



POLICY ROUNDTABLES

State Owned Enterprises and the Principle of Competitive Neutrality 2009

Introduction

The OECD Competition Committee debated the application of competition rules to state owned enterprises and the principle of competitive neutrality in October 2009. This document includes an executive summary, a background note and an issues paper by Mr. Antonio Capobianco for the OECD and country contributions from Brazil, Canada, Chile, China, Czech Republic, European Commission, Finland, France, Germany, Greece, India, Indonesia, Korea, Lithuania, Netherlands, Norway, Poland, Romania, Russia, Spain, Sweden, Switzerland, Chinese Taipei, Turkey, United Kingdom, United States and BIAC, as well as two aides memoires for the discussions.

Overview

Due to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises. Although enforcing competition rules against SOEs presents enforcers with particular challenges, competition rules should, and generally do, apply to both private and state-owned enterprises, subject to very limited exceptions.

Competition law alone is not sufficient in ensuring a level playing field for SOEs and private enterprises, which is why policies aimed at achieving competitive neutrality between the two play an essential role. Competitive neutrality can be understood as a regulatory framework (i) within which public and private enterprises face the same set of rules and (ii) where no contact with the state brings competitive advantage to any market participant. Presence of competitive neutrality policies is of particular importance in recently liberalised sectors, where they play a crucial role in leveling the playing field between former state monopoly incumbents and private entrants. Equally important is their effective monitoring and enforcement.

Related Topics

Competition and Corporate Governance (2010)
Competition Policy, Industrial Policy and national Champions (2009)
Predatory Foreclosure (2004)
Regulating Market Activities by the Public Sector (2004)
Recommendation of the Council Concerning Structural Separation in Regulated Industries (2001)

Unclassified

DAF/COMP(2009)37

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

20-Sep-2010

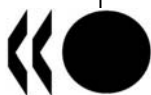
English, French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

STATE-OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY

JT03288487

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format



**DAF/COMP(2009)37
Unclassified**

English, French

FOREWORD

This document comprises proceedings in the original languages of two roundtables on (i) the Application of Antitrust Law to State-Owned Enterprises and (ii) Corporate Governance and the Principle of Competitive Neutrality held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in October 2009.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à deux tables rondes sur (i) l'Application du Droit de la Concurrence aux Entreprises Publiques et (ii) Gouvernement d'Entreprise et Principe de Neutralité Concurrentielle des Entreprises Publiques qui se sont tenues en octobre 2009 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la Coopération et l'Application de la Loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

Visit our Internet Site -- Consultez notre site Internet

<http://www.oecd.org/competition>

OTHER TITLES
SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment	OCDE/GD(96)22
2.	Failing Firm Defence	OCDE/GD(96)23
3.	Competition Policy and Film Distribution	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD(96)65
5.	The Essential Facilities Concept	OCDE/GD(96)113
6.	Competition in Telecommunications	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11.	Competition Issues related to Sports	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14.	Resale Price Maintenance	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP(99)1
22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP(99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25.	Oligopoly	DAFFE/CLP(99)25
26.	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27.	Competition in Professional Services	DAFFE/CLP(2000)2
28.	Competition in Local Services	DAFFE/CLP(2000)13
29.	Mergers in Financial Services	DAFFE/CLP(2000)17
30.	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31.	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32.	Competition and Regulation Issues in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33.	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34.	Competition Issues in Road Transport	DAFFE/CLP(2001)10

35.	Price Transparency	DAFFE/CLP(2001)22
36.	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37.	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38.	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39.	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40.	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41.	Communication by Competition Authorities	DAFFE/COMP(2003)4
42.	Substantive Criteria used for the Assessment of Mergers	DAFFE/COMP(2003)5
43.	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44.	Media Mergers	DAFFE/COMP(2003)16
45.	Universal Service Obligations	DAF/COMP(2010)13
46.	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47.	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48.	Merger Remedies	DAF/COMP(2004)21
49.	Cartels: Sanctions against Individuals	DAF/COMP(2004)39
50.	Intellectual Property Rights	DAF/COMP(2004)24
51.	Predatory Foreclosure	DAF/COMP(2005)14
52.	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53.	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54.	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55.	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56.	Competition on the Merits	DAF/COMP(2005)27
57.	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58.	Barriers to Entry	DAF/COMP(2005)42
59.	Prosecuting Cartels without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60.	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18
61.	Competition in the Provision of Hospital Services	DAF/COMP(2006)20
62.	Access to key Transport Facilities	DAF/COMP(2006)29
63.	Environmental Regulation and Competition	DAF/COMP(2006)30
64.	Concessions	DAF/COMP/GF(2006)6
65.	Remedies and Sanctions	DAF/COMP(2006)19
66.	Competition in Bidding Markets	DAF/COMP(2006)31
67.	Competition and Efficient Usage of Payment cards	DAF/COMP(2006)32
68.	Vertical mergers	DAF/COMP(2007)21
69.	Competition and Regulation in Retail Banking	DAF/COMP(2006)33
70.	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71.	Public Procurement – The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72.	Competition, Patents and Innovation	DAF/COMP(2007)40
73.	Private Remedies	DAF/COMP(2006)34

74.	Energy Security and Competition Policy	DAF/COMP(2007)35
75.	Plea Bargaining Settlement of Cartel Cases	DAF/COMP(2007)38
76.	Competitive Restrictions in Legal Professions	DAF/COMP(2007)39
77.	Dynamic Efficiencies in Merger Analysis	DAF/COMP(2007)41
78.	Guidance to Business on Monopolisation and Abuse of Dominance	DAF/COMP(2007)43
79.	The Interface between Competition and Consumer Policies	DAF/COMP/GF(2008)10
80.	Facilitating Practices in Oligopolies	DAF/COMP(2008)24
81.	Taxi Services Regulation and Competition	DAF/COMP(2007)42
82.	Techniques and Evidentiary Issues in Proving Dominance/ Monopoly Power	DAF/COMP(2006)35
83.	Managing Complex Merger Cases	DAF/COMP(2007)44
84.	Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations	DAF/COMP(2007)45
85.	Market Studies	DAF/COMP(2008)34
86.	Land Use Restrictions as Barriers to Entry	DAF/COMP(2008)25
87.	Construction Industry	DAF/COMP(2008)36
88.	Antitrust Issues Involving Minority Shareholding and Interlocking Directorates	DAF/COMP(2008)30
89.	Bundled and Loyalty Discounts and Rebates	DAF/COMP(2008)29
90.	Techniques for Presenting Complex Economic Theories to Judges	DAF/COMP(2008)31
91.	Competition Policy for Vertical Relations in Gasoline Retailing	DAF/COMP(2008)35
92.	Competition and Financial Markets	DAF/COMP(2009)11
93.	Refusals to Deal	DAF/COMP(2007)46
94.	Resale Price Maintenance	DAF/COMP(2008)37
95.	Experience with Direct Settlements in Cartel Cases	DAF/COMP(2008)32
96.	Competition Policy, Industrial Policy and National Champions	DAF/COMP/GF(2009)9
97.	Two-Sided Markets	DAF/COMP(2009)20
98.	Monopsony and Buyer Power	DAF/COMP(2008)38
99.	Competition and Regulation in Auditing and Related Professions	DAF/COMP(2009)19
100.	Roundtable on competition policy and the informal economy	DAF/COMP/GF(2009)10
101.	Competition, Patents and Innovation	DAF/COMP(2009)22
102.	The Standard for Merger Review, with a Particular Emphasis on Country Experience with the change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test	DAF/COMP(2009)21
103.	Failing Firm Defence	DAF/COMP(2009)38
104.	Competition, Concentration And Stability In The Banking Sector	DAF/COMP(2010)9
105.	Margin Squeeze	DAF/COMP(2009)36

