

## **The Principle of Competitive Neutrality: Theory and Practice**

*The principle of competitive neutrality is an important concept for states when they choose to act as business owners. Its contents can be summarized as follows: When state bodies own commercial legal entities, the latter should not possess any advantage in relation to those competitors that happen to be private businesses.*

*The bigger a role the state undertakes in regard to business, the more important observing the principle of competitive neutrality becomes. Therefore, a number of passive and active steps have been stipulated, which need to be utilized in practice to ensure that the said principle is observed. Hence, the state must make certain that such steps are indeed undertaken.*

*Considering the fact that, in Georgia, the governing bodies are actively involved in the field of commerce, it is important, that the needed actions are taken, and the principle of competitive neutrality is made reality. In light of this, the present essay discussed the very essence of the said principle, as well as those steps necessary for its implementation and compares them with the extant reality of Georgia.*

**Key Words:** *Competitive Neutrality, State Owned Enterprises, State Business.*

### **1. Introduction**

The participation of the governing bodies in business activities has become an inseparable part of modern commerce<sup>1</sup>. State owned enterprises play a significant role in international business<sup>2</sup> and have a major impact on the development of the world economy<sup>3</sup>. Their actions can, in a big way, determine the success or failure of the relevant commercial sector<sup>4</sup>. Therefore, it is of utmost importance to have an appropriate legislative “frame”, within which the state owned enterprise is to be contained<sup>5</sup>.

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<sup>1</sup> *Grossi G., Papenfuss U., Tremblay M., Corporate Governance and Accountability of State-Owned Enterprises Relevance for Science and Society and Interdisciplinary Research Perspectives. International Journal of Public Sector Management, № 28(4), 2015, 274-285.*

<sup>2</sup> *Milhaupt C. J., Pargendler M., Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform. Cornell International Law Journal, № 50(3), 2017, 473-542.*

<sup>3</sup> *Kirkbride J., Letza S., Smallman C., Minority Shareholders and Corporate Governance: Reflections on the Derivative Action in the UK, the USA and in China. International Journal of Law and Management, № 51(4), 2009, 206-219.*

<sup>4</sup> *Shirley M., Bureaucrats in Business: The Roles of Privatization versus Corporatization in State-Owned Enterprise Reform, World Development Journal, № 27(1), 1999, 115-136.*

<sup>5</sup> *Grossi G., Papenfuss U., Tremblay M., Corporate Governance and Accountability of State-Owned Enterprises Relevance for Science and Society and Interdisciplinary Research Perspectives. International Journal of Public Sector Management, № 28(4), 2015, 274-285.*

One of the fields in which the activities of state owned enterprises are a major topic of study is competition law<sup>6</sup>. The purpose of the latter is to ensure the existence of a competitive environment, in which obtaining and, especially, abusing a dominant position would be impossible<sup>7</sup>. However, this often conflicts with the interests of public entities<sup>8</sup>, especially, if such an entity chooses to actively participate in business<sup>9</sup>.

In practice, it is difficult to determine when the steps undertaken by the state as part of its commercial activities are appropriate and when, instead, they cause harm to the national economy<sup>10</sup>. The principle of competitive neutrality has been envisaged for such a purpose, to help define the good and the bad<sup>11</sup>. In accordance with it, the state owned enterprise should possess no competitive advantages when juxtaposing it with private companies, with no comparative benefits stemming from the fact that the former is owned by public government<sup>12</sup>.

The principle of competitive neutrality has enjoyed significant popularity ever since the start of the 21<sup>st</sup> century<sup>13</sup>. With time, it is becoming increasingly unacceptable to have certain sectors be monopolized by the state<sup>14</sup> and the support of healthy competition is becoming more and more important<sup>15</sup>. Therefore, it is of great significance to realize the considerable positive impact that the implementation of the principle of competitive neutrality can have upon the free market.

For this very purpose, the present article will, first of all, study the theoretical groundwork of the principle of competitive neutrality. Afterwards, it will analyze the steps needed to implement the principle at hand. Finally, it will evaluate whether the current reality within Georgia is in line with the demands of competitive neutrality.

As a result of the writing of the present essay, the main aspects necessary for defining the main ideas of competitive neutrality shall be clarified. This will show the necessity of their practical

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<sup>6</sup> *Matsushita M., Lim C., Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules, World Trade Review, № 19(3), 2020, 402-423.*

<sup>7</sup> *Mosca M., On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition, European Journal of the History of Economic Thought, № 15(2), 2008, 317-353.*

<sup>8</sup> *Fletcher G. S., Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation, Duke Law Journal, № 68, 2018, 479-554.*

<sup>9</sup> *Talus K., Long-Term Natural Gas Contracts and Antitrust Law in the European Union and the United States, The Journal of World Energy Law & Business, № 4(3), 2011, 260-315.*

<sup>10</sup> *Matsushita M., Lim C., Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules. World Trade Review, № 19(3), 2020, 402-423.*

<sup>11</sup> *Zwalf S., Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.*

<sup>12</sup> *Healey D., Competitive Neutrality, and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific, Revista de Defesa da Concorrência, № 7(1), 2019, 51-68.*

<sup>13</sup> *Valkama P., Virtanen M., Competitive Neutrality and Distortion of Competition: A Conceptual View, World Competition Journal, № 32(3), 2009, 393-407.*

<sup>14</sup> *Bezzobs T., The Trade Practices Act, Competitive Neutrality, and Research Costing Issues for Australian Universities, Australian Universities' Review, № 51(1), 2009, 21-29.*

<sup>15</sup> *Albers M., Achieving Competitive Neutrality Step-By-Step, World Competition Journal, № 41(4), 2018, 495-512.*

enactment, both on an international level as well as in Georgia. This, in turn, will create the theoretical basis necessary for the eventual legislative regulation of such an important principle as that of competitive neutrality.

