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Competitive neutrality and state owned enterprises

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South African context



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- Competition Act applies to all commercial economic activity in Republic and, where there is a regulator, the Act provides for concurrent jurisdiction
- Legacy of apartheid: extensive state ownership, support, regulation
- Privatisation and liberalisation with little/no attention to entrenched positions of market power and need for effective competitive rivalry
- Development challenges: infrastructure investment for sustainable and diversified long-term growth (and addressing skewed existing infrastructure provision)
- Rationale for state ownership: to ensure investment (and crowd-in private investment) while critically not undermining private investment in areas that can and should be competitive

Cases



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- Cases reveal extent of legacy of state role in terms of entrenched dominant firms (now private)
- Over 12 years of the competition authorities, 15 out of 20 abuse cases referred or settled by Commission involved respondents who have been state-owned or beneficiaries of large previous support / licensing
- The only two firms that have paid penalties for abuse are current SOEs: SAA and Foskor
- Substantive remedies in Sasol (no penalty) and Foskor cases = both relating to fertilizer components

Illustrative case study: role of state and competition concerns



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- Major forestry areas are state owned (indeed, privatisation of important forest was opposed by Commission because of substantial horizontal and vertical problems with the winning bidder)
 - Long-term investment required given 25+ years for trees to grow
- But: downstream (sawmilling) should be a competitive space, though SOE also participates
 - Abuse of dominance investigations regarding SOE conduct
- Lessons:
 - Be clear on rationale for state ownership – ensuring long-term investment, where natural monopolies (competition will be unlikely if is privatisation)
 - But: SOE should not undermine competition at other levels of the value chain – vertical separation; acceptance of competition principles; effective competition enforcement

Conclusion



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- South Africa had lack of regard for competition principles during liberalization: public to private monopolies and highly concentrated markets
- Competition enforcement has been seized with former and current SOEs abuses of dominance (and cartels – fertilizer, steel)
- More pro-active role for the competition authority identified in future through policy development and advocacy
- Developmental agenda (long term investment in infrastructure) needs to be consistent with competition principles.