TABLE OF CONTENTS

EXECUTIVE SUMMARY	9
SYNTHÈSE	15

I. THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES

BACKGROUND NOTE.....	25
NOTE DE REFERENCE.....	63

CONTRIBUTIONS

Canada	107
Czech Republic.....	113
Finland.....	121
France	135
Germany	155
Greece.....	161
Korea	171
Netherlands.....	177
Norway	185
Poland.....	195
Spain	199
Switzerland	203
United Kingdom	211
United States.....	225
European Commission.....	233

and

Brazil	245
Chile	249
China.....	253
India.....	255
Indonesia.....	261
Lithuania.....	265
Romania.....	269
Russia	277
Chinese Taipei.....	283
BIAC.....	289

SUMMARY OF DISCUSSION	301
COMPTE RENDU DE LA DISCUSSION	311

II. CORPORATE GOVERNANCE AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY

ISSUES PAPER.....	325
NOTE POUR DISCUSSION.....	333

CONTRIBUTIONS

Finland.....	341
Norway	359
Spain	371
Sweden	375
Turkey.....	385
United Kingdom	395
United States.....	409
European Commission.....	417

and

Brazil	427
Romania.....	431
Chinese Taipei	439
BIAC.....	447

SUMMARY OF DISCUSSION	459
COMPTE RENDU DE LA DISCUSSION	469

EXECUTIVE SUMMARY

By the Secretariat

From the issues papers, country submissions and the discussion at the roundtables on (i) the application of antitrust law to state-owned enterprises and (ii) corporate governance and the principle of competitive neutrality the following points emerge:

- (1) *The concept of state-owned enterprise (SOE) encompasses a broad range of entities united by the common feature of government control. In many OECD countries, SOEs operate in a wide range of markets and represent a significant part of national economies.*

State control over an enterprise can take various forms. It can be identified in terms of grants of exclusive rights to private enterprises, share ownership or direct assignment of manufacturing or service providing functions to governmental agencies. Some SOEs may be corporatised and exist in corporate forms available to private actors, while others may exist in specific organizational forms reserved for SOEs. Alternatively, the term may simply describe elements and activities carried out directly by a government agency.

SOEs operate in a wide range of markets, in particular utilities and public services sectors, and while the level of their involvement in the economy differs from country to country, it is indisputable that their conduct may present similar competitive concerns to that of private actors in the market. In fact, the potential for anticompetitive effects may be even greater in the case of SOEs due to the various advantages conferred upon them as a result of government control.

- (2) *Due to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises.*

Competition concerns that arise in relation to the conduct of SOEs may vary depending on the form in which the state exercises its control over them and whether they occupy monopoly positions or actively compete in a market with private entities. Some SOEs may in fact simultaneously carry out activities in areas where they face competition and where they do not, in particular in public service sectors. In such situations an SOE may wish to leverage its legal monopoly position into the markets where it competes with private participants, for example through cross-subsidisation. On the other hand, it was also mentioned during the discussion that since public service obligations are often costly, an SOE may in fact use profits from its market activities to subsidise these obligations, which while not profitable are of value to society.

Concerning a general propensity for anticompetitive conduct, it cannot be concluded that SOEs are more inclined to act anticompetitively than private enterprises. While it is true that SOEs that enjoy near-monopoly positions in newly liberalised markets may attempt to hold on to their market position through various practices, some of which may be anticompetitive, the same could be said about any incumbent, public or private. It is therefore important, in view of the ability of SOEs to harm competition and consumer welfare in the same way as private

enterprises, to ensure, to the greatest extent possible, that SOEs operate under the same competition law framework as private enterprises.

- (3) *Competition rules should, and generally do, apply to both private and state-owned enterprises, subject to very limited exceptions.*

There is a general consensus that competition law should apply to all actors in the market, be they public or private and, in general terms, that is also the reality in most OECD countries. SOEs that are corporatised and therefore organizationally distinct from the state are generally subject to the same set of competition rules as their private counterparts. Most competition laws define their subjective scope as covering the conduct of any "person" or "undertaking", which are terms that have been generally interpreted as encompassing any entity engaged in a commercial activity regardless of the character of its ownership or financing. However, there may be circumstances where such SOEs are exempt from competition rules. That may be the case where they provide general public services, such as postal services, railways, health care, etc. Exceptions of this nature should, however be accompanied by appropriate regulation that would minimize the risk of resulting market distortions.

The situation is, however, very different where SOEs are closely affiliated to the state. In such cases they may be qualified as not falling within the scope of competition laws due to their close proximity to the state, which in most countries is not among the entities to whom competition law applies. There may be further distinctions within this category, in particular in federal states. For example, in the United States the applicability of US antitrust laws may differ depending on whether the SOE is controlled by the federal government, an individual state or a municipality. On the other hand, not in all jurisdictions is the state exempt from competition rules. The Member States of the European Union are subject to EC competition rules, in so far as their actions with respect to state-owned or otherwise privileged enterprises are concerned, and may be held liable for their anticompetitive conduct where it is shown that such conduct was state-imposed or induced.

- (4) *Enforcing competition rules against SOEs presents enforcers with particular challenges.*

Even though competition law generally applies to both private and public economic entities, competition authorities may face distinct challenges when enforcing it against SOEs. These may be of institutional as well as substantive character.

While the vast majority of competition authorities are impartial in their investigations, it is nevertheless theoretically conceivable that, in some instances, they could be exposed to the risk of undue government influence. Also, competition authorities may often lack sufficient statutory power over the SOE, in particular, with respect to industries that are subject to oversight by sectoral regulatory agencies.

Concerning substantive challenges, competition law enforcers may have to deal with the fact that obtaining relevant information from SOEs could be very difficult due to lack of transparency regarding costs and insufficient standard accounting procedures. Moreover, even where the relevant information can be collected, the application of the traditional competition law tests, such as recoupment in predatory pricing, may be limited as some SOEs have goals other than profit maximization, such as maximizing revenue and size of the workforce. Also, because of the complexity SOEs often present due to the variety of their activities, it is very difficult to determine whether an SOE is cross-subsidizing, pricing at below competitive levels or engaging in other forms of anticompetitive conduct.

With respect to compliance, it was noted that awareness of competition rules among SOEs has grown considerably over the past 10 to 15 years. Today, most large SOEs have legal departments with a significant focus on competition regulation and compliance. This development, while not necessarily the direct result of enforcement activity, positively contributes to the achievement of the objectives that competition agencies strive to accomplish.

- (5) *Competition law alone is not sufficient in ensuring a level playing field for SOEs and private enterprises, which is why policies aimed at achieving competitive neutrality between the two play an essential role.*

There is a broad consensus that competition can generate significant benefits by enhancing consumer welfare through the provision of better products and services at a lower cost. These benefits are equally available in purely private markets as well as where private and public enterprises compete. However, public enterprises may often benefit from advantages conferred upon them by existing legislative and administrative frameworks, which may have an effect on the quality and cost of the goods and services they provide. These effects include but are not limited to lower costs of capital, lesser tax burdens, and lower risks of takeover and bankruptcy. As a consequence, competition between public and private enterprises may be distorted.

As such distortions cannot always be addressed through competition law enforcement, a possible solution may be found in policies aimed at achieving competitive neutrality in markets where public and private enterprises compete.

- (6) *Competitive neutrality can be understood as a regulatory framework (i) within which public and private enterprises face the same set of rules and (ii) where no contact with the state brings competitive advantage to any market participant.*

In a strict sense, competitive neutrality can be understood as a legal and regulatory environment in which all enterprises, public or private, face the same set of rules, and government ownership or involvement does not confer unjustified advantages on any entity. For example, SOEs should not have easier access to capital than private enterprises or be treated more favorably with respect to tax burdens. However, as one of the panelists noted, contrary to common perceptions, state ownership may not always be accompanied by advantages. Direct involvement may allow the state to access information it would not be able to obtain from a private enterprise, for example with respect to costs and pricing, which could then lead to closer regulatory scrutiny.