## **2. The Theoretical Basis of the Principle of Competitive Neutrality**

A dominant position within the modern academic literature is that for both the internal, national economy<sup>16</sup>, as well as the international counterpart thereof, competition is always good<sup>17,18</sup>. Therefore, it is of utmost importance to undertake steps that are capable of ensuring that a healthy, competitive environment for the economic reality is ensured<sup>19</sup>. At the same time, when the state makes a decision on becoming a participant of commercial activities, naturally, it is within its interest to be successful in such a pursuit<sup>20</sup>. A commercial entity, within its capacity, utilizes all instruments available to it in order to achieve success<sup>21</sup>. The state is not immune to having such an impulse either<sup>22</sup> which can lead to the latter using the natural advantages it possesses, that stem from the very nature thereof<sup>23</sup>. This may include disparate actions, such as writing laws that are in line not with the market demands but with the needs of the state owned enterprises<sup>24</sup>, or using state bodies in a way that is contradictory to their public law purpose<sup>25</sup>, or using state funds for illicit means<sup>26</sup>, etc.

The principle of competitive neutrality focuses on avoiding such activities<sup>27</sup>. Its purpose is to ensure the existence of a level playing field, for both private businesses and the state owned

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<sup>16</sup> *Fletcher G. S.*, Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation, *Duke Law Journal*, № 68, 2018, 479-554.

<sup>17</sup> *Mosca M.*, On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition, *European Journal of the History of Economic Thought*, № 15(2), 2008, 317-353.

<sup>18</sup> *Fletcher G. S.*, Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation, *Duke Law Journal*, № 68, 2018, 479-554.

<sup>19</sup> *Yun M.*, An Analysis of the New Trade Regime for State-Owned Enterprises under the Trans-Pacific Partnership Agreement. *Journal of East Asian Economic Integration*, № 20(1), 2016, 3-35.

<sup>20</sup> *Shaver E. B.*, Two Paths to Development: Policy Channeling and Listed State-Owned Enterprise Management in Peru and Colombia, *University of Pennsylvania Journal of Business Law*, № 21(4), 2019, 1006-1033.

<sup>21</sup> *Goldeng E., Grunfeld L. A., Benito G.*, The Performance Differential between Private and State-Owned Enterprises: The Roles of Ownership, Management and Market Structure. *Journal of Management Studies*, № 45(7), 2008, 1244-1273.

<sup>22</sup> *Willemys I.*, Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction? *Journal of International Economic Law*, № 19(3), 2016, 657-680.

<sup>23</sup> *Cuniberti G.*, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of International Law & Business*, № 34(3), 2014, 455-517.

<sup>24</sup> *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, *Leiden Journal of International Law*, № 33(2), 2019, 1-32.

<sup>25</sup> *Goldeng E., Grunfeld L. A., Benito G.*, The Performance Differential between Private and State-Owned Enterprises: The Roles of Ownership, Management and Market Structure, *Journal of Management Studies*, № 45(7), 2008, 1244-1273.

<sup>26</sup> *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements. *Leiden Journal of International Law*, № 33(2), 2019, 1-32.

<sup>27</sup> *Zwalf S.*, Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, *Asia Pacific Journal of Public Administration*, № 39(4), 2017, 225-237.

enterprises<sup>28</sup>, in order to rule out the companies owned by the governing bodies having an unsustainably large advantage<sup>29</sup> which, as a direct result, may even lead to the relevant economic sector being controlled by a monopoly<sup>30</sup>.

This is paramount, since it is a well agreed-upon fact that monopolies are always a negative development for the economy<sup>31</sup>. Moreover, when there is a state owned monopoly in place, it becomes doubly harder to ever dislodge it, unless the state itself consents to such a change<sup>32</sup>. As a result, the situation that is in place means that the state is “successful” in its entrepreneurial activities, because it has no competition and, most likely, can have no competitors either<sup>33</sup>. This significantly increases the chance for the state bodies to forget their public law obligations and put an unhealthy amount of emphasis on the success of their own enterprises<sup>34</sup>. Such an action should be considered to be a major threat not just to the economy, but to the very legal system itself<sup>35</sup>.

Something to be emphasized is, that even when there is no monopoly, the state can still cause significant harm by participating in a business and granting major advantages to the government-owned companies. This harms the relevant field in a big way<sup>36</sup>. The competing private entities are “bullied”, with their economic interests being injured<sup>37</sup>. On the other hand, such actions also lead to the decrease in the trust the government enjoys, which is problematic for a host of reasons and goes beyond the economic problems that state owned enterprises are sometimes associated with<sup>38</sup>.

