Challenges of Competition Regulation of State Conducts in Emerging Economies: A Comparative Review of the Case in EU, China, and Nigeria

Enyinnaya Chimezirim Uwadi

Abstract

Regulation of state conducts and anti-competitive behaviours of state-owned enterprises (SOEs) by competition authorities could be a very sensitive venture. This is especially the case where the anti-competitive conducts are backed by the state for the attainment of wider state policy objectives. From a comparative review of the position in EU, China and particularly Nigeria, under the new Federal Competition and Consumer Protection Act 2019, this article identifies the benefits and challenges of regulating state conducts and SOEs anti-competitive activities in emerging markets, and concludes with key recommendations on the way forward.

1. Introduction

Over the last two decades, competition law and regulation witnessed massive growth and expansion to the extent that it has been adopted in over 120 jurisdictions as of today,[1] inclusive of emerging markets.[2] This underscores the importance which nations ascribe to the concept of competition law. However, notwithstanding the seeming global allure of competition law in recent times, it has been faced with some challenges with regards to whether state conducts should come under competition regulation, and also whether the anti-competitive conducts of state-owned enterprises (SOEs)[3] should come under the scrutiny of competition authorities.

The question of SOEs' regulation under competition law and competitive neutrality[4] has been subject to divergent views and debates over time, maybe due to a lack of global consensus and approach under the national competition laws. For example, while jurisdictions like the UAE expressly exclude SOEs from competition law regulation,[5] others like Nigeria,[6] India,[7] and Peru[8] do not.

---

[1] OECD, 'Challenges of International Co-operation in Competition Law Enforcement' (2014) <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> accessed 11 April 2019.

[2] Kathryn McMahon, 'Competition Law and Developing Economies: Between 'Informed Divergence" and International Convergence' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing 2012) Ch 9.

[3] In this article, SOEs and state conduct will be used interchangeably and deemed to have the same meaning. Where any of them appears alone in a sentence, it will be deemed to include the other.

[4] This refers to a regulatory framework where a relationship with the state confers no competitive advantage to a firm, and all market participants are subjected to the same set of rules.

[5] Eleanor Fox and Deborah Healey, When the State Harms Competition—The Role for Competition Law' (2014) 79 Antitrust Law Journal, No. 3, pp. 769 at 776.

[6] Section 2 of the Nigerian Federal Competition and Consumer Protection Act 2019.

[7] *In re Maharashtra Generation Co. Ltd*., Case Nos. 03, 11 & 59 of 2012 (Dec. 12, 2013).

[8] Legislative Decree No. 1034, art. 2, Junio 25, 2008 (Peru).

This may be because SOEs operation spread across a broad range of markets, particularly in the utilities and public services industries and their level of involvement in the national economy varies from one jurisdiction to the other. Due to the special relationship they have with the government, which confers several advantages on them, their conduct may present a competitive challenge with the private companies operating in the same market. To address this problem, competition authorities, especially those from emerging markets, face several challenges, some of which are most prevalent within the developing world.

The above points noted, this article undertook a critical analysis of this identified challenge by reflecting on the approaches adopted by the European Union (EU), the People's Republic of China, and Nigeria under its new competition regime. In comparing these jurisdictions, this article hopes that emerging economies with new competition regimes like Nigeria could learn from the experiences of developed and more advanced competition regimes (EU and China), and avoid the pitfalls from their SOEs competition regulatory endeavour.

The article concludes that SOEs' anti-competitive conducts and well as that of chief executive officers (CEOs) who facilitate the SOEs conducts should be fully regulated by competition law, to protect consumers in emerging markets from the effects of the anti-competitive conducts. However, it recommended that to balance the competing interest between competition regulation of SOEs and the attainment of state policy objectives via SOEs, emerging markets should adopt a hybrid approach which is similar to that of the EU, with the provision of a narrow exception which should be construed very remotely, to prevent the abuse of the exception.

2. What Are SOEs, and Why Are They Established

According to the World Bank, SOEs are 'government-owned or government-controlled economic entities that generate the bulk of their revenues from selling goods and services'.[9] In simple terms, SOEs refer to those firms or businesses which are wholly owned or controlled by the government/state, as opposed to those owned by private individuals, which may be referred to as private-owned enterprises (POEs) . Government ownership and control of businesses have been a recurrent cause of concern for competition authorities. Government control strengthens and potentially empowers businesses to engage in anti-competitive practices because such government intervention could shield competition regulation where a foreign government owns the business and also reduce external market pressures.

Generally, SOEs can be divided into three categories to wit; statutory corporations whose operations are very similar to government departments; state-owned companies fully incorporated under the national company law; private firms with the state having a majority shareholding.[10] The latter category may not really be a problem to competition authorities, because their aim is profit maximisation, and they are regulated under general company and securities regulation law. In any event, a fourth category may be added to include those POEs which are assigned exclusive and special privileges by the state, as it happens in the EU which will be discussed shortly in section 2.2 of this article.

[9] World Bank, 'Bureaucrats in business: The economics and politics of government ownership (English)' (1995) A World Bank policy research report.
<http://documents.worldbank.org/curated/en/197611468336015835/Bureaucrats-in-business-the-economics-and-politics-of-government-ownership> accessed 23 January 2020.

[10] OECD, 'State Owned Enterprises and the Principle of Competitive Neutrality' (OECD Policy Roundtables 2009) <http://www.oecd.org/daf/competition/46734249.pdf> accessed 23 January 2020.

A major difference between SOEs and POEs is that while the latter have profit maximisation as a core and indispensable mandate, the former has several objectives which include the provision of basic and essential services of which profit maximisation may not necessarily be a core mandate.[11] According to Sappington and Sidak, the decision by a government to establish an SOE is a pointer that the firm embodies an attempt by the state to address perceived market failure or to promote a specific public interest goal like redistribution of income, via means other than profit maximisation.[12]

States establish SOEs for several reasons. Firstly, is the ideological and political reason. Some national governments may nationalise an entire sector of the economy based on the ideology that the state is in the best position to redistribute wealth and power equitably in the society and to achieve that, it should have a significant presence in the economy.[13] This ideology is more prevalent in developing countries where the government through SOEs, reduces the prices of essential products which are in high demand by low-income earners, to make them affordable. Secondly, the social benefit is another driving force for SOEs establishment[14] because most SOEs provide better working conditions and offer guaranteed employment to the labour force when compared to POEs.[15] Thirdly, SOEs are established as an antidote to market failure.[16] Through them, the government can ensure that consumers are offered goods and services on reasonable and fair terms. Finally, through the instrumentality of SOEs, governments can promote economic progress in the underdeveloped areas of the society or sectors of the economy. This is because SOEs being public enterprises can be used for such a policy which is long-term in nature and may not offer a short-term commercial profit.