In a wider sense, competitive neutrality can be seen as a market framework within which no contact with the state brings a competitive advantage to any market participant. For example, when the state acts as a purchaser of goods or services, it is important to ensure that prices are not above competitive levels, and hence, do not include a hidden subsidy. The use of proper public procurement procedures is an obvious and commonly used solution to this problem. Other areas of concern may be where contracting with the government confers advantages of economies of scale on a winning bidder that are not replicable by others or results in major reputational advantages to a firm. It is thus important to keep in mind that there may be neutrality concerns in areas where the government acts as a customer as well as a provider.

- (7) *Competitive neutrality does not mean that SOEs which provide essential public goods cannot be compensated for doing so. However, such compensation must be fair.*

The role, or at least a partial role, of many SOEs is to provide essential public goods, such as the postal service, railways, health service, etc. There are circumstances where competitive neutrality

may be at odds with achieving this objective. SOEs have a legitimate right to compensation for providing these public goods, which is often costly. For example, the postal service has to ensure delivery to all areas of a country, even the remote and scarcely inhabited, and complying with this obligation becomes expensive. Therefore, unless service in unprofitable areas is to be eliminated, there has to be a system of compensating the costs associated with it. However, it is important to ensure that such costs are properly calculated to minimize the distortionary effects of compensation. There are various ways to ensure that SOEs are not overcompensated for the public services they provide, some of which include market solutions, such as selecting the provider through reverse auctions with the participation of private enterprises.

- (8) *There are situations where insistence on strict competitive neutrality is not appropriate as it may hamper the achievement of important societal goals.*

While competitive neutrality is desirable in general, there are instances where its strict application may hamper the achievement of important societal goals, such as in crisis situations or when dealing with market failures. The recent bank bailouts are an example of state intervention in situations of crisis. Governments had to decide, often within days, which banks to rescue and which to allow to fail, in view of their resource limitations and keeping in mind various factors, such as the systemic importance of each bank to the financial system. Insisting on a strictly neutral approach under these circumstances may have prevented the government from responding effectively to the economic crisis. With respect to market failures, government intervention may be necessary to overcome the inefficiencies of entrenched oligopolistic markets. However, even in such a situation it is necessary to ensure that a government-backed enterprise does not displace competition from private actors.

- (9) *Presence of competitive neutrality policies is of particular importance in recently liberalised sectors, where they play a crucial role in leveling the playing field between former state monopoly incumbents and private entrants. Equally important is their effective monitoring and enforcement.*

There has been significant progress in OECD countries in the liberalisation of many of the sectors traditionally dominated by state monopolies, such as public utilities. While this process can be coupled with full or partial privatisation of state monopoly incumbents, privatisation alone is not sufficient in eliminating the advantages that such entities enjoy due to their past state ownership and their position in the market. Similarly, liberalisation can successfully proceed even without extensive privatisation. However, no matter what path governments choose to pursue in the liberalisation of their industries (liberalisation only or coupled with privatisation), it is critical that they put in place, and ensure implementation, monitoring and enforcement of, policies that create a level playing field in the newly created markets.

The discussion emphasized the desirability of a comprehensive framework in order to achieve the goals of competitive neutrality policy. However, the discussion has also shown that so far, countries generally lack broad competitive frameworks that would comprehensively encompass all areas relevant to the creation and maintenance of competitively neutral markets.

Some countries and jurisdictions, in particular those which have progressed on the path of liberalisation the furthest, have more developed competitive neutrality policies than others, for example the EU and the United Kingdom. The EU as a supranational entity has, within the framework of its competition law, the authority to ensure that competition is not distorted through undue support by any of its member states, be it for private or public enterprises. Moreover, it can also control whether SOEs that are mandated with providing services of general

public interest do not distort competition by receiving compensation disproportionate to the cost of such obligation. The approach in the UK has been, in the words of one of the panelists, more sectoral and reactive but important progress has been made nevertheless. However, there remain important areas in which neutrality needs to be addressed, such as public pensions and taxation.

Other countries, such as Sweden, Norway and Spain have adopted laws aimed at improving competitive conditions between public and private enterprises, which contain rules granting new powers to competition authorities, prohibiting SOEs from leveraging their monopoly positions into markets where they compete with private enterprises or promoting increased transparency.

- (10) *Competition authorities, while generally not entrusted with specific hard powers, can play an important role in advocating for competitive neutrality.*

The role of competition authorities in the sphere of competitive neutrality is rather limited due to the fact that ensuring a level playing field requires a number of different government policies outside the scope of competition law. They can nevertheless effectively contribute to the attainment of competitive neutrality within the scope of their powers, be they granted by specific laws or related to their competition enforcement authority. For example, in Sweden the courts can, on application by the Competition Authority, prohibit measures and conduct by municipal and local authorities that may impede or distort competition, unless they are justified by public interest. Competition authorities in many countries also prepare reports and studies dealing with competitive conditions in various industries, which can help identify various distortions between public and private participants. These reports can then serve as a basis for the development of an appropriate government policy, which the competition authority can continue to support in the process of its formulation and adoption. Last but not least, public advocacy by competition authorities was noted as a very useful tool in promoting the policy of competitive neutrality.

- (11) *Given the necessary role that many SOEs play in achieving goals of general public interest, which cannot be accomplished by private enterprises, it is important to subject them to appropriate corporate governance frameworks in order to maximise their effectiveness and reduce potential market distortions resulting from their privileged position.*

It was recognized that SOEs play a crucial role in providing public goods, such as the postal service, railways, health care etc. In these areas, there may be legitimate reasons why such activities generally cannot be carried out by private enterprises, whose focus is on maximising profitability.

The reason why SOEs should be subjected to appropriate rules of corporate governance is two-fold. First, proper rules of corporate governance and transparency can limit any undue advantages that an SOE may enjoy due to its government involvement to the minimum necessary for the accomplishment of its tasks. Second, the state, as any other shareholder, is interested in the SOE operating efficiently and effectively in carrying out its activities.

For these reasons, corporate governance frameworks should include clear and transparent directions to SOEs regarding non-commercial objectives, an adequate separation of regulatory responsibilities from the ownership function, as well as the corporate governance of the individual SOEs. It must be clear and transparent to competitors what privileges the SOEs may enjoy due to the government ownership. The government should strive for competitive neutrality such that when favourable treatment is occasioned by a public policy goal, distortions in the market are minimised to allow for full and fair competition. Such policy goals should be advanced by the government in its capacity as a regulator and not as a market participant.

Furthermore, SOEs should be subject to rules that strengthen their internal audit systems, create sound accounting systems, increase the efficiency of governing bodies, improve supervisory functions, enhance transparency and promote the rights of both shareholders and stakeholders.

In this respect it was also pointed out that the 2005 OECD Guidelines on Corporate Governance of State-Owned Enterprises contain many valid and useful recommendations aimed at establishing a proper corporate governance framework for SOEs.

SYNTHÈSE

Par le Secrétariat

Il ressort des documents de réflexion, des contributions des pays et des débats tenus lors des tables rondes sur : i) l'application du droit de la concurrence aux entreprises publiques ; ii) le gouvernement d'entreprise et le principe de neutralité concurrentielle, que :

- (1) *Le concept d'entreprise publique regroupe des entités très diverses ayant en commun d'être contrôlées par l'État. Dans de nombreux pays de l'OCDE, les entreprises publiques opèrent sur un vaste ensemble de marchés et représentent un pan significatif de l'économie nationale.*

Le contrôle de l'État sur une entreprise peut prendre diverses formes : octroi de droits exclusifs à une entreprise privée, détention d'actions, ou délégation directe de la fabrication de produits ou de la prestation de services à un organisme public. Certaines entreprises publiques peuvent être constituées en sociétés et exister sous une forme sociale accessible aux acteurs privés, tandis que d'autres peuvent se présenter sous une forme qui leur est propre. Mais le terme « entreprise publique » peut aussi simplement désigner une composante ou une opération relevant directement d'un organisme d'État.