In light of the above, the theoretical basis of the principle of competitive neutrality can be defined as follows: If the state participates in economic activities, the enterprises owned by it should have no advantages over their competitors. This is necessary to ensure the existence of a competitive environment, to support the organic development of the economy and to avoid creating a monopoly.

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<sup>28</sup> *Valkama P., Virtanen M., Competitive Neutrality and Distortion of Competition: A Conceptual View, World Competition Journal, № 32(3), 2009, 393-407.*

<sup>29</sup> *Healey D., Competitive Neutrality, and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific, Revista de Defesa da Concorrência, № 7(1), 2019, 51-68.*

<sup>30</sup> *Zwalf S., Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.*

<sup>31</sup> *Kim M., Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements, Harvard International Law Journal, № 58(1), 2017, 225-272.*

<sup>32</sup> *Room R., The Evolution of Alcohol Monopolies and Their Relevance for Public Health, Contemporary Drug Problems, № 20, 1993, 169-187.*

<sup>33</sup> *Sakyi K. A., Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), Advances in Social Sciences Research Journal, № 6(4), 2019, 148-167.*

<sup>34</sup> *Kim M., Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements, Harvard International Law Journal, № 58(1), 2017, 225-272.*

<sup>35</sup> *Room R., The Evolution of Alcohol Monopolies and Their Relevance for Public Health, Contemporary Drug Problems, № 20, 1993, 169-187.*

<sup>36</sup> *Fox E., Healey D., When the State Harms Competition: The Role for Competition Law, Antitrust Law Journal, № 79(3), 2014, 769-820.*

<sup>37</sup> *Gallagher M., Reform and Openness: Why China’s Economic Reforms Have Delayed Democracy, World Politics Journal, № 54, 2002, 338-372.*

<sup>38</sup> *Fox E., Healey D., When the State Harms Competition: The Role for Competition Law, Antitrust Law Journal, № 79(3), 2014, 769-820.*

### **3. The Principle of Competitive Neutrality in Practice**

The primary problem currently associated with the principle of competitive neutrality is the fact that there is a certain ambiguity regarding the methods which can be utilized to implement its provisions<sup>39</sup>. There is no unified approach in regards to what instruments and mechanisms should be utilized in order to realize the said principle<sup>40</sup>. Hence, the present paragraph will summarize the most often used steps.

The principle of competitive neutrality can be summarized as follows: State owned enterprises should have no advantage just because they are owned by the state<sup>41</sup>. This can be ensured by undertaking certain passive or active measures<sup>42</sup>.

The passive measures in question, in practice, consist of the state refusing to undertake certain actions<sup>43</sup>. This, mostly, means that the representatives of public governance must refuse to utilize their power in order to draft and enact laws and other administrative documents, as well to otherwise work in such a way that their actions are aimed at supporting state owned enterprises. In effect, all actions that support businesses owned by the public bodies, be they legal or otherwise, must be cut out<sup>44</sup>.

As it has been discussed above, in accordance with the principle of competitive neutrality, the state may not enact administrative acts (which includes all types and subtypes, starting from the most basic individual acts to legislation), the purpose or the effect of which is the support for state-owned enterprises<sup>45</sup>. This means that the governing bodies may not take any steps which are focused on the commercial success of their own businesses, unless such actions would be taken regardless of the existence of state owned enterprises<sup>46</sup>. In practice, such actions are divided into three categories. They are as follows:

**A) Legislative changes aimed at creating a beneficial environment for the state owned enterprises** – In such a case the state may choose to adopt specific pieces of appropriate legislation<sup>47</sup>. The effect of such an activity may sometimes be minimal, but, in other cases, it can fundamentally

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<sup>39</sup> *Valkama P., Virtanen M.*, Competitive Neutrality and Distortion of Competition: A Conceptual View, *World Competition Journal*, № 32(3), 2009, 393-407.

<sup>40</sup> *Zwalf S.*, Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, *Asia Pacific Journal of Public Administration*, № 39(4), 2017, 225-237.

<sup>41</sup> *Huang K., Liu Z., Tian G.*, Promote Competitive Neutrality to Facilitate China's Economic Development: Outlook, Policy Simulations, and Reform Implementation: A Summary of the Annual SUFE Macroeconomic Report (2019–2020), *Frontiers of Economics in China*, № 15(1), 2020, 1-24.

<sup>42</sup> *Krafve L. J.*, To Design Free Choice and Competitive Neutrality: The Construction of a Market in Primary Health Care, *Scandinavian Journal of Public Administration*, № 15(4), 2012, 45-66.

<sup>43</sup> *Sadiq K., Richardson C.*, Tax Concessions for Charities: Competitive Neutrality, the Tax Base and “Public Goods” Choice, *Australian Tax Forum: a Journal of Taxation Policy, Law and Reform*, № 25(4), 2010, 401-416.

<sup>44</sup> *Healey D., Smith R. L.*, Competitive Neutrality in Australia: Opportunity for Policy Development, *Competition & Consumer Law Journal*, № 25, 2018, 223-248.

<sup>45</sup> *Pan L.*, Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees, *Cambridge Journal of China Studies*, № 14(4), 2019, 16-30.

<sup>46</sup> *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, *Leiden Journal of International Law*, № 33(2), 2019, 1-32.

