

Effective redress?

- Who can harmed consumer sue?
- Does exemption/defence bar public enforcement only (civil redress still poss)?
- Cost passed back onto taxpayers?
- What role for CA?

Conclusion

Competitive neutrality:
A new frontier for competition policy?

or

A new parameter challenging current frontiers of competition policy

- Raise government understanding of competition & CN benefits, compatibility with other policy goals
- Develop toolbox & cooperation
- Apply competition rules widely and critically.

Thank you

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BETTER POLICIES FOR BETTER LIVES

BACKGROUND SLIDES

RE: STATE MEASURES & DISTORTIONS

a) State ownership & control

- Traditional focus of CN debate
- Warning - ownership does not necessarily mean:
  - state controlled
  - carries out a public service
  - enjoys competitive advantages
- No universal definition/approach – consequences:
  - Broaden CN reach v. narrow down AT exemptions
  - Cross-border impact v. int'l cooperation

a) State ownership & control (cont'd)

Relevance: more not less.

Challenges:

1. Uneasy calculation of SOE net advantage or hardship in relation to actual or potential competitors
2. CN concerns at two levels:
   - (Dis)advantages from the State's upstream control/measure
   - Ways economic player exercises prerogatives downstream
3. Competitive analysis often limited to SOE market: quid
   - Multi-market?
   - Multi-SOE?
   - Multi-jurisdictional?

b) Subsidies & entrusted players

- EU and WTO: rare (anti-)state aid and subsidy regimes (with limits)
- Two criteria:
  i. selective advantage
  ii. public resources
- Relevance: EU-28 State aid = 0.5% EU GDP
  (2013 EU State Aid Scoreboard)

b) Subsidies & entrusted players (cont'd)

Public service duties?

How company selected: open competitive process?

Compensation parameters: market value + reas. profit?

What powers/privileges, how used?

How long entrusted and compensated for?

Public policy objective? (rescue, market failure, innovation stimulus,…)

Subsidy effectual: ability and right incentive?

Least restrictive and distortive means?

c) Regulation

- Pro-active market regulation
  liberalisation, de-regulation & regulators
- Reactive *ad hoc* regulation
  v. disruptive innovation
- Professional rules
- Enforcers becoming market regulators

…for better or worse?

c) Regulation (cont'd)

CN questions:

1. Is there a market (or should there be a market)?
2. How levelling or discriminatory is the competitive environment?
3. Does the regulatory environment or intervention make it better or worse?
4. How to maximise CN without jeopardizing regulation's objectives?

d) Industrial policy & state activism

State activism, entrepreneurship, capitalism, industrial policy through e.g.:

- *golden shares and shareholder's activism,*
- *investments by sovereign wealth funds,*
- *political involvement in strategic deals,*
- *joint technological or industrial initiatives,*
- *public-private partnerships for infrastructure,*
- *administrative hardship in certain industries,*
- *standard setting.*

d) Industrial policy & state activism (cont'd)

- Competitiveness v. protectionism
- Cost v. benefit: for whom?
- Domestic v. international playing field
- Short term v. long term impact
- Reporting & detection?

RE: RULES TO ADDRESS DISTORTIONS

Neutralisation Rules

Competition laws (circle 3):

To ensure CN, competition laws themselves should be origin-, ownership- and nationality-neutral.

- OECD countries generally do not exclude public sector business from competition law (functional criterion)
- Differences across jurisdictions still arise re:
  i. Interpretation of functional criterion: what is an economic activity, for profit or not?
  ii. What falls under state prerogatives?
  iii. How hybrid entities are treated?
  iv. Must be a competitive market or not?
  v. Exceptions, exemptions, immunities, defences

Neutralising Rules (cont'd)

Other laws (circle 2)

- Competitive neutrality frameworks (e.g. Australia)
- Anti-subsidy rules and control (e.g. EU)
- Public service and compensation framework (e.g. EU)
- Public procurement laws
- Corporate governance rules (OECD SOE Guidelines)
- Regulatory assessment rules (e.g. OECD PMR indicators, Toolkit, Recommendation on Structural Separation)
- Public administrative law (e.g. Italy, Spain)
- Constitutions: non-discrimination, good public governance, open economy principles, fair competition

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CONCLUDING REMARKS

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Public restrictions of Competition: Challenges for Competition Authorities, Governments and Rule Makers

Thank you

Thursday 28 May 2015, Brussels

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