Les entreprises publiques opèrent sur un vaste ensemble de marchés, en particulier dans les services de distribution et autres services publics, et bien que leur place dans l'économie varie d'un pays à l'autre, il ne fait aucun doute que leur comportement est susceptible d'engendrer des problèmes de concurrence analogues à ceux qui découlent du comportement des acteurs privés sur le marché. En fait, les entreprises publiques risquent même davantage de se comporter de manière anticoncurrentielle compte tenu des divers avantages dont elles bénéficient du fait de leur contrôle par l'État.

- (2) *En raison de leur statut privilégié, les entreprises publiques risquent de nuire à la concurrence. C'est pourquoi il importe de veiller à ce que, dans toute la mesure possible, et dans le respect de leurs obligations de service public, ces entreprises soient soumises en matière de concurrence à des règles de conduite semblables à celles des entreprises privées.*

Les problèmes de concurrence issus du comportement des entreprises publiques peuvent dépendre de la forme sous laquelle l'État exerce son contrôle sur elles, et du fait qu'elles jouissent d'un monopole ou qu'elles rivalisent activement sur un marché ouvert à des entités privées. D'ailleurs, certaines entreprises publiques peuvent opérer simultanément dans des domaines où elles sont confrontées à une concurrence et dans d'autres où ce n'est pas le cas, notamment dans les secteurs touchant aux services publics. Elles pourraient alors éventuellement profiter de leur situation légale de monopole sur les marchés où elles se mesurent à des acteurs privés, par exemple grâce à des subventions croisées. Cependant, il est également signalé au cours du débat que, les obligations de service public étant souvent coûteuses, il se peut en réalité que les entreprises publiques utilisent les bénéfices tirés de leurs activités marchandes pour subventionner l'exécution de ces obligations qui, bien que non rentable, présente une utilité pour la société.

Pour ce qui est d'une tendance générale aux comportements anticoncurrentiels, rien ne permet d'affirmer qu'ils se manifestent plus dans le secteur public que dans le secteur privé. S'il est vrai que les entreprises publiques qui jouissent d'une situation de quasi-monopole sur des marchés récemment ouverts à la concurrence essaieront peut-être de conserver leur position sur ces marchés par différentes pratiques, dont certaines peuvent s'avérer anticoncurrentielles, la même remarque pourrait être formulée à propos de n'importe quelle entreprise en place, aussi bien publique que privée. Il importe donc, étant donné que les entreprises publiques peuvent nuire à la concurrence et au bien-être du consommateur tout autant que les entreprises privées, de veiller dans toute la mesure possible à ce que les premières opèrent en vertu du même cadre juridique en matière de concurrence que les secondes.

- (3) *Les règles de concurrence devraient s'appliquer, et s'appliquent généralement, à la fois aux entreprises privées et aux entreprises publiques, à de rares exceptions près.*

Il est généralement admis que le droit de la concurrence devrait s'appliquer à tous les acteurs présents sur le marché, qu'ils soient publics ou privés, et d'ailleurs, en règle générale, la réalité est conforme à cette vision des choses dans la plupart des pays de l'OCDE. Les entreprises publiques constituées en sociétés et qui ne dépendent donc pas directement de l'État en tant qu'organisations sont généralement soumises au même ensemble de règles de concurrence que leurs homologues du secteur privé. Le champ d'application subjectif de la plupart des lois sur la concurrence fait référence au comportement de toute « personne » ou « entreprise », termes qui englobent, selon l'interprétation la plus courante, toute entité exerçant une activité commerciale, indépendamment de la nature de son régime de propriété ou de son financement. Or, dans certaines circonstances, ces entreprises publiques peuvent être dispensées du respect des règles de concurrence, par exemple lorsqu'elles assurent des services d'intérêt général tels que services postaux, services de transport ferroviaire, services de santé, etc. Les exceptions de ce type devraient être régies par une réglementation adéquate réduisant au minimum le risque de distorsions sur le marché.

La situation est néanmoins très différente dans le cas où les entreprises publiques sont rattachées de près à l'État. Elles peuvent alors être exclues du champ d'application des lois sur la concurrence au motif des liens étroits qui les unissent à l'État, lequel, dans la plupart des pays, ne fait pas partie des entités soumises au droit de la concurrence. Des distinctions supplémentaires peuvent exister, en particulier dans les États fédéraux. Par exemple, aux États-Unis, le droit de la concurrence est susceptible de s'appliquer différemment selon que les entreprises publiques sont contrôlées par le Gouvernement fédéral, par un État ou par une municipalité. Cela étant, l'État n'est pas dispensé du respect des règles de concurrence dans tous les pays. Les États membres de l'Union européenne (UE) sont soumis à celles de la Commission, s'agissant des mesures qu'ils adoptent à l'intention d'entreprises publiques ou, d'une façon générale, privilégiées, et ils peuvent être tenus responsables du comportement anticoncurrentiel de ces entreprises s'il est démontré qu'ils l'ont imposé ou encouragé.

- (4) *L'imposition des règles de concurrence aux entreprises publiques confronte les autorités à certains problèmes.*

Bien que le droit de la concurrence s'applique en règle générale aux entités économiques tant publiques que privées, les autorités de la concurrence peuvent se heurter à des problèmes spécifiques, de nature institutionnelle et opérationnelle, en obligeant les entreprises publiques à s'y conformer.

Si l'immense majorité des autorités de la concurrence enquêtent de manière impartiale, il est néanmoins théoriquement concevable qu'elles puissent, dans certains cas, être exposées à un risque d'influence illégitime de la part de l'État. En outre, elles risquent souvent de ne pas avoir un pouvoir réglementaire suffisant sur les entreprises publiques, en particulier dans les secteurs soumis à la surveillance d'autorités de tutelle sectorielles.

Pour ce qui est des problèmes opérationnels, les autorités de la concurrence risquent de devoir surmonter d'éventuels obstacles de taille afin d'obtenir des renseignements pertinents auprès des entreprises publiques, compte tenu du manque de transparence concernant les coûts et de la normalisation insuffisante des procédures comptables. De plus, même si les informations nécessaires peuvent être recueillies, le recours aux instruments classiques de vérification du respect du droit de la concurrence, qui consistent par exemple à s'assurer de l'absence de recouvrement des pertes en cas de pratique de prix d'éviction, risque d'être limité dans la mesure où certaines entreprises publiques ont d'autres objectifs que la maximisation du profit, comme celle des recettes et des effectifs de la population active. Par ailleurs, étant donné la fréquente complexité des entreprises publiques due à la diversité de leurs activités, il est très difficile de déterminer si une telle entreprise fait appel à des subventions croisées, pratique des prix inférieurs au niveau concurrentiel ou manifeste d'autres formes de comportement anticoncurrentiel.

En ce qui concerne le respect des règles de concurrence, on observe que la connaissance de ces règles par les entreprises publiques s'est considérablement renforcée au cours des 10 à 15 dernières années. Aujourd'hui, la plupart des grandes entreprises publiques disposent d'un département des affaires juridiques consacrant une part non négligeable de ses activités à la réglementation en matière de concurrence et au respect de ladite réglementation. Cette évolution, bien que n'étant pas nécessairement issue en droite ligne du travail accompli dans le domaine de la mise en application du droit, contribue favorablement à la réalisation des objectifs que les autorités de la concurrence s'efforcent d'atteindre.