<sup>47</sup> *Kwan C. H.*, China's Unfinished Ownership Reform: Privatization and a Fair and Competitive Environment Remain to be Achieved, *Public Policy Review*, № 16(3), 2020, 1-26.

alter the commercial reality<sup>48</sup>. In any case, by taking such steps, the state ensures that the company within its control is in a more advantageous position than the private business<sup>49</sup>. The worst type of interference is the state creating a monopoly by way of a focused law, meaning that the legislative act stipulates that the state owned enterprise is the sole entity allowed to participate in the certain field, with all others being legally excluded<sup>50</sup>. This does not mean, however, that the less drastic actions (such as, for instance, freeing the state owned companies from the payment of taxes<sup>51</sup>) are not harmful, as their implementation can have a hugely adverse impact on the competitive environment and, indirectly, on the national economy at large<sup>52</sup>.

**B) Enacting administrative acts to ensure support for state owned enterprises** – In such cases, the state or one or more of its bodies, attempt, via a variety of administrative actions, to confer benefits to their own companies<sup>53</sup>. This may involve the transfer of property to a state owned enterprise<sup>54</sup>, provision of services thereto free of charge<sup>55</sup> or other beneficial actions. In any event, in such a case, the beneficiary is granted a considerable advantage in relation to those others working in the same sector, which, in itself, rules out the possibility of the principle of competitive neutrality becoming reality<sup>56</sup>.

**C) Unofficial steps aimed at granting a competitive advantage** – Such events involve the state using its power to support the business below it<sup>57</sup>. This may be legal, but unethical. Though, sometimes, such actions possess an illegal nature<sup>58</sup>. Sometimes, they may even involve criminal activities<sup>59</sup>. Therefore, even if actions of this type are relatively less impactful upon the economic equilibrium, as opposed to, for example, a monopoly enshrined in law<sup>60</sup>, it can be argued, that a harmful law is better than the representatives of the state acting in an illegal and corrupt manner.

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<sup>48</sup> *Ramaiah A. K.*, The Competition Neutrality in Malaysia: Challenges and Policy Options, *Journal of International Business, Economics and Entrepreneurship*, № 3(2), 2018, 45-54.

<sup>49</sup> *Pan L.*, Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees, *Cambridge Journal of China Studies*, № 14(4), 2019, 16-30.

<sup>50</sup> *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements. *Leiden Journal of International Law*, № 33(2), 2019, 1-32.

<sup>51</sup> *Graetz M. J., Warren A. C.*, Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility, *The Yale Law Journal*, № 121, 2012, 1118-1167.

<sup>52</sup> *Sakyi K. A.*, Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), *Advances in Social Sciences Research Journal*, № 6(4), 2019, 148-167.

<sup>53</sup> *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, *Leiden Journal of International Law*, № 33(2), 2019, 1-32.

<sup>54</sup> *Modou D., Yun L. H.*, An Empirical Investigation of Causal Relationship of Chinese FDI to African Economies, *International Journal of Academic Research in Business and Social Sciences*, № 7(3), 2017, 199-207.

<sup>55</sup> *Mason R., Knoll M. S.*, What Is Tax Discrimination? *The Yale Law Journal*, № 121, 2012, 1014-1116.

<sup>56</sup> *Kwan C. H.*, China's Unfinished Ownership Reform: Privatization and a Fair and Competitive Environment Remain to be Achieved, *Public Policy Review*, № 16(3), 2020, 1-26.

<sup>57</sup> *Argy F.*, National Competition Policy: Some Issues. *Agenda*, № 9(1), 2002, 33-46.

<sup>58</sup> *Waldron J.*, Is the Rule of Law an Essentially Contested Concept (In Florida)? *Law and Philosophy*, № 21(2), 2002, 137-164.

<sup>59</sup> *Lopes Júnior E. P., Camara S. F., Rocha L. G., Brasil A.*, Influence of Corruption on State-Owned Enterprise Expenditures, *Brazilian Journal of Public Administration*, № 52(4), 2018, 695-711.

<sup>60</sup> *Dutta N., Sobel R.*, Does Corruption Ever Help Entrepreneurship? *Small Business Economics*, № 47(1), 2016, 179-199.

Whichever of the actions discussed above is present, in order for competitive neutrality to be enacted, all of them need to be avoided. If this is indeed achieved, then it can be said that the passive measures have been successfully implemented.

As for the active measures, they are relatively difficult to classify<sup>61</sup>. In essence, they are considered to be the actions needed to be actively undertaken in order to ensure that the principle of competitive neutrality is in effect in the relevant economic field<sup>62</sup>. In practice, this means creating a legislative framework that ensures a twofold result:

**D) Reducing the overlap between the state and the commercial entity** – The creation of such legislation is necessary, so that the state owned enterprise has no access to certain advantages that the private entities possess<sup>63</sup>. Therefore, it is recommended to enact such legislative regulations, which would rule out “higher up” politicians being involved, as well as make sure that the intellectual capital of the public sector is not supporting a private sector player<sup>64</sup>.

**E) Proactive support for competition** – The state must always strive to strengthen competition in all economic sectors<sup>65</sup>. This is especially important in those sectors where the state owned enterprises are involved<sup>66</sup>. Considering the fact, that by doing business, the public bodies effectively harm those private interests already tied up in the relevant sector, it is doubly important for the state to act in such a case. It must strive to ensure that competitive neutrality is in place, and such a result can only be achieved if the independent businesses are supported and allowed to flourish<sup>67</sup>.