2.1 SOEs, State Conducts and Competition Law

Since SOEs are vehicles used by the state to pursue several goals of which profit maximisation may not be a priority even when they are engaging in activities of commercial nature,[17] one may assume that they may have a lesser incentive to engage in anti-competitive behaviours. However, experience over time has proved this assumption to be wrong because some of the other objectives which SOEs are mandated to pursue besides profit maximisation could be infringing competition law principles. For example, making goods and services affordable to low-income earners by setting their prices below cost (unintentional or intentional predatory pricing) is problematic to competitors. It could also be a barrier to new entrants.[18]

---

[11] David E M Sappington and J Gregory Sidak, 'Competition Law for State-Owned Enterprises' (2003) 71 Antitrust LJ 479.

[12] ibid at 515.

[13] OECD Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19].

[14] Ronald Wintrobe, 'The Market for Corporate Control and the Market for Political Control' (1987) 3 J.L. Econ. & Org. 435, 435-36.

[15] Maxim Boycko, Shleifer Andrei, and Vishny W. Robert, 'A Theory of Privatisation' (1996) 106 The Economic Journal no. 435 309-19.

[16] Paul A. Grout and Margaret Stevens, 'The Assessment: Financing and Managing Public Services' (2003) 19 Oxford Rev. Econ. Pol'y 215, 215.

[17] Wentong Zheng, 'State-Owned Enterprises versus the State' in Thomas K. Cheng, Ioannis Lianos, and Daniel Sokol (Eds) *Competition and the State* (Stanford University Press 2014) Ch 4.

[18] David E.M. Sappington and J. Gregory Sidak, 'Incentives for Anticompetitive Behavior by Public Enterprises' (2003) 22 Rev. Indus. Org. 183.

The size, resources, and good relationship between SOEs and the state establish them as dominant players. These factors, therefore, create an environment for a potential breach of competition law like unilateral conducts, through predatory pricing, raising rivals' cost and erecting barriers to entry, cross-subsidisation, and strategic choice of inefficient technology. To illustrate further in detail, SOEs can set prices of goods and services at below-cost rates to the disadvantage of competitors and the detriment of competition. The ability of SOEs to set below cost rates is possible because of the following; SOEs have the ability to recoup losses by cross-subsidisation;[19] they can also raise prices in markets where they operate as statutory monopoly or benefit from the largesse of state treasury via subsidy programs or budgetary allocations; they also have the ability to operate on a negative profit balance over a long period of time without the fear of going bankrupt due to exemption from bankruptcy rules;[20] they can prevent new entrants by erecting barriers to entry in markets where they operate as statutory monopolies when prices rise at profitable levels;[21] usually, they may be exempted from paying tax, which reduces their cost of operation; they may be less compliant to price regulation provisions unlike their private counterparts, due to a real or perceived sense of assistance and protection from the state, even when engaging in anti-competitive conducts;[22] and finally, they can adopt the use of cheap inefficient technologies in order to maintain price levels at low rates.

SOEs can also engage in other anti-competitive practices like collusive agreements and anti-competitive mergers, which could be done according to state policy to create a domestic giant to compete favourably with multinational foreign firms.

The state conducts in competition law, on the other hand, refers to those actions of the state which perpetuates a state of anti-competitiveness and violation of competition law principles in the economy. This is usually the case where the state and its officials create a statutory monopoly; organises cartels; facilitates bid-rigging in public procurement; engages in anti-competitive abuse of monopoly powers, or engages in anti-competitive conducts via SOEs.

The potential for the state to direct the affairs of SOEs both for policy and commercial purposes raises vital questions in competition law on when SOEs should be treated as an economic entity under government control, and when they should be treated as a distinct economic entity that can collude with others.[23]

From the discussions above, it appears that two economic conditions need to be fulfilled for SOEs to be subject to competition law. First is the ability and autonomy of SOEs to set price in a market where the price plays a key role. The reason is that in markets where prices are controlled and regulated, there may not be any room for competition. Secondly, the SOE must have significant market power or monopoly power because the absence of these powers may likely restrain an SOE from engaging in anti-competitive conducts, unless it collaborates with other businesses to form a cartel.

Relatedly, foreign governments are not left out in the regulation of SOEs debate. Besides SOEs, foreign government investment could come in different forms like pension funds and

[19] *Deutsche Post AG* (Case COMP/35.141) Commission Decision 2001/354/EC [2001] OJ L 125/27.
[20] Richard Geddes, 'Case Studies of Anticompetitive SOE Behavior' in Richard Geddes (ed), *Competing with the Government, Anticompetitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004) Ch 4.
[21] ibid.
[22] Sappington and Sidak 'Competition Law for State-Owned Enterprises' (n 11) 514-515.
[23] Zheng (n 17).

sovereign wealth funds (SWF). Prima facie, these sorts of investments appear to have a relatively low effect on market competitiveness because they are 'mere' investments into existing structures. The investor may not be exercising direct control over the activities of the financed entity. However, in recent times, the particular nature of foreign government investments are issues of great interest to competition regulators due to their effect on the free market and the extent to which they should be subjected to competition enforcement actions. SWFs could raise potential anti-competitive issues, especially where the SWF is a calculated investment to promote national champions.[24] OECD acknowledges the absence of a consensus approach to these issues and reiterates the need for future empirical analysis.[25] In January 2021, the Court of Justice of the European Union (CJEU) expanded the scope of parental liability. It held that financial investors holding 100% voting rights are liable to competition regulation even where they did not own 100% of the share capital.[26] The key question here is on who lies the controlling power and commanding heights of a business. Huge financial injections in the form of SWF could empower a foreign government to exercise direct or indirect control in the affairs of a business.[27] In the absence of direct control, the CJEU decision implies that foreign governments have a duty of care to ensure that their funds are not invested in firms that participate in anti-competitive activities. No matter how one looks at it, this decision brought the scope of SWFs within the precincts of competition regulators.

2.2 Competitive Neutrality

The concept of competitive neutrality promotes the idea that SOEs and private businesses ought to compete on a level playing field.[28] There is an underlying principle in competition law that all businesses should not gain from undue advantages accruing to them from the position of ownership or nationality. Rather, they should compete strictly on the merits. Specifically, competitive neutrality has been summarised under four key points, namely; SOEs commercial operations of SOEs should be separate from their public service responsibilities, and their public responsibilities should entitle them to fair and transparent compensation. Secondly, governments should treat SOEs and POEs equally in terms of taxation, regulation, and procurement. Thirdly, governments should neither provide guarantees for SOEs loans nor exempt them from debt repayment as it amounts to a subsidy. Finally, governments should demand the same level of financial returns expected of POEs on SOEs because investing state funds in SOEs without achieving a similar output to POEs appears to be a form of subsidy.[29]

---

[24] Julien Chaisse 'Untangling the Triangle - Issues for State-Controlled Entities in Trade, Investment and Competition Law' in Julien Chaisse and Tsai-yu Lin (eds) International Economic law and Governance-- Essays in the Honour of Mitsuo Matsushita (London: Oxford University Press, 2016) 233-258.

[25] OECD, 'Competition Law and Foreign-Government Controlled Investors' (2009) <https://www.oecd.org/daf/inv/investment-policy/41976200.pdf> accessed 03 June 2021.

[26] Goldman Sachs Group Inc v. European Commission ECLI:EU:C:2021:73

[27] Chaisse (n 24).

[28] OECD, 'Competitive Neutrality: Maintaining a level playing field between public and private business' (2012) <https://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm > accessed 03 June 2021.

[29] Nicholas Lardy, 'Achieving Competitive Neutrality in China' (2019) Chapter in the People's Bank of China and International Monetary Fund Seventh Joint Conference volume, *Opening Up and Competitive Neutrality: The International Experience and Insights for China*, edited by Guo Kai and Alfred Schipke.

Creating and safeguarding a level playing field for all economic actors irrespective of their ownership is critical in promoting competition ideals, attainment of consumer and economic benefits to consumers particularly and the wider economy. However, in reality, state actions could potentially distort, prevent and restrict competition directly and indirectly. This could come in the form of tax and regulatory waiver for SOEs, or elevating SOEs to the status of a market regulator within the relevant market. In any event, competitive neutrality is steadily gaining global traction except that in practice, its implementation is shrouded with complexities.[30]

2.3 Position in the EU

The EU has a goal of a single common market for all the member states. This goal relies on efficient competition regulation to ensure that barriers to trade are not erected by any member state.[31] While state interference in the form of tariff and nontariff barriers are subjected to the trade law discipline of the internal market provisions of the Treaty on the Functioning of the European Union (TFEU)[32] , which is the foundation of the EU,[33] interference by a member state in the common market could be justified if it is in the interest of the public and proportionate to the protected interest.[34] However, indirect interferences whereby a member state grants special privilege to domestic POEs or enacts legislation that shields them from competition or limits the capacity of other firms within the EU to compete in the domestic market of the member state, are subject to the provisions of Articles 106 and 107 of the TFEU, as well as the case law 'state action doctrine' developed from Articles 101 and 102 of the TFEU, and Article 4(3) of the Treaty on European Union (TEU).[35]

Article 106 of the TFEU is the only piece of legislation in the body of EU Treaties with an express reference to state actions to restrict competition and will be most relevant to this article. The Article will be reproduced hereunder for ease of reference.

> *Article 106(1) TFEU: In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*
>
> *Article 106(2) TFEU Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

[30] OECD, 'Competitive Neutrality in Competition Policy' < https://www.oecd.org/competition/competitive-neutrality.htm> accessed 03 June 2021.
[31] OECD, 'State Owned Enterprises and the Principle of Competitive Neutrality' (n 10) 233.
[32] Articles 34, 49, 56 and 63, TFEU.
[33] Case 194/94, *CIA Security v Signalson* [1996] E.C.R. 1-2201, para 40.
[34] Damien M.B. Gerard, 'A Global Perspective on State Action' in Ioannis Lianos and Daniel Sokol *The Global Limits of Competition Law* (Stanford University Press 2012) Ch 7.
[35] ibid.

A literal interpretation of the above provisions shows that member states of the EU are prohibited from enacting laws or policies to prevent the application of EU Treaties' rules, particularly those relating to competition law, on public undertakings,[36] and those which are granted special or exclusive rights. To be precise, these sorts of undertakings that are granted special or exclusive rights are private firms that fall under the category of SOEs. The reason behind widening the scope to privately owned undertakings that are granted special or exclusive rights is because the same set of rules should be applicable notwithstanding whether a member state decides to retain ownership of the undertaking carrying out the public service or whether it delegates this to a POE.

Article 106 (1) has been interpreted by the Court of Justice of the European Court of Justice (ECJ) in several cases, which includes *Commission v Dimosia Epicheirisi Ilektrismou (DEI)* where it was held that an infringement of Article 106 (1) could be established even in the absence of actual abuse. All that needs to be proved is to identify a potential anticompetition consequence arising from the state measure in question.[37]

The second paragraph of Article 106 introduced a narrow exception to the application of competition law on SOEs in a bid to strike a balance between subjecting SOEs to the application of competition law and the State's interest in providing quality services of public nature.[38] It provides that SOEs shall be exempted from the application of competition law where it obstructs the performance of such duty which has been assigned to them. This is similar to the popular public interest considerations in competition law enforcement which is very popular in developing countries of sub-Saharan Africa, like South Africa.[39] However, this exemption will not apply if the anti-competitive conduct negatively affects the development of trade to such an extent that it becomes contrary to the interests of the EU community.

A point to note from the above exemption is that 'services of general economic interest' was not defined in the TFEU.[40] In practice, however, member states have the discretion to define the scope of what could be a service of general economic interest in their jurisdiction[41] , which could be public utilities ranging from postal services, telecommunication services, gas, electricity and transportation in some cases.

---

[36] Article 106 did not define 'public undertaking', however the term is defined in the Commission Directive 2006/111/EC of 16 November 2006 as: 'any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

[37] Case C-553/12P *Commission v Dimosia Epicheirisi Ilektrismou (DEI)* [2014] CMLR 19.

[38] Ariel Ezrachi, *EU Competition Law, An Analytical Guide to the Leading Cases* (Hart Publishing 5th Edn 2016) 336.

[39] Azza A. Raslan, 'Public Policy Considerations in Competition Enforcement: Merger Control in South Africa' (2016) Centre for Law, Economics and Society Research Paper Series 3/2016, p 8 <https://www.ucl.ac.uk/cles/sites/cles/files/cles-3-2016.pdf> accessed 08 April 2019.

[40] It was however subsequently defined as economic activities which a government identify as being of particular value to its citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. See <http://ec.europa.eu/competition/state_aid/overview/public_services_en.html> accessed 28 January 2020.

[41] OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Roundtable on Competitive Neutrality In Competition Enforcement' (2015) DAF/COMP/WD(2015)3 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)31&docLanguage=En> accessed 25 January 2020; See also Case T-106/95 *FFSA v. Commission* [1997] ECR II-229, para 99.

Nevertheless, there may be a question as to where the liability lies when a member state breaches the above Article 106. The general rule is that an SOE will be liable when it autonomously behaves in an anti-competitive way upon being granted a special and exclusive right. Also, when the anti-competitive behaviour is state induced, both the SOE and state will be liable. However, if the anti-competitive conduct is forced on an SOE in compliance with domestic legislation, to the extent that it can no longer act autonomously, it can invoke the 'state action defence' and pass on liability to the member state.[42] However, the US position is that such an anti-competitive effect must be within the reasonable expectation of the state before such a defence can apply.[43]

For Article 106 of the TFEU to apply, the Commission or ECJ will first identify the existence of a special or exclusive right, secondly, identify a position of dominance, thirdly establish an abuse of the dominant position, and fourthly identify whether the undertaking involved is tasked with providing a service of general economic interest so that the application of competition law thereof will restrict the carrying out of such task.[44] This was the procedure followed by the ECJ in the *Port of Rodby* case.[45] The facts of this case are that Danske Statsbaner (DSB) owned the Danish Port of Rodby and had an exclusive right to manage railroad traffic in Denmark. Stena, a Swedish ferry firm requested permission from the government of Denmark to use the facilities in the Port or build a new one close by, which was refused. Construing Article 106(1) of the TFEU, the European Commission (EC) came to the finding that DSB has a special and exclusive right in the Port of Rodby, which is evidence of a dominant position. According to the EC, this dominant position was abused by the refusal of access for Stena to operate from the port. This action was given state support by the refusal of Denmark to authorise the construction of a new one by Stena. Further, it was held that the exception of Article 106(2) of the TFEU would not avail DSB because the application of competition law in this instance will not prevent or restrict DSB from carrying out its functions of organising rail services and managing the port facilities.

A similar decision was reached in *Régie des Postes v. Corbeau,* where the ECJ held that 'a state-owned or city-owned mail delivery service or one with an exclusive license could not legally prevent the entry of a private express delivery service except to the extent that exclusivity was necessary to achieve a public mission.'[46]

On the flip side, the exception in Article 106(2) was upheld in the case *Albany International B V Posts SBT* where the ECJ came to the decision that the exclusive rights granted to a pension fund for the management of supplementary pensions within a particular sector was justified or else 'young people in good health engaged in non-dangerous activities' will opt out of the scheme, thereby raising the costs for the remaining people.[47]

The above legislative texts, case laws, and principles show that the EU has developed a unique jurisprudence that centrally addresses SOEs' measures in restricting competition, and places an obligation on member states not to set up measures that will prod on SOEs to restrict competition within the common market of the Union.

---

[42] OECD *ibid*; See also Case C-198/01, *Consorzio Industrie Fiammiferi, v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, para. 56.
[43] Fox and Healey (n 5) 797.
[44] Gerard (n 34) 105.
[45] *Port of Rodby* Commission Decision 94/119/EC [1993] OJ L055.
[46] Case C-320/91, *Régie des Postes v. Corbeau*, [1993] E.C.R 1-2533, paras. 12-13
[47] Cases C-67/96 Albany International B V v SBT [1999] ECR I-5751, [2000] 4 CMLR 446.

2.4 Position in the People's Republic of China

China's Anti-Monopoly Law (AML)[48] became effective a little over a decade ago in August 2008. Three agencies are responsible for the enforcement of the AML. The Ministry of Commerce (MOFCOM) enforces the merger provisions, while the National Development and Reform Commission (NDRC) is in charge of prohibitions on price-related anti-competitive conduct. The State Administration for Industry and Commerce (SAIC) regulates non-price anti-competitive conduct. According to Zhang, the enactment of the AML by China was surprising to many, because China is a communist regime[49] where public ownership and control supersedes private ownership and free-market competition.[50]

The AML contains provisions that prohibit anti-competitive practices of POEs on the one hand and the abuse of administrative powers by provincial and local governments on the other hand. The latter provision covers conduct set out in Chapter V of the AML which includes requirements to deal, purchase, or use commodities provided by designated local undertakings;[51]discriminatory charges and technical barriers to trade;[52] discriminatory bidding requirements;[53] restrictions on investment or establishment by businesses originating from outside the relevant region.[54] According to Gerard, these provisions are meant to address the protectionist barriers to the free movement of goods and corporate investment in China.[55]

The AML applies to any undertaking which engages in monopolistic activities as well as conducts that harm competition within the People's Republic of China.[56] An undertaking is defined under the AML as 'a natural person, legal person, or other organisation that engages in the production of business commodities or private services.'[57] The above definition of an undertaking encompasses SOEs in China. Indeed, it appears very surprising and paradoxical for a communist state like China to enact an AML which provides for the regulation of SOEs, a potent political and economic entity in the republic.[58] On the face of this, this provision seems to give the impression that all SOEs in China are subject to the competition regulation by the regulatory agencies. However, this has been subject to diverse views and debates as will be shown in the subsequent paragraphs.

Article 7 of the AML provides as follows:

> *Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful*

[48] Anti-Monopoly Law of the People's Republic of China (2007), Presidential Order No. 68, 30 August 2007.
[49] Angela Huyue Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?' (2015) 51 Stanford Journal of International Law 195.
[50] Youngjin Jung and Qian Hao, 'The New Economic Constitution in China: A Third Way for Competitive Regime?' (2003) 24 NW. J. Int'l L. & Bus. 107, 111
[51] Article 32, AML.
[52] Article 33, AML.
[53] Article 34, AML.
[54] Article 35, AML.
[55] Gerard (n 34) 104.
[56] Article 2, AML.
[57] Article 12, AML.
[58] H. Stephen Harris Jr., Peter J. Wang, Yizhe Zhang, Mark A. Cohen, and Sebastien J. Evrard, *Anti-Monopoly Law and Practice in China* (OUP 2nd edn. 2016).

operation by the undertakings. The State shall supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technological progress.

The undertakings mentioned in the paragraph above shall operate, in good faith, in accordance with the law and in a self-disciplined manner, accepting public supervision and shall not harm the interests of consumers from a controlling or exclusive dealing position.[59]

The language of the above-referenced Article appears ambiguous to an extent and could be subject to different interpretations. This could have been intentional to allow for a flexible approach in its application[60] by either broadening or narrowing the scope of its interpretation.[61] However, this ambiguity made the enforcement of competition law against SOEs in China to be subject to some controversies[62] in the early years of AML's post-enactment.

A combined reading of the above Articles 2, 12, and 7 shows that although the AML applies to SOEs, those who operate in strategic sectors of the Chinese economy appear to be exempted from the regulatory authority of MOFCOM, NDRC, and SAIC. The exempted SOEs who are dominant players in those strategic sectors are subject only to the control and supervision of the state to protect the interest of the consumers. This led to the position by some scholars that the state alone reserves the right on whether to control or ignore the anti-competitive conducts of these SOEs which operate as state-sponsored monopolies in various critical sectors of the national economy, which includes telecommunications, banking, electricity, petroleum, railway, aviation.[63]

On the other hand, a different view to the one in the preceding paragraph is that it may not be correct to say that the dominant SOEs operating in strategic sectors are exempted from the AML. This is because Clause 17 of the State-Owned Assets Law of China mandates SOEs to comply with laws and regulations when they are involved in commercial activities. Accordingly, it can be argued that any SOE, whether involved in strategic sectors or not, that meets the definition of undertaking in Article 12 of the AML, will be subject to the provisions of the AML. To buttress this point further, the last paragraph of the referenced Article 7 of the AML provides that these SOEs shall accept public supervision and shall not harm the interests of consumers from a controlling or exclusive dealing position. This implies that they are bound to accept supervision by complying with the AML and its regulatory agencies, and shall not abuse their dominant positions to eliminate or restrict competition.

In any event, available literature in Chinese competition law shows that even the dominant SOEs operating in strategic sectors have been subjected to competition law enforcement in

[59] Article 7, AML.
[60] Fox and Healey (n 5) 778.
[61] Eleanor Fox, 'An Anti-Monopoly Law for China: Scaling the Walls of Government Restraints' (2008) 75 Antitrust Law Journal 173, 179.
[62] Thomas K. Cheng, 'Competition and the State in China' in Cheng *et al* (Eds) (n 17) Ch 10.
[63] Bruce M. Owen, Su Sun and Wentong Zheng, 'Antitrust in China 2006: The Problem of Incentive Compatibility' in Belton M. Fleisher (Ed) *Policy Reform and Chinese Markets: Progress and Challenges* (Elgar 2008) Ch 3; Fox (n 54) 178.

recent times,[64] notable among them being the NDRC's enforcement against China Telecom and China Unicom, major Chinese SOEs in the telecom sector.[65]

2.5 Position in Nigeria

Nigeria is the latest country to adopt a national competition law upon the enactment of the Federal Competition and Consumer Protection Act (FCCPA) on January 30, 2019. This came 17 years after the first idea for competition law in Nigeria was touted in December 2002. From that time till 2015 when the latest competition bill that matured into the FCCPA was drafted, several versions of national competition Bills were introduced for consideration and passage in the National Assembly. Still, all these efforts yielded little or no results due to several factors which might not be unconnected with the overbearing influence of vested interests like owners of vast business empires who enjoy political patronage and saw the emergence of competition law as a threat to their businesses.[66]

However, it is worthy to note that despite the prolonged delay in the passage of the bill, a handful of results were achieved by competition law advocates via the subtle introduction of competition law and its principles by empowering some sector-specific regulators, especially those which were established post-2002 with competition regulatory functions.[67] These agencies include the Nigerian Communications Commission which regulates competition in the communications sector pursuant to Sections 4 and 90 of the Nigerian Communications Act 2003; the Nigerian Civil Aviation Authority (NCAA) which regulates unfair business practices in the aviation sector by virtue of Section 30(4) of the Civil Aviation Authority (CAA) Act 2006; the National Insurance Commission which regulates mergers in the insurance sector under Section 30 of the Insurance Act 2003; the Securities and Exchange Commission (SEC) which is empowered under Sections 121 to 128 of the Investment and Securities Act (ISA) 2007 to regulate and approve mergers; the Nigerian Electricity Regulatory Commission regulates competition in the power sector pursuant to Sections 82 of the Electric Power Sector Reforms Act 2005; the Petroleum Products Pricing Regulatory Agency which has the mandate to prevent collusion and restrictive trade practices in the downstream petroleum sector, by virtue of Section 7 (j) of the Petroleum Products Pricing Regulatory Agency Act 2004.

The delay in the passage of the Bill led to the clothing of these agencies with competition law powers, being sectors of national and strategic importance that cannot be left totally unregulated, competition-wise, especially in the wake of the massive surge towards privatisation and globalisation in the early 2000s. Whether these agencies achieved their competition regulation mandate or not is a topic open to debate. Howbeit, with the enactment of the FCCPA, the nature and extent of the statutory powers of the above sector regulators as it relates to competition law are now subject to the FCCPA.

---

[64] William E Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16 World Trade Rev 693; Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?' (n 49).

[65] Cheng (n 17) Ch 10.

[66] Bukola Akinbola and Enyinnaya Uwadi, 'Antitrust as a Panacea for Economic Development in Nigeria' (2017) 11 (2) Ife Juris Review.

[67] Enyinnaya Uwadi, 'Competition Law in Nigeria: A Brief Overview of the Federal Competition and Consumer Protection Act 2019' (*Sound Counsel* August 2019) 36.

2.5.1 Institutional Structure of the Nigerian Regime

The FCCPA repealed the Consumer Protection Council Act and established the FCCPC in the place of the Consumer Protection Council (CPC). It also repealed Sections 118 to 127 of the Investments and Securities Act 2007, which hitherto empowered the SEC to regulate and approve mergers, and assigned this role to the FCCPC.

The FCCPA created two institutions to enforce its provisions, namely; the Federal Competition and Consumer Protection Commission (FCCPC) and the Competition and Consumer Protection Tribunal (CCPT). It saddled them with the responsibility of promoting competition in the Nigerian market by eliminating monopolies, prohibiting abuse of a dominant position and penalising other restrictive trade and business practices.

2.5.2 Competition Law and SOEs in Nigeria

The relevant portion of the FCCPA, which relates to the conduct of SOEs, is Section 2 of the Act, which is reproduced hereunder for ease of reference.

1. *Except as may be indicated otherwise, this Act applies to all undertakings and all commercial activities within, or having effect within, Nigeria.*
2. *This Act also applies to and is binding upon-*
   a. *a body corporate or agency of the Government of the Federation or a body corporate or agency of a subdivision of the Federation, if the body corporate or agency engages in commercial activities;*
   b. *a body corporate in which a Government of the Federation or government of a State or a body corporate or agency of Government of the Federation or any State or Local Government has a controlling interest where such a body corporate engages in economic activities; and*
   c. *all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public.*

From the above legislative text, as provided in subsection 2.1 above, it is crystal clear that the FCCPA applies to all commercial activities within Nigeria, including extraterritorially, to the extent that the effect of the commercial activity in question extends to Nigeria. In the absence of an explicit provision mentioning SOEs, it can be argued that this provision alone encompasses SOEs when they engage in commercial activities. However, to avoid ambiguity as to the extent of the application of the Act, subsection 2 of the above- referenced section of the Act specifically mentioned that the provisions of the FCCPA are binding on all government departments where they engage in commercial activities, as well as state- owned enterprises, and indeed POEs wherein the federal, state or local government directly or via any of its agencies has a controlling shareholding.

Therefore, one may confidently say that the anti-competitive conducts of SOEs are regulated under the Nigerian regime. However, this may not be entirely true in practice. Since the enactment of the Act in January 2019 to date, the FCCPC has yet to exercise its competition-related powers against any POE. Indeed, it appears that the slow pace of the active enforcement of the competition-related powers of the FCCPC against dominant POEs could be attributed to the fact that some provisions of the Act made the competition authority an

appendage of political actors.[68] These political actors who enjoy the patronage and sponsorship of the dominant POEs will be prone to dance to the tune of these POEs and may be tempted to shield them from the enforcement hammer of the FCCPC because they are most likely to be the first casualties of competition enforcement.

This suggests that even when the FCCPC commences active competition regulatory enforcement over anti-competitive conduct of firms, it could face a potential challenge of political interference where the firm in question is a dominant one. If indeed the FCCPC will find it problematic to enforce competition law against dominant firms due to the potential for political interference, one is left to wonder whether it can successfully bring the anti-competitive conducts of SOEs in which the state has direct control and vested interest, under its regulatory domain. Only time will tell.

3. Benefits of Competition Law Regulation of SOEs

The position of under the EU law, as discussed under paragraph 2.2, shows that SOEs are important components of the domestic markets, as well as growing forces in international businesses. Therefore, there is the need to create a level playing field between them and POEs to foster competitive markets, which creates efficiencies and opens doors to international trade and investment.

Where SOEs and state conducts are fully covered by competition law, it sends a signal to businesses and intending investors that there are no *sacred cows* in competition regulation. This portrays the jurisdiction as one that is pro-competition, which most likely encourages private investments as potential investors are assured of a level playing field to compete with the SOEs.

Similarly, it will be in the best interest of the market and consumers for SOEs to be regulated under competition law, to guard against the potential of their engaging in anti-competitive practices flowing from their exclusive privileges and state support. Also, it will act as a check on the possible abuse of such privileges by the CEOs of the SOEs.

Furthermore, it encourages efficiency and innovation in the operation of SOEs because rather than rely on government support and cash injections, they will develop new cost- effective approaches to compete with POEs effectively. This will lead to the innovation of efficient business models and strategies by SOEs to remain relevant in the market.

4. Criticisms and Challenges Concerning Emerging Economies

There are several criticisms and challenges to the full regulation of SOEs under competition law which varies from one jurisdiction to the other, with a majority of them prevalent in developing countries. This section of the article will highlight some of them.

A significant criticism and apparent disadvantage of subjecting SOEs within the regulatory ambit of competition authorities is that since SOEs are charged with several non-commercial objectives,[69] subjecting them to competition law limits the ability of the state to be flexible in

[68] For example, sections 88 to 91 which makes up Part XI of the Act provides for price regulation of some select goods and services upon an order of the President published in the gazette.
[69] OECD Report on Non-Commercial Service Obligations and Liberalisation (n 13).

carrying out these non-commercial state objectives and policies via the instrumentality of these SOEs. This is because, in some jurisdictions like emerging economies, the state may decide to engage in policies which are generally restrictive and appear to be anti -competitive but geared towards the good of the vast majority of the citizens like, promoting the national champions and shielding them from the external competition by multinational firms, extending subsidy to public utilities,[70] encouraging local innovation and national security concerns. In carrying out these policies on the ground of public interest,[71] these SOEs may engage in some anti-competitive conducts like exclusive dealings and market division, for the ultimate benefit of the domestic market.[72]

In the same way, a study from the OECD countries suggests that where SOEs are made subject to competition law, the state may be unable to maintain public service obligations in network industries by offering essential utilities at affordable rates.[73] The study also suggests that some SOEs are tools of industrial policies which generates a lot of revenue regularly on which the national treasury relies. Therefore, they ought to be immune from the competition law regulation to safeguard the national treasury.

Likewise, competition authorities from developing countries may not have the independence to enforce competition law against SOE, due to their attachment to political aprons, and dependence on the state for budgetary allocations. Further, they may not have the powers under the national legislation[74] or expertise to carry out such enforcement against SOEs.

Similarly, due to some of the challenges already identified, enforcement of competition law against SOEs in emerging economies may have a limited chance of success. Therefore, it will be an unwise economic venture for a competition authority to expend scarce state resources in the process. The reason being that the competition authority will need to justify its expenditures before any future budgetary allocation from the parliament, and where it appears that the competition regulator is only expending resources without a commensurate revenue generation, it may not be able to justify any request for increased funding.[75]

In the case of collusion by SOEs, the discovery of cartels may prove difficult as potential leniency applicants may be apprehensive of the aftermath consequences of their disclosure due to the perceived close ties between the SOE and the state. There may also be difficulties in carrying out dawn raids against SOEs, as the competition authority in this instance may likely be subjected to greater scrutiny by the state generally and other arms of the government

[70] For example, the Nigerian Downstream petroleum sector where the difference between the landing cost and retail price of petroleum products are subsidised by the government to make it more affordable for the low-income earners.

[71] See the position in South Africa in, Azza Raslan, 'Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?' (2016) 4 World Competition 39, Kluwer Law International, 625.

[72] This position is subject to debate as countries from the west like US reject this argument and hold out the position that promoting competition in the economy is a greater public interest. See OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Public Interest Considerations in Merger Control – Note by the United States' (2016) Working Paper No. 3 on Co-operation and Enforcement <https://www.justice.gov/atr/file/872386/download> accessed 08 April 2019.

[73] Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options' (2011) OECD Corporate Governance Working Papers No. 1, 5.

[74] For example, Serbia. See Fox and Healey (n 5) 798.

[75] Caveat: The primary purpose of competition law enforcement is not revenue generation, but to promote competition for the general benefit of the public.

in particular.[76] In the same manner, going after SOEs may distract the Competition Commission from its key competition regulatory priorities. For example, in the case of a dawn raid, where the key officials of the competition authority may be summoned by the parliament to justify the raid.

From the analogy in China where competition lawyers rarely advise their clients to appeal unfavourable antitrust decisions due to the high potential of retaliatory measures against the businesses from the government,[77] enforcement of competition law against SOEs could make the state to retaliate by limiting the statutory powers or reduce the budgetary allocation of the competition commission.[78] In extreme cases, the state could overreach the powers of the commission, as it happened in Columbia where the President of the country circumvented the competition commission's opposition to the merger between the state -owned Avianca and ACES Airline on the ground that it will create a monopoly situation and approved the merger, after which the head of the Competition Commission resigned in protest.[79]

Furthermore, the judiciary in developing or communist countries may tend to lean more favourable towards SOEs, as a result of fear of political victimisation, where they give judgments that are not favourable to the government. The recent case of the suspension of the former Chief Justice of Nigeria through an *ex-parte* order of a Code of Conduct Tribunal which is under the office of the President, as against the laid down constitutional procedure also serves as a reference point.[80]

A closely related challenge is that the competition commission staff members may deliberately under regulate SOEs by overlooking cases of apparent engagement in anti-competitive conducts due to career or self-preservation. This is because strict enforcement of competition law against SOEs may attract sanctions like career stagnancy, forced resignation like the case of Columbia, or outright termination of employment.

There is also a fear the competition commission may overzealously adopt a broad approach in regulation which could have the potential of affecting the performance of regular administrative duties by the member of staff of the SOEs.

Furthermore, there is a problem of complexity in assessing the effectiveness of the various types of sanctions to be imposed on the anti-competitive conducts of SOE. This is because turnover-based fines could pose difficulty in calculating. Also, monetary fines might not have the desired deterrence effect on SOEs because they may be passed on to taxpayers.

---

[76] OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Competition Law and State-Owned Enterprises' (2018) Global Forum on Competition, DAF/COMP/GF(2018)10 < https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf> accessed 28 January 2020.

[77] Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) 47 Cornell Int'l L. J.671, 678

[78] Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?' (n 49) 23.

[79] Andrés Palacios Lleras, 'Competition Law in Latin America: Markets, Politics, Expertise' (DPhil Thesis, University College London 2016) 149; ICN Curriculum Project, Developing Countries & Competition, YouTube (Feb. 26, 2014), <www.youtube.com/watch?v=ZBBFNty2hsk> accessed 22 January 2020.

[80] The suspension and sacking of the Chief Justice of Nigeria in 2019 which many criticised for being unconstitutional and judicial witch-hunt. See 'Nigeria's president sacks the chief justice weeks before an election' *The Economist* (2 February 2019) <https://www.economist.com/middle-east-and-africa/2019/02/02/nigerias-president-sacks-the-chief-justice-weeks-before-an-election> accessed 28 January 2020.

Similarly, some argue that SOEs anti -competitive conducts may be more effectively regulated via alternative legal provisions aside from competition law, like in the case of the state action defence under the US legal system,[81] where there is an operative regulatory mechanism to actively supervise and monitor the resulting anti-competitive effects of the SOEs conduct in question.[82]

There could also be challenges where foreign SOEs are involved in cross-border anti-competitive practices. These include the difficulty in obtaining information, gathering evidence on governance and control within the foreign state, interpretation of foreign law, the weight to be attached to such a foreign law and expert opinion from the foreign jurisdiction, political pressures to consider the broader diplomatic relationship with the foreign country.[83] A closely related challenge is that where SOEs engage in export cartels, which are generally implicitly or explicitly exempted from domestic competition regulation.[84] The competition regulator of the affected country, on the other hand, may not possess the legal power under its laws or lack the required resources and capabilities, to enforce competition law against such SOEs.

5. Should State Conduct in Emerging Economies be Regulated by Competition Law?

Generally, SOEs enjoy some inherent privileges and immunities which are not usually available to their rivals, the POEs. These privileges, it is argued, have the potential of distorting competition in the market because they may not be essentially based on higher performance, better efficiency, superior technology, or quality management skills, but are only created by the government to give SOEs a favourable disposition and competitive advantage over their competitors.[85]

As a result of the state privileges above, there is a high incentive and potential of SOEs to engage in anti-competitive conducts as suggested by existing literature.[86] Thus, exempting them from competition regulation will be disadvantageous to POEs who compete directly with these SOEs. This will also act as a disincentive to intending investors.

Furthermore, exemption of SOEs from competition law will be a setback in any effort, scheme or policy to regulate anti-competitive conducts, especially in developing jurisdictions where the majority of businesses are owned or controlled by the state, and most of the SOEs occupy dominant positions in the economy.

Similarly, a situation of full immunity to SOEs may be an incentive for them to aggressively engage in anti-competitive conduct since there is no penalty for doing so. Dominant SOEs

[81] This was first developed in the case of *Parker v Brown* 317 U.S. 341 (1943) which held that anticompetitive conduct is immune to competition law enforcement on the fulfilment of two cumulative conditions namely; the conduct 'must flow from a clearly articulated and affirmatively expressed state policy', and must be subject to 'active state supervision'.

[82] *Cal. Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97. 105 (1980).

[83] Geneviève Lallemand-Kirche, Caroline Tixier and Henri Piffaut, 'The Treatment of State-owned Enterprises in EU Competition Law: New Developments and Future Challenges' (2017) 8 Journal of European Competition Law & Practice, Issue 7, Page 475.

[84] D. Daniel Sokol, 'What Do We Really Know About Export Cartels and What is the Appropriate Solution?' (2008) 4 J. Comp. L. & Econ. 967.

[85] Capobianco and Christiansen (n 73) 8.

[86] Sappington and Sidak, 'Competition Law for State-Owned Enterprises' (n 11) 479.

may become emboldened to engage in various anti -competitive acts to obtain exclusive benefits, which may hinder efficiencies and innovation in the market.

Chief Executive Officers (CEOs) of SOEs which occupy dominant positions wield a lot of economic and political power. They may commit economic offences like abusing administrative powers, which could harm the market, like in the case of China.[87] Applying competition law to SOEs in this regard will act as a deterrent for the CEOs not to engage in such conduct. However, following the argument made in the preceding section on the non-deterrence effect of monetary fines on SOEs conduct as such fines could be passed on to taxpayers, any effective competition regulation of SOEs should include personal liability of complicit CEOs of SOEs who facilitate anti-competitive infringements.

Competition regulation of SOE in a new liberalised sector of an economy ensures that incumbent, former state monopolies do not adopt anti-competitive measures to frustrate the liberalisation process by protecting their monopoly positions.

However, from experience in the EU under the exception in Article 106(2), this article sustains that a limited exemption of the application of competition law should be extended to revenue-generating SOEs with monopoly powers, especially in the developing countries. This is because the national economy, which funds several national policies, capital projects, as well as the salaries of public workers, relies on the revenues generated by these SOEs for survival. Subjecting them to full competition regulation may reduce their ability to generate sufficient revenue for the national economy.

However, there is a need to balance this exception with the obligation of the competition commission to protect consumers in apparent cases of abuse by being enforcement neutral notwithstanding the ownership of the undertaking involved.

6. Summary and Conclusion

In summary, when the benefits of SOEs regulation under competition law (which are summarised as the consistency of law towards efficient consumer welfare and competitiveness in the economy) are juxtaposed with the costs of the opposite (which are summarised as loss or intrusion in the states' autonomy to pursue non-market public interests and interference into the political process), the benefits appear to have overwhelming support from the majority of scholars and national jurisdictions.[88]

Therefore, to protect consumers from anti-competitive practices in emerging markets, this article is of the view that competition regulation should be enforcement neutral, notwithstanding the ownership of the firm involved. From the discussions above, the article suggests that competition regimes in emerging markets should adopt a hybrid approach similar to that of the EU, which brings the conducts of SOEs within the purview of competition law, with some minor exceptions tailored in line with prevailing domestic conditions and public policy concerns.

This is because a full application of competition law to all conducts by SOE has the potential of hindering the ability of the state to adopt a flexible approach in the execution of policies

[87] Fox and Healey (n 5) 807.
[88] ibid.

for the public good. This could be the reason for the flexibility in the Chinese AML regime. However, where SOEs engage in commercial activities and are in direct competition with POEs, they should be made subject to competition law to create a level playing field for POEs and encourage potential investors. In any event, it is suggested that acts done by SOEs pursuant to state policy towards public interest should be narrowly construed and could be an acceptable middle-ground for immunity of competition regulation. For example, where such anti-competitive conduct relates to national security.

Moreover, competition regimes from emerging markets should consider developing an SOE competition regulatory model to address the challenges and criticisms highlighted in section 3.1. A few suggestions include; full independence and financial autonomy for all the institutions involved in the enforcement of the competition regime like the competition regulator and judiciary; comprehensive provisions in the national competition legislation which provides for a broad range of regulatory powers for the competition regulator; a building of expertise amongst the staff of the competition regulator; increased synergy between the competition regulator and state actors; among other policy and legislative options suitable for each domestic emerging market.

Finally, in the present globalised and digital age, SOEs' presence in regional and international markets increases daily. There is, therefore, a need for states to fashion out a model for the regulation of the anti-competitive effects of the conducts of foreign SOEs when they engage in state-sponsored anti-competitive conduct, rather than allowing them to take advantage of the state action defence in all cases, as this may lead to an abuse of the defence.