

ICN Unilateral Conduct Working Group

STATE-CREATED MONOPOLIES ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS

Recommended Practices

As part of its work in 2006-07, the ICN Unilateral Conduct Working Group (UCWG) examined the challenges faced by competition authorities in jurisdictions with many state-owned monopolies or recently privatized state-created firms. This project was intended especially to address the interests and needs of competition authorities in developing and transition economies, which frequently face unilateral conduct enforcement issues involving state-owned or state-created monopolies or recently privatized firms that are dominant or have substantial market power. For the purposes of brevity, these firms are referred to as “state-created monopolies.” To avoid duplicating previous ICN work, the project did not cover core government functions or sectors regarded as “natural monopolies.”¹

Competition authorities both enforce unilateral conduct rules against the anticompetitive behavior of state-created monopolies and advocate the elimination of barriers to the development of competitive markets. Last year’s project found that jurisdictions take different approaches to assessing potentially anticompetitive conduct of state-created monopolies under unilateral conduct rules. Some jurisdictions apply the same general-application rules to state-created monopolies as they do to other firms. Other jurisdictions exempt state-created monopolies from the application of unilateral conduct rules, either generally or in a more limited fashion, for instance where their application would jeopardize the performance of a public interest. The choice of the approach depends, in part, on the priority the jurisdiction assigns to competition and other values underlying the creation of the monopoly in a specific sector.

On the basis of the working group’s report and further discussions, the UCWG proposes the following general guidance as to recommended practices for promoting sound competition values in addressing unilateral conduct relating to state-created monopolies, and the privatization or liberalization decisions involving such firms in all sectors with the exception of core government functions and those involving natural monopolies.

I. Enforcement Role of Competition Authority

In their enforcement roles, competition authorities should, where such enforcement is not exempted:

- protect and promote competition by taking appropriate enforcement action against anticompetitive unilateral conduct by state-created monopolies;
- treat state-created monopolies like private undertakings by using standard antitrust analysis to assess dominance/substantial market power regardless of state ownership or legal status of the firm;

¹ Former ICN Working Groups on Antitrust Enforcement in Regulated Sectors (2003-2005) and Telecommunications (2005-2006) addressed antitrust issues in sectors including telecom, energy, water, and railways.

- possess effective instruments, including effective investigative powers and the ability to seek or impose effective remedies, to carry out successful enforcement of unilateral conduct rules regarding state-created monopolies, recognizing that the instruments might vary according to the legal environment in which each competition authority is operating;
- apply sound antitrust analysis and remedies when investigating potentially anticompetitive unilateral conduct of state-created monopolies and deciding whether enforcement action is appropriate,

II. Advocacy Role of Competition Authorities During the Liberalization and Privatization Process

In their competition advocacy role before government entities that oversee the liberalization and privatization process of state-created monopolies, competition authorities should:

- advocate that competition considerations are taken into account from the inception of the process;
- participate in planning the liberalization/privatization, where appropriate, to help ensure post-privatization/liberalization competitive operation of the relevant market/sector;
- promote an effective role for competition authorities in the course of the liberalization and privatization process in order to promote competition in post-privatization/liberalization markets and help avoid further competition problems that could drain substantial time and effort of the competition authorities in the absence of their previous involvement;
- advocate for an expeditious liberalization of barriers to entry in markets with state-created dominant enterprises;
- possess effective instruments such as those discussed in III. below to carry out successful advocacy work, recognizing that the instruments might vary according to the legal environment in which each competition authority operates.

III. Effective Competition Advocacy Instruments

Effective advocacy instruments that may help competition authorities in their competition advocacy role in the liberalization/privatization process include:

- the provision of formal input through written reports or expert opinions on competition-related issues to other government agencies responsible for the liberalization/privatization process;
- participation in meetings with, or offering technical briefings to, governmental officials in order to enhance their understanding of the important role of competition;
- the ability to bring legislative instruments and administrative decisions before the courts in order, in some jurisdictions, to help inject competition values into the decision making;
- publication of the competition authority's opinions in order to help promote transparency in decision-making, create a basis for a public debate regarding competition considerations raised by the transaction, and enable interested

parties (e.g., other government agencies, consumers, market participants) to use them in support of their own pro-competitive arguments.