- (5) *Le seul droit de la concurrence ne suffit pas à garantir la mise sur un pied d'égalité des entreprises publiques et des entreprises privées. Aussi les politiques visant à instaurer la neutralité concurrentielle entre les premières et les secondes jouent-elles un rôle essentiel.*

Il existe un large consensus quant à la capacité de la concurrence à engendrer des effets positifs importants en améliorant le bien-être du consommateur grâce à la fourniture à moindre coût de produits et services plus performants. Ces effets positifs existent aussi bien sur les marchés réservés au secteur privé que sur ceux où rivalisent entreprises privées et entreprises publiques. Cependant, les entreprises publiques ont souvent la possibilité de tirer avantage des cadres juridiques et administratifs en vigueur, ce qui peut influencer sur la qualité et le coût des biens et services qu'elles produisent. Le coût du capital étant plus faible, la charge fiscale moins lourde, et les risques de rachat ou de banqueroute réduits, notamment, la concurrence entre les entreprises publiques et privées peut s'en trouver faussée.

Étant donné que l'application du droit de la concurrence ne permet pas toujours de remédier à ces distorsions, les politiques visant à instaurer la neutralité concurrentielle sur les marchés où se mesurent entreprises publiques et entreprises privées constituent peut-être une solution.

- (6) *La neutralité concurrentielle peut se concevoir comme un cadre réglementaire au sein duquel : i) les entreprises publiques et privées sont soumises au même ensemble de règles ; ii) l'absence de lien avec l'État procure un avantage concurrentiel à tout acteur présent sur le marché.*

Au sens strict, la neutralité concurrentielle peut se définir comme un cadre juridique et réglementaire dans lequel toutes les entreprises, publiques ou privées, sont soumises au même ensemble de règles, et aucune ne se voit conférer des avantages injustifiés au motif que l'État en est propriétaire ou partie prenante. Par exemple, les entreprises publiques ne devraient pas accéder au capital plus facilement que les entreprises privées, ni bénéficier d'un traitement de faveur en matière d'imposition. Toutefois, comme le fait remarquer l'un des participants, l'appartenance à l'État ne s'accompagne pas systématiquement d'avantages, contrairement aux idées reçues. La participation directe de l'État peut lui permettre d'accéder à des informations qu'il ne pourrait obtenir d'une entreprise privée, par exemple en ce qui concerne les coûts et la tarification, ce qui pourrait alors se traduire par une surveillance réglementaire plus étroite.

Au sens large, la neutralité concurrentielle peut se définir comme un cadre de marché dans lequel l'absence de lien avec l'État procure un avantage concurrentiel à tout acteur présent sur le marché. Par exemple, lorsque l'État achète des biens ou des services, il est important de s'assurer que leurs prix ne sont pas supérieurs aux niveaux concurrentiels et, partant, qu'ils ne reflètent pas une subvention occulte. Le recours à des procédures adaptées de passation des marchés publics est une solution évidente et courante à ce problème. Les cas où la conclusion de marchés avec l'État permet à un adjudicataire de réaliser des économies d'échelle non reproductibles par ses concurrents, ou confère à une entreprise des avantages importants en termes de réputation, peuvent également s'avérer problématiques. Il convient donc de ne pas perdre de vue que le principe de neutralité risque d'être menacé dans les domaines où l'État est à la fois client et fournisseur.

- (7) *Le principe de neutralité concurrentielle n'interdit pas aux entreprises publiques qui fournissent des biens et services d'intérêt général de bénéficier à ce titre d'une compensation. Néanmoins, celle-ci doit être équitable.*

Le rôle, au moins partiel, de nombreuses entreprises publiques est de fournir des biens et services d'intérêt général (services postaux, services de transport ferroviaire, services de santé, etc.). Dans certaines circonstances, le principe de neutralité concurrentielle risque d'être en contradiction avec ce rôle. Les entreprises publiques peuvent légitimement prétendre à une compensation au titre de la fourniture de ces biens et services d'intérêt général, souvent coûteuse. Par exemple, les services postaux devant être assurés dans toutes les régions d'un pays, y compris celles qui sont isolées et peu peuplées, le respect de cette obligation présente au bout du compte un coût élevé. Aussi, à moins de supprimer la prestation de services dans les régions non rentables, faut-il mettre en place un système connexe de compensation des coûts. Cela étant, il importe de veiller à ce que ceux-ci soient dûment calculés en vue de la réduction au minimum des effets de distorsion de la compensation. Il existe différents moyens de s'assurer que les entreprises publiques ne bénéficient pas d'une compensation excessive pour les services d'intérêt général qu'elles fournissent, notamment des solutions faisant appel aux mécanismes du marché, comme la sélection par adjudication à l'envers d'un fournisseur parmi des entreprises privées.

- (8) *Dans certaines situations, il n'est pas bon d'insister sur la stricte application du principe de neutralité concurrentielle, étant donné qu'elle risque de nuire à la réalisation d'objectifs de société importants.*

Si la neutralité concurrentielle est souhaitable en général, il existe des cas où la stricte application de ce principe risque de nuire à la réalisation d'objectifs de société importants, comme dans les situations de crise ou lorsqu'il s'agit de faire face à des dysfonctionnements du marché. Les récents sauvetages de banques constituent un exemple d'intervention de l'État dans les situations de crise. Les pouvoirs publics ont dû prendre la décision, souvent en quelques jours, de sauver certaines banques et d'en laisser d'autres faire faillite, en tenant compte des contraintes budgétaires et de divers facteurs tels que la place des différentes banques dans le système financier. Dans ce contexte, la stricte application du principe de neutralité concurrentielle a peut-être empêché les pouvoirs publics de réagir efficacement face à la crise économique. Quant aux dysfonctionnements du marché, l'intervention de l'État peut s'avérer nécessaire pour pallier les insuffisances de marchés structurellement oligopolistiques. Cependant, il est nécessaire même en pareil cas de s'assurer qu'une entreprise publique ne se substitue pas à la concurrence entre acteurs privés.

- (9) *L'existence de politiques de neutralité concurrentielle est particulièrement importante dans les secteurs récemment ouverts à la concurrence, où elles jouent un rôle crucial dans la mise sur un pied d'égalité des entreprises publiques en place jouissant auparavant d'un monopole et des nouveaux entrants privés. La bonne application et le suivi rigoureux de ces politiques sont tout aussi importants.*

Les pays de l'OCDE ont fait des progrès notables en matière d'ouverture à la concurrence de nombreux secteurs traditionnellement dominés par des monopoles d'État, notamment celui des services de distribution. Bien qu'il soit possible d'associer ce processus à une privatisation complète ou partielle des entreprises publiques en place en situation de monopole, la privatisation ne suffit pas à elle seule à faire disparaître les avantages dont ces entreprises bénéficient du fait de leur appartenance passée à l'État et de leur position sur le marché. De même, l'ouverture à la concurrence peut être réalisée avec succès sans privatisation massive. Néanmoins, quelle que soit la voie que l'État décide de suivre dans le cadre de l'ouverture à la concurrence des secteurs qu'il contrôle (ouverture seule ou combinée à une privatisation), il est essentiel qu'il instaure des politiques propres à mettre sur un pied d'égalité les acteurs présents sur les marchés récemment créés, et qu'il veille à la mise en œuvre, au suivi et au respect de ces politiques.

Les participants au débat soulignent qu'il est souhaitable de disposer d'un cadre global afin d'atteindre les objectifs des politiques de neutralité concurrentielle. Cependant, on note également qu'à ce jour, peu de pays sont dotés d'un cadre de portée générale qui prendrait en compte l'intégralité des questions relatives à la création et au maintien de marchés neutres sur le plan de la concurrence.