In the end, in order for the principle of competitive neutrality to be put in place, the state and its bodies must enact both passive and active measures. Only in this case will it be possible for the activities of the state owned enterprises not to have negative ramifications on the economic sector and those private businesses working within it.

#### **4. Georgia and the Principle of Competitive Neutrality**

State owned enterprises play a significant role in the national economy of Georgia. The public sector controls such companies, as JSC Partnership Fund (The state investment fund<sup>68</sup>), Georgian Post

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<sup>61</sup> *Pan L.*, Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees. *Cambridge Journal of China Studies*, № 14(4), 2019, 16-30.

<sup>62</sup> *Sadiq K., Richardson C.*, Tax Concessions for Charities: Competitive Neutrality, the Tax Base and “Public Goods” Choice, *Australian Tax Forum: a Journal of Taxation Policy, Law and Reform*, № 25(4), 2010, 401-416.

<sup>63</sup> *Healey D., Smith R. L.*, Competitive Neutrality in Australia: Opportunity for Policy Development, *Competition & Consumer Law Journal*, № 25, 2018, 223-248.

<sup>64</sup> *Zwalf S.*, Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, *Asia Pacific Journal of Public Administration*, № 39(4), 2017, 225-237.

<sup>65</sup> *Kim M.*, Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements, *Harvard International Law Journal*, № 58(1), 2017, 225-272.

<sup>66</sup> *Fox E., Healey D.*, When the State Harms Competition: The Role for Competition Law, *Antitrust Law Journal*, № 79(3), 2014, 769-820.

<sup>67</sup> *Zwalf S.*, Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, *Asia Pacific Journal of Public Administration*, № 39(4), 2017, 225-237.

<sup>68</sup> About Us, JSC “Partnership Fund”, <<https://www.fund.ge/who-we-are>> [05.01.2022] (in Georgian).

Ltd (The primary postal operator of Georgia<sup>69</sup>), United Airports of Georgia LLC (The company that owns all of the country's international airports<sup>70</sup>), etc. Additionally, JSC Partnership Fund itself is the sole owner of such major commercial players as JSC Georgian Oil and Gas Corporation (A major business in the field of oil and gas), JSC Georgian Railway (The main rail operator of Georgia), Academician Nikoloz Kipshidze Central University Clinic Ltd (One of the biggest medical clinics of Georgia<sup>71</sup>), etc.<sup>72</sup>

Considering the major part these companies play in the beneficial development of the Georgian Economy and since they sometimes even tend to act as monopolies in the relevant sectors, it is even more important to ensure the enactment of the principle of competitive neutrality. Therefore, the present essay shall analyze, whether the aforesaid active and passive measures are indeed implemented or whether the needs of the economy, in line with principle in question, are neglected.

**Legislative Acts** – Research has revealed no Georgian legislative acts, which directly confer the right to act as a monopoly in the relevant sector to any state owned enterprise. At the same time, there are still a number of legislative pieces that convey advantages to such entities. For instance, JSC Georgian Oil and Gas Corporation has been granted the status of the national oil company<sup>73</sup>, which is its exclusive privilege and entails a number of rights and obligations for the said company<sup>74</sup>. Moreover, a number of state owned enterprises have been granted special rules, enacted by way of government ordinances, which frees them from certain legal obligations and procedures, making it easier for them to do business<sup>75/76/77</sup>. The latter fact has, in the past, become a topic of discussion in a dispute in front of the Constitutional Court of Georgia. The court reviewed a case in 2019, which was focused on the said special rules as pertaining to Georgian Post Ltd. The court stated, that while the company was indeed privileged, since as a result of this the postal service was ensured for the entirety of the country, such privileged status was indeed constitutional<sup>78</sup>. However, it did not consider whether such a status-quo would be harmful for competition and the national economy at large.

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<sup>69</sup> About Us, “Georgian Post” Ltd, <<https://www.gpost.ge/?site-lang=ka&site-path=company/about/>> [05.01.2022] (in Georgian).

<sup>70</sup> About Us, “United Airports of Georgia” LLC, <<http://airports.ge/index.php/ka/about-us/goals-and-objectives>> [05.01.2022] (in Georgian).

<sup>71</sup> About Us, Academician Nikoloz Kipshidze Central University Clinic, <<http://respublikuri.ge/%e1%83%a9%e1%83%95%e1%83%94%e1%83%9c-%e1%83%a8%e1%83%94%e1%83%a1%e1%83%90%e1%83%ae%e1%83%94%e1%83%91/>>> [05.01.2022] (in Georgian).

<sup>72</sup> Consolidated Audited Financial Report of JSC “Partnership Fund”, 2019, <[https://fund.ge/upload/media/PF\\_Consolidated\\_FS2019GEO.pdf](https://fund.ge/upload/media/PF_Consolidated_FS2019GEO.pdf)> [05.01.2022] (in Georgian).

<sup>73</sup> Ordinance № 299 of November 25, 2013 of the Georgian Government on Granting the Status of the State Oil Company to JSC “Georgian Oil and Gas Corporation”.

<sup>74</sup> Article 9, Georgian Law on Oil and Gas, LHG, 13(20), 16/04/1999.

<sup>75</sup> Ordinance № 506 of November 30, 2017 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC “Georgian Oil and Gas Corporation”.

<sup>76</sup> Ordinance № 587 of September 18, 2020 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC “United Airports of Georgia”.

<sup>77</sup> Ordinance № 411 of August 16, 2021 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by “Georgian Post” Ltd.

<sup>78</sup> Decision of April 18, 2019 case № 1/1/655 of Georgian Constitutional Court, 33-59.



In light of the above, it can indeed be said, that the passive measure in question is not in place in Georgia. There are a number of extant legislative acts, which privilege the state owned enterprises, which, in turn, comes in conflict with the principle of competitive neutrality.

**Administrative Acts** – In practice, Georgian state owned enterprises are bestowed their property by the government free of charge, with no additional obligations coming in tow, which means they are granted a significant advantage as opposed to their competitors, as the latter are forced to undertake a number of duties in order to accrue capital, ensuring further needs and ramifications in the future<sup>79</sup>. At the same time, the state owned enterprises need do no such things, being granted property and capital by way of administrative acts. As a result, the fact remains that even in such regard, there are issues regarding the implementation of the principle of competitive neutrality.

**Practical Support** – Naturally, there are a number of methods to ensure the success of state owned enterprises, which are effectively impossible to find out information about. However, the fact remains, that the representatives of the state, including those at the very top, often undertake steps which are aimed at exactly that very purpose<sup>80</sup>. Hence, it can indeed be said that the principle discussed within this document is not in place in this regard as well.

**Contact Minimization** – There are very few steps that can be considered to have been undertaken by the Georgian government that can be construed as being aimed at proactively ensuring that the contact between the state and its companies are minimized. For instance, one of the primary governing bodies of JSC Partnership Fund is the Supervisory Board<sup>82</sup>. The head of this board is the Prime Minister of Georgia, with other ministers being a part thereof as well<sup>83</sup>. As for a number of other state owned enterprises, the company is governed by the director, who is directly or indirectly appointed by public governing bodies<sup>84</sup>.

Hence, it is clear, that the link between the state and its businesses is indeed still in place. In order for the principle of competitive neutrality to be observed, this needs to change and the role of the government as pertaining to running its companies needs to be reduced much further.

**Support for Competition** – When analyzing the laws of Georgia, there is no trend of proactive support for competition in the fields within which the state owned enterprises are active. Moreover, the Georgian National Competition Agency, the primary entity tasked with ensuring the rule of

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<sup>79</sup> *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, *Leiden Journal of International Law*, № 33(2), 2019, 1-32.

<sup>80</sup> The Georgian Prime Minister meets with the President of the Paris Airports Union., February 19, 2020, <[http://gov.ge/index.php?lang\\_id=-&sec\\_id=541&info\\_id=75207](http://gov.ge/index.php?lang_id=-&sec_id=541&info_id=75207)> [05.01.2022] (in Georgian).

<sup>81</sup> At the Prime Minister's assignment, the procedure for the corporatization and reform of the railway shall be drafted, February 4, 2021, <<https://1tv.ge/news/premier-ministris-davalebit-rkinigzis-korporatizaciisa-dareformirebis-dghis-wesrigi-shemushavdeba/>> [05.01.2022] (in Georgian).

<sup>82</sup> Article 4, Ordinance № 230 of June 2, 2011 of the Georgian Government on affirming the Bylaws of JSC Partnership Fund and forming its Capital.

<sup>83</sup> *Ibid*, Article 5.

<sup>84</sup> Article 5, Order № 93 of May 13, 2013 of the Minister of Energy of Georgia on affirming the bylaws of LEPL "Oil and Gas State Agency".

<sup>85</sup> Article 9, Order № 1-3/815 of September 4, 2012 of the Chairman of LEPL "Company Governance Agency" on Affirming the Bylaws of "United of Airports of Georgia" LLC.

competition law in the country<sup>86</sup>, essentially refuses to investigate companies under the public bodies. It has never found any evidence of a breach of competition law by a state owned enterprise. Which, if the international practice in the relevant field is examined, is quite unlikely and should be considered a significant anomaly<sup>87</sup>.

Therefore, it can be said that the state most certainly does not strive to actively support competition in the sectors which are relevant to the activities of its own businesses. Therefore, just as with the previous measures, the steps needed in order to ensure competitive neutrality are not being taken.

In light of all the above, it is evident, that neither the passive nor the active measures are put in place by the Georgian state. Appropriate actions need to be taken as soon as possible, as the extant reality is incompatible with the principle of competitive neutrality. Such a status-quo, by itself, will most assuredly lead to a misdevelopment of the national economy and significantly harm the commercial sector.

## **5. Conclusion**

The principle of competitive neutrality is one of the keys that can unlock the economic success of the nation. Its implementation would, on the one hand, be beneficial to the appropriate development of state owned enterprises and, at the same time, be a major positive change for their competitors, the private businesses, which, in sum, would have a productive impact upon the whole commercial field.

In order for the principle of competitive neutrality to become reality, both passive and active measures are needed to be undertaken. Unfortunately, in the case of Georgia, such measures are not in place to the extent needed. This, in turn, means that competition is stifled and the national economy suffers significantly. Considering the fact that the share of the state owned enterprises in the gross domestic product is quite considerable, this fact should be considered a major problem.

As a result, remedying the extant situation should become a priority for the state. Only if competitive neutrality is put into practice, it will become possible for the free market and the state-owned enterprises to successfully cohabitate, which would, in turn, be a significant step on the road to economic success.

As it has been discussed above, the principle of competitive neutrality has great importance for the development of the national economy. There are a number of ways in which its provisions can be implemented, however, this remains not to be the case in Georgia. The economy of the country cannot afford to ignore such an important instrument for its development, so it is of paramount importance that the legislative framework is amended so that the principle of competitive neutrality is enshrined therein. As a result, in such an event, this highly valuable concept shall be permitted to play its role in enhancing the everyday life of Georgia.

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<sup>86</sup> About Us, Georgian National Competition Agency, <<https://competition.ge/about-us/what-we-do>> [05.01.2022] (in Georgian).

<sup>87</sup> *Sakvi K. A.*, Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), *Advances in Social Sciences Research Journal*, № 6(4), 2019, 148-167.

**Bibliography:**

1. Georgian Law on Oil and Gas, LHG, 13(20), 16/04/1999.
2. Order № 93 of May 13, 2013 of the Minister of Energy of Georgia on Affirming the Bylaws of LEPL “Oil and Gas State Agency”.
3. Ordinance № 230 of June 2, 2011 of the Georgian Government on affirming the Bylaws of JSC “Partnership Fund” and Forming its Capital.
4. Ordinance № 299 of November 25, 2013 of the Georgian Government on Granting the Status of the State Oil Company to JSC “Georgian Oil and Gas Corporation”.
5. Ordinance № 411 of August 16, 2021 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by “Georgian Post” Ltd.
6. Ordinance № 506 of November 30, 2017 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC “Georgian Oil and Gas Corporation”.
7. Ordinance № 587 of September 18, 2020 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC “United Airports of Georgia”.
8. Order № 1-3/815 of September 4, 2012 of the Chairman of LEPL “Company Governance Agency” on Affirming the Bylaws of “United of Airports of Georgia” LLC.
9. *Albers M.*, Achieving Competitive Neutrality Step-By-Step, *World Competition Journal*, № 41(4), 2018, 495-512.
10. *Argy F.*, National Competition Policy: Some Issues. *Agenda*, № 9(1), 2002, 33-46.
11. *Bezzobs T.*, The Trade Practices Act, Competitive Neutrality, and Research Costing Issues for Australian Universities, *Australian Universities’ Review*, № 51(1), 2009, 21-29.
12. *Borlini L. S.*, When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, *Leiden Journal of International Law*, № 33(2), 2019, 1-32.
13. *Cuniberti G.*, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of International Law & Business*, № 34(3), 2014, 455-517.
14. *Dutta N., Sobel R.*, Does Corruption Ever Help Entrepreneurship?, *Small Business Economics*, № 47(1), 2016, 179-199.
15. *Fletcher G. S.*, Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation. *Duke Law Journal*, № 68. 2018. 479-554.
16. *Fox E., Healey D.*, When the State Harms Competition: The Role for Competition Law. *Antitrust Law Journal*, № 79(3). 2014. 769-820.
17. *Gallagher M.*, Reform and Openness: Why China’s Economic Reforms Have Delayed Democracy, *World Politics Journal*, № 54, 2002, 338-372.
18. *Goldeng E., Grunfeld L. A., Benito G.*, The Performance Differential between Private and State-Owned Enterprises: The Roles of Ownership, Management and Market Structure, *Journal of Management Studies*, № 45(7), 2008, 1244-1273.
19. *Graetz M. J., Warren A. C.*, Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility, *The Yale Law Journal*, № 121, 2012, 1118-1167.
20. *Grossi G., Papenfuss, U., Tremblay, M.*, Corporate Governance and Accountability of State-Owned Enterprises Relevance for Science and Society and Interdisciplinary Research Perspectives, *International Journal of Public Sector Management*, № 28(4), 2015, 274-285.

21. *Healey D.*, Competitive Neutrality, and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific, *Revista de Defesa da Concorrência*, № 7(1), 2019, 51-68.
22. *Healey D., Smith R. L.*, Competitive neutrality in Australia: Opportunity for Policy Development. *Competition & Consumer Law Journal*, № 25, 2018, 223-248.
23. *Huang K., Liu Z., Tian G.*, Promote Competitive Neutrality to Facilitate China's Economic Development: Outlook, Policy Simulations, and Reform Implementation: A Summary of the Annual SUFE Macroeconomic Report (2019–2020), *Frontiers of Economics in China*, № 15(1), 2020, 1-24.
24. *Kim M.*, Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements. *Harvard International Law Journal*, № 58(1), 2017, 225-272.
25. *Kirkbride J., Letza S., Smallman C.*, Minority Shareholders and Corporate Governance: Reflections on the Derivative Action in the UK, the USA and in China, *International Journal of Law and Management*, № 51(4), 2009, 206-219.
26. *Krafve L. J.*, To Design Free Choice and Competitive Neutrality: The Construction of a Market in Primary Health Care, *Scandinavian Journal of Public Administration*, № 15(4), 2012, 45-66.
27. *Kwan C. H.*, China's Unfinished Ownership Reform: Privatization and a Fair and Competitive Environment Remain to be Achieved, *Public Policy Review*, № 16(3), 2020, 1-26.
28. *Lopes Júnior E. P., Camara S. F., Rocha L. G., Brasil A.*, Influence of Corruption on State-Owned Enterprise Expenditures, *Brazilian Journal of Public Administration*, № 52(4), 2018, 695-711.
29. *Mason R., Knoll M. S.*, What Is Tax Discrimination?, *The Yale Law Journal*, № 121, 2012, 1014-1116.
30. *Milhaupt C. J., Pargendler M.*, Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform, *Cornell International Law Journal*, № 50(3), 2017, 473-542.
31. *Matsushita M., Lim C.*, Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules, *World Trade Review*, № 19(3), 2020, 402-423.
32. *Modou D., Yun L. H.*, An Empirical Investigation of Causal Relationship of Chinese FDI to African Economies, *International Journal of Academic Research in Business and Social Sciences*, № 7(3), 2017, 199-207.
33. *Mosca M.*, On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition, *European Journal of the History of Economic Thought*, № 15(2), 2008, 317-353.
34. *Pan L.*, Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees, *Cambridge Journal of China Studies*, № 14(4), 2019, 16-30.
35. *Ramaiah A. K.*, The Competition Neutrality in Malaysia: Challenges and Policy Options, *Journal of International Business, Economics and Entrepreneurship*, № 3(2), 2018, 45-54.
36. *Room R.*, The Evolution of Alcohol Monopolies and Their Relevance for Public Health, *Contemporary Drug Problems*, № 20, 1993, 169-187.
37. *Sadiq K., Richardson C.*, Tax Concessions for Charities: Competitive Neutrality, the Tax Base and "Public Goods" Choice, *Australian Tax Forum: a Journal of Taxation Policy, Law and Reform*, № 25(4), 2010, 401-416.
38. *Sakyi K. A.*, Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), *Advances in Social Sciences Research Journal*, № 6(4), 2019, 148-167.

39. *Shaver E. B.*, Two Paths to Development: Policy Channeling and Listed State-Owned Enterprise Management in Peru and Colombia, *University of Pennsylvania Journal of Business Law*, № 21(4), 2019, 1006-1033.
40. *Shirley M.*, Bureaucrats in Business: The Roles of Privatization Versus Corporatization in State-Owned Enterprise Reform, *World Development Journal*, № 27(1), 1999, 115-136.
41. *Talus K.*, Long-Term Natural Gas Contracts and Antitrust Law in the European Union and the United States, *The Journal of World Energy Law & Business*, № 4(3), 2011, 260-315.
42. *Valkama P., Virtanen M.*, Competitive Neutrality and Distortion of Competition: A Conceptual View, *World Competition Journal*, № 32(3), 2009, 393-407.
43. *Waldron J.*, Is the Rule of Law an Essentially Contested Concept (In Florida)? *Law and Philosophy*, № 21(2), 2002, 137-164.
44. *Willemyns I.*, Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?, *Journal of International Economic Law*, № 19(3), 2016, 657-680.
45. *Yun M.*, An Analysis of the New Trade Regime for State-Owned Enterprises under the Trans-Pacific Partnership Agreement, *Journal of East Asian Economic Integration*, № 20(1), 2016, 3-35.
46. *Zwalf S.*, Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, *Asia Pacific Journal of Public Administration*, № 39(4), 2017, 225-237.
47. Decision of April 18, 2019 case № 1/1/655 of Georgian Constitutional Court.
48. Consolidated Audited Financial Report of JSC “Partnership Fund”, 2019, <[https://fund.ge/upload/media/PF\\_Consolidated\\_FS2019GEO.pdf](https://fund.ge/upload/media/PF_Consolidated_FS2019GEO.pdf)> [05.01.2022] (in Georgian).
49. Georgian National Competition Agency, <<https://competition.ge/about-us/what-we-do>> [05.01.2022].
50. JSC “Partnership Fund”, <<https://www.fund.ge/who-we-are>> [05.01.2022].
51. “United Airports of Georgia” LLC, <<http://airports.ge/index.php/ka/about-us/goals-and-objectives>> [05.01.2022].
52. Academician Nikoloz Kipshidze Central University Clinic, <<http://respublikuri.ge/%e1%83%a9%e1%83%95%e1%83%94%e1%83%9c-%e1%83%a8%e1%83%94%e1%83%a1%e1%83%90%e1%83%ae%e1%83%94%e1%83%91/>> [05.01.2022].
53. “Georgian Post” Ltd, <<https://www.gpost.ge/?site-lang=ka&site-path=company/about/>> [05.01.2022].
54. <<https://1tv.ge/news/premier-ministris-davalebit-rkinigzis-korporatizaciisa-da-reformirebis-dghis-wesrigi-shemushavdeba/>> [05.01.2022].
55. <[http://gov.ge/index.php?lang\\_id=-&sec\\_id=541&info\\_id=75207](http://gov.ge/index.php?lang_id=-&sec_id=541&info_id=75207)> [05.01.2022].