Certains pays et entités, en particulier ceux qui sont allés le plus loin dans l'ouverture à la concurrence, se sont montrés plus actifs que d'autres dans l'élaboration de politiques de neutralité concurrentielle. C'est le cas, par exemple, de l'UE et du Royaume-Uni. En tant qu'entité supranationale, l'UE a le pouvoir, dans le cadre des dispositions du droit de la concurrence européen, de s'assurer que la concurrence n'est pas faussée en raison du soutien abusif éventuellement apporté par l'un de ses États membres à une entreprise, qu'elle soit publique ou privée, ou du fait que les entreprises publiques chargées de fournir des services d'intérêt général reçoivent une compensation excessive au regard du coût de leur mission. Au Royaume-Uni, si l'approche est plus sectorielle et passive, d'après l'un des participants, de grands progrès n'en ont

pas moins été accomplis. Cependant, des problèmes de neutralité doivent encore être réglés dans des domaines importants tels que les retraites publiques et la fiscalité.

D'autres pays, comme l'Espagne, la Norvège et la Suède, ont cherché à améliorer les conditions de concurrence entre entreprises publiques et privées en adoptant des lois en vertu desquelles les autorités de la concurrence se voient accorder de nouveaux pouvoirs, les entreprises publiques n'ont pas le droit de profiter de leur situation de monopole sur les marchés où elles rivalisent avec des entreprises privées, et le renforcement de la transparence est encouragé, entre autres.

- (10) *Bien qu'en règle générale, aucun pouvoir de coercition particulier ne leur soit confié, les autorités de la concurrence peuvent jouer un rôle important dans la défense du principe de neutralité concurrentielle.*

Le rôle des autorités de la concurrence dans le domaine de la neutralité concurrentielle est plutôt limité compte tenu que la mise sur un pied d'égalité des différents acteurs requiert un certain nombre de politiques publiques distinctes en dehors du champ d'application du droit de la concurrence. Les autorités de la concurrence peuvent néanmoins contribuer efficacement à l'instauration de la neutralité concurrentielle, dans les limites des pouvoirs qui leur sont conférés en vertu de lois spécifiques ou du fait de leur compétence en matière d'application des règles de concurrence. En Suède, par exemple, les tribunaux peuvent, à la demande de l'autorité nationale de la concurrence, interdire les mesures et comportements des communes et autres collectivités locales susceptibles d'entraver ou de fausser la concurrence, à moins que l'intérêt général les justifie. Dans beaucoup de pays, les autorités de la concurrence préparent aussi des rapports et des études sur les conditions de concurrence dans différents secteurs, lesquels peuvent faciliter la mise en évidence de distorsions diverses entre secteur public et secteur privé. Ces documents peuvent alors servir de point de départ pour l'élaboration d'une politique publique adaptée, au titre de laquelle l'autorité de la concurrence peut continuer d'apporter son concours dans le cadre du processus de définition et d'adoption. Enfin et surtout, les campagnes à l'intention du public menées par les autorités de la concurrence sont considérées comme un instrument très utile de promotion des politiques de neutralité concurrentielle.

- (11) *Étant donné le rôle nécessaire de nombreuses entreprises publiques dans la fourniture de services d'intérêt général, que ne peuvent assurer les entreprises privées, il importe d'imposer aux premières des cadres de gouvernement d'entreprise appropriés afin d'optimiser leur efficacité et de réduire les distorsions éventuelles sur le marché résultant de leur situation privilégiée.*

On reconnaît que les entreprises publiques jouent un rôle crucial dans la fourniture de biens et services d'intérêt général, tels que les services postaux, les services de transport ferroviaire, les services de santé, etc. En ce qui concerne ces activités, des motifs légitimes peuvent expliquer pourquoi il est généralement impossible qu'elles soient accomplies par des entreprises privées, dont l'objectif principal est la maximisation du profit.

La raison pour laquelle les entreprises publiques devraient être soumises à des règles appropriées de gouvernement d'entreprise est double. Tout d'abord, l'existence de règles adéquates de gouvernement d'entreprise et de transparence peut permettre de réduire au minimum, eu égard à la nécessité de s'acquitter de ses missions, tout avantage injustifié dont une entreprise publique est susceptible de bénéficier en raison de ses liens avec l'État. Ensuite, comme tout autre actionnaire, l'État souhaite que l'entreprise publique fonctionne de manière efficace et rentable.

Compte tenu de ce qui précède, les cadres de gouvernement d'entreprise devraient intégrer à l'intention des entreprises publiques des consignes claires et transparentes concernant les objectifs non commerciaux, une distinction adéquate entre les fonctions réglementaires et les fonctions actionnariales, ainsi que le gouvernement d'entreprise de chaque entreprise publique. Les concurrents doivent être informés avec précision et transparence des privilèges dont jouissent les entreprises publiques en raison de leur appartenance à l'État. Celui-ci devrait s'efforcer de parvenir à la neutralité concurrentielle de sorte que lorsqu'un traitement de faveur résulte d'une mission de service public, les distorsions sur le marché soient réduites au minimum dans la perspective d'une concurrence pleine et équitable. Il conviendrait que l'État formule les missions de service public en sa qualité de régulateur et non en tant qu'acteur du marché. Par ailleurs, il faudrait soumettre les entreprises publiques à des règles se traduisant par un renforcement de leurs systèmes d'audit interne, la création de systèmes de comptabilité fiables, un accroissement de l'efficacité des organes de direction, une amélioration des fonctions de contrôle, un renforcement de la transparence et la promotion des droits des actionnaires comme des parties prenantes.

À cet égard, il est également signalé que les Lignes directrices de l'OCDE sur le gouvernement d'entreprise des entreprises publiques datant de 2005 comportent de nombreuses recommandations avisées pour l'établissement d'un cadre de gouvernement d'entreprise adapté au secteur public.

I.

THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES

BACKGROUND NOTE

By the Secretariat

Over the last thirty years many countries have put into place large privatisation plans and transferred corporate control from public to private hands. However, state-owned enterprises (SOEs) remain important in key sectors of the economy (e.g., energy, telecommunication, postal and health services, etc.) in many OECD member as well as non-member countries. Across OECD countries many SOEs are providing products and services in competition with private sector businesses, or in areas where private sector businesses could potentially compete. This paper discusses the competitive distortions arising in competitive or potentially competitive markets due to the advantages that certain public sector businesses enjoy because of their government ownership.

This paper is structured in three main parts:

- An introductory section discussing the benefits and the limitations of SOEs and drawing an historical overview of the involvement of SOEs in the market.
- A section discussing the main competition issues arising from the presence of SOEs in competitive markets, including the incentives and ability of SOEs to engage in anti-competitive practices, the main anti-competitive practices that SOEs may adopt, the exemptions from antitrust enforcement that SOEs can call upon, and a description of a number of antitrust cases involving SOEs from the postal sector.
- An overview of some policy solutions other than *ex post* antitrust enforcement that have been considered to address the competition issues arising from the presence of SOEs in competitive markets.

The main conclusions from the paper are:

- Despite the extensive privatisation programs implemented in the 1980s and 1990s, SOEs are still widespread in many OECD member and non-member countries. To some extent the recent financial crisis has increased the level of state ownership in many countries, particularly in countries where governments have decided to nationalise private businesses deeply affected by the financial crisis as a form of rescue measure.
- In most instances, SOEs enjoy privileges and immunities that are not available to their privately-owned competitors. These privileges, which are not based on better performance, superior efficiency, better technology or superior management skills but are merely government-created, give SOEs significant advantages over their rivals. These privileges and immunities distort competition in the market between state-owned and privately-owned rivals.
- In many cases, SOEs are instructed by governments to pursue goals other than commercial ones and to carry out public service requirements. This may require the adoption of strategies, including pricing strategies, incompatible with profit-maximisation.

- Even if SOEs may be less concerned than private firms with generating profits, they may have even stronger incentives than private firms to engage in anti-competitive conduct. The broader set of SOEs' objectives can lead them to adopt pricing and other commercial strategies which may have anti-competitive effects. As opposed to privately-owned firms, SOEs may find it beneficial to foreclose competitors and expand the scope of the SOE's operations and its revenues even if such strategies generate losses. Examples of these strategies include pricing products below cost, cross-subsidisation between reserved and competitive activities raising rivals' operating costs or erecting barriers to preclude entry of more efficient rivals in the market.
- In a number of OECD countries, competition rules on abuse of dominance and monopolisation provide the basis for investigating and sanctioning business conduct by SOEs. These antitrust cases, mostly relating to pricing abuses, have shown the complexity of enforcing competition law against SOEs due to the difficulty in calculating the appropriate measure of costs for SOEs, particularly when the SOE's governance arrangements lack transparency or their accounting practices are poor.
- *Ex-post* antitrust enforcement, however, is only one answer to the concerns raised by SOEs. Other solutions can be taken into account. These include privatisation and exit from public ownership; reforms of SOEs' corporate governance and adoption of competitive neutrality frameworks (e.g. separating the SOE's commercial activities from non-commercial policy objectives; improving SOEs' standards of transparency and disclosure; increasing the independence and accountability of government representatives and accelerating appointments of independent and accountable directors, etc.); and using regulatory alternatives to command-and-control regulation and direct intervention.

1. Introduction

After introducing the notion of state-owned enterprises, the following sections will discuss the reasons that are often used to justify the government establishing SOEs and the reasons supporting a limited state presence in the market place. An historical overview of state intervention in the economy and of the SOEs' importance in the market in OECD member and non-member countries will follow.

1.1 State-owned enterprises

State-owned enterprises, also known as public enterprises, are as the name suggests entities controlled by the state rather than by private actors. There is no political agreement on how to define an SOE. The OECD does not offer such definition. The World Bank, however, uses the following definition: SOEs are "*government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services*".¹ At national level, there are a multitude of definitions of an SOE. Most of these definitions have been developed for administrative or national budget purposes or by state ownership agencies.² Even if there is no general agreement on what is an SOE, there is however some consensus on what are the key factors that distinguish SOEs from privately-owned firms:

¹ World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, 1995.

² Many of these definitions tend to be rather narrow in scope. From an analytical viewpoint this is problematic as it means that neither SOEs held at the sub-national levels nor unincorporated entities (according to national accounts definitions, "quasi-corporations") would normally be included. In some cases it also means that enterprises with a government ownership of less than 50% would be excluded.

- SOEs generally face softer budget constraints than private enterprises because of (a) the possibility of infusions of government cash; and (b) cheaper financing due to perceived government guarantees;
- SOEs are generally charged with the pursuit of a number of non-commercial objectives;³ and
- even where SOEs are not used by government to pursue public policy goals, they are shielded from the risk of takeovers and in practice will often be less commercially oriented than other companies because they are more easily captured by insider groups such as management or unionised staff.

Two considerations appear important to qualify the discussion in this paper. The first one concerns the corporate form of SOEs. The three main categories of SOEs are (1) statutory corporations which run close to or as part of a government department; (2) fully incorporated, state-controlled companies; (3) listed SOEs with a minority share floated on stock markets. The latter category is becoming more and more widespread and, as they are subject to both general company law, and securities laws, listing requirements etc. is much less problematic from a competition viewpoint. The second important consideration refers to the fact that adverse effects on competition due to the presence of an SOE in the market may not be necessarily related to the public ownership of SOEs. There may be other factors (e.g. concentrated market structures, market failures, natural monopolies, legal monopolies, etc.) that would equally apply to private companies in like circumstances and generate the same incentives to adopt anti-competitive strategies. This paper mainly addresses the incentives and the ability to behave anti-competitively of SOEs which operate in potentially competitive environments and of the so called “hybrid” SOEs, i.e. vertically integrated companies which enjoy monopoly rights in their value chain but face competition from privately-owned companies in other parts of the value chain.

1.2 *Reasons for the establishment of SOEs*

There are many reasons why governments decide to establish a market presence through a state-controlled entity.⁴ First, SOEs can be driven by political and ideological reasons. Some countries have nationalised entire industry sectors because it was thought that ensuring the state had a significant presence in the economy would achieve a better distribution of wealth and power within society.⁵ This ideological and political motive has been mainly present in countries whose policies rest on the belief that governments can instruct SOEs to reduce prices, particularly for goods that are in demand by lower income earners, and thereby influence the distribution of real income within society.⁶ That would not be possible via private firms as their pricing policies are defined to maximise profits in the interest of the firms’ shareholders. Moreover, governments can use SOEs to control strategic resources – an argument frequently used in some emerging economies – or to address deficiencies in sector regulation.

³ OECD Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19].

⁴ Toninelli, The Rise and Fall of State-Owned Enterprise, The Framework, in Toninelli eds. The Rise and Fall of State-Owned Enterprise in the Western World, Cambridge University Press, 2000.

⁵ OECD Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19].

⁶ Bös, Public Enterprise Economics: Theory and Application, Amsterdam, 1989; Stiglitz, The Economic Role of the State, Oxford, 1989; Shleifer, State Versus Private Ownership, 12 J. Econ Persp., 1998.

Social reasons can also be an important driver for developing a large presence of SOEs in the market.⁷ Governments use SOEs to guarantee employment, offer better working conditions to the labour force and improve industrial relations.⁸ This is why in times of crisis, state ownership is often used to rescue private businesses affected by deep, systemic, economic and financial problems.⁹ Such government bailouts of private firms in crisis are carried out for a variety of reasons, including the safeguard of jobs, industrial policy considerations and other strategic and political motivations.

Governments may decide to move into the market for economic reasons.¹⁰ Market failure is the most common reason that justifies public intervention in the economy. In a natural monopoly, for example, the presence of an unregulated private firm could lead to market exploitation in the form of increased prices¹¹, while through an SOE the government could ensure that products and services are offered to consumers under “fair” terms and conditions.¹²

Finally, through SOEs governments can promote economic growth in underdeveloped parts of the country or in industrial sectors. In this case, the argument is that a public enterprise can be used to make decisions on the basis of long-term considerations which may not be profit-maximising in the short-medium term.¹³ These are decisions that a privately-owned firm would not make.

1.3 *Reasons for limiting the presence of SOEs in the market*

The main reason put forward in the literature against a large state presence in the market is that SOEs are not as efficient as privately-owned firms. The assumption that private firms are generally driven by profit is not always valid for SOEs because some (or in a number of cases, all) of their functions may be based on non-commercial objectives.¹⁴ As just discussed, some objectives for SOEs may include employment, social goals, or wealth distribution.¹⁵ As a result, SOEs’ incentives can be significantly affected as is their performance on the market.

⁷ Wintrobe, *The Market for Corporate Control and the Market for Political Control*, 3 J.L. Econ. & Org, 1987.

⁸ Boycko, Shleifer and Vishny, *A Theory of Privatization*, 106 Econ. J., 1996.

⁹ OECD Report on Competition and Financial Markets (DAF/COMP(2009)11).

¹⁰ Grout and Stevens, *The Assessment: Financing and Managing Public Services*, 19 Oxford Rev. Econ. Pol’y, 2003; see also Sappington and Stiglitz, *Privatization, Information, and Incentives*, 6 J. Policy Analysis and Manag., 1987.

¹¹ While most Western European countries have opted for state ownership and management as a way to avoid diseconomies for consumers, some countries like the United States have decided to leave these activities to private firms but have introduced severe regulation of prices and terms of supply.

¹² OECD Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19].

¹³ Kaldor, *Public or Private Enterprises: The Issues to be Considered*, in Baumol eds., *Public and Private Enterprises in a Mixed Economy*, 1980.

¹⁴ SOEs may not exist to maximise shareholder (citizen) value. There may be non-commercial activities that an SOE pursues and potential political interference in the day-to-day management of SOEs. Worse, if the political elements of government decide SOE policy, this takes independence and authority away from the SOE board of directors.

¹⁵ There are obviously many situations in which SOEs play a significant role in the economy, but for the most part their strategies may not be based only on an efficiency rationale.

Box 1. SOEs' performance vis-à-vis privately-owned firms

The assumption that ownership *per se* creates an environment that is conducive to high or low performance is not proven, and empirical research on this point has yielded conflicting results. On the one hand, there are empirical works suggesting that when benchmarked against similar private firms, SOEs perform worse. A series of studies suggest that a relatively modest improvement in the efficiency of SOEs of 5% in a given country could free up financial resources of approximately 1-5% of a country's GDP. Conversely, if an SOE is poorly managed, it can increase the cost to governments and divert money from other priorities. For example, Shirley and Walsh in their literature review find that among 52 studies they survey, in only 5 of the 52 studies do SOEs outperform private firms.¹ On the other hand, part of the literature tends to emphasise the ambiguity of the empirical evidence of SOEs' performance *vis-à-vis* privately-owned firms.² These studies conclude that the assumption that SOEs are *inherently* less efficient and performing than private firms is not supported. Rather they conclude that SOEs' inefficiencies are mostly due to politicisation and mismanagement of state ownership.

SOEs may undertake certain policies which are not always in the interest of the ultimate beneficiary owners, i.e. the general public. In case of an SOE the state is the shareholder, but the tax payers are the ultimate beneficiary owners.³ This peculiarity adds an extra dimension to the classic agency problems (owners/managers; majority/minority shareholders) in that government officials' incentives may not be aligned with those of the general public in whose interest they are supposed to act. When dealing with SOEs, the types of market incentives used to align the interest of the firm with that of its shareholders are either non-existent or more limited.⁴

Another important efficiency difference is that in private firms the decision-making is less burdensome than in SOEs and there is more accountability based on the outcome of such decisions. It is more difficult to constrain public actors than private ones as there is less accountability for any errors made. Indeed, because SOEs have many sub-principal agent problems resulting from an overly complex chain of command,⁵ accountability is significantly reduced, especially when there are multiple principals.

¹ See, among others, López-de-Silanes, Determinants of Privatization Prices, 112 Q. J. Econ., 1997; Megginson, Nash and van Randenborgh, The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis, 49 J. Fin., 1994; Cuervo and Villalonga, Explaining the Variance in the Performance Effects of Privatization, 25 Acad. Manag. Rev., 2000 (noting that privatised firms perform better but with variable performance); Villalonga, Privatization and Efficiency: Differentiating Ownership Effects from Political, Organizational, and Dynamic Effects, 42 J. Econ. Behavior & Org., 2000 (providing a literature review of 153 studies on privatisation), Vagliasindi, Governance Arrangements for State Owned Enterprises, World Bank Policy Research Working Paper No. 4542, 2008; Shirley and Walsh, Public vs. Private Ownership: The Current State of the Debate, World Bank Policy Research Working Paper No. 2420, 2001.

² Aharoni, The Performance of State-Owned Enterprises, in The Rise and Fall of State-Owned Enterprise in the Western World, eds. Toninelli, Cambridge University Press, 2000.

³ Unlike privately-owned companies, there is a restricted ownership right in the SOE. Transferability of shares in private firms means that there is an exit for shareholders dissatisfied with managerial decision-making. This is an important control mechanism, as a lower share price creates a threat to management through the market for corporate control, which SOEs face to a much more limited extent. Hence, the various internal and external mechanisms that limit agency cost problems in private firms are far less effective for SOEs. The various traditional governance mechanisms may not fit an SOE that is not motivated by profit. Of course, citizens (the ultimate SOEs' shareholders) can always exercise their right to vote and influence the government policies, but the inability to transfer ownership rights results in state ownership inherently less efficient than private ownership.

⁴ Jensen and Murphy, Performance Pay and Top-Management Incentives, 98 J. Pol. Econ., 1990.

⁵ Governments may not provide the necessary oversight functions for an SOE or provide ineffective oversight by a number of different parts of government (see Scott, Strengthening the Governance and

In addition, managers in SOEs are less likely to be dismissed by the board for making a bad decision and the state is more likely to provide financial assistance to a mismanaged SOE. Theoretically private firms should perform better as incentives between management and shareholders are closer aligned towards better performance in firms.⁶

1.4 *Historical developments of state intervention in the economy*

The history of the state presence in the economy can be divided into three main periods.⁷ The first phase covers the period between the Renaissance and the end of the nineteenth century, the second phase covers the time period up to the Second World War, and the third phase spans the period from the Second World War to the present.

The early years up to the Industrial Revolution were characterised by occasional and sporadic nationalisations.⁸ However, after the Industrial Revolution, and especially in the nineteenth century, the relation between state and society, between public and private, began to change, along with the economic, political, and ideological changes. In more recent years, state behaviour with regard to the economy followed two opposite patterns: the European continental model with a stronger government intervention, and the American model with a limited direct intervention by the state in the economy and a much greater reliance on public regulation. The difference lies in whether priority is given to the “entrepreneurial” state or to the “regulative” state.

The main experiences relating to the European continental model – which was applied first in the state control policies that reached their peak before World War II and, after the war, in the establishment of the mixed economies of Western Europe – were 1) the French tradition supporting a strongly centralised and authoritative bureaucracy with strong powers over public order, public works, taxation policy and the law; 2) the new idealist vision of the state in Germany, with the belief that individual actions could not solve problems concerning the public interest; 3) the scientific socialism inspired by Marx; and 4) the influence of Keynesian economics. On the other side of the Atlantic, the control and regulation of economic activity was the outcome of a legal-administrative system in which British common-law tradition and French political, cultural, and juridical influences converged.⁹

Performance of State-Owned Financial Institutions, World Bank Policy Research Working Paper No. 4321, 2007).

⁶ Laffont and Tirole, *Privatization and Incentives*, 7 J. L. Econ. & Org., 1991; Sappington and Stiglitz, *Privatization, Information and Incentives*, 6 J. Pol’y Analysis & Mgmt., 1987; Shapiro and Willig, *Economic Rationales For the Scope of Privatization*, in *The Political Economy of Public Sector Reform and Privatization*, Suleiman & Waterbury eds., 1990.

⁷ The part on the historical background extensively draws upon the book *The Rise and Fall of State-Owned Enterprise in the Western World*, eds. P. A. Toninelli, Cambridge University Press, 2000.

⁸ Nationalisations occurred principally in industrial sectors that were considered strategic for national defence, such as metals and mining. Illustrious exceptions were the *manufacture royales* (cloth, glass-ware, tapestries, etc.) encouraged in France by Henri IV in the XVIth century, followed by similar experiences in Russia, Prussia, Austria and Spain.

⁹ Goodrich, *Government Promotions of American Canals and Railroads*. New York, 1960; North, *Government and the American Economy*, in *American Economic Growth: An Economist’s History of the U.S.*, eds. Davis, Easterlin, and Parker, New York, 1972; Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy*, Athens, Ohio, 1969; Toninelli, *Nascita di una Nazione: Lo Sviluppo Economico degli Stati Uniti (1780-1924)*, Bologna, 1993; Galambos, *State-Owned Enterprises in a Hostile Environment: The U.S. Experience in The Rise and Fall of State-Owned Enterprise in the Western World*, eds. Toninelli, Cambridge University Press, 2000.

The three decades following the Great Depression of the 1930's represented the golden age of nationalisation and the expansion of public enterprise in many industrial sectors. This is well illustrated in the rise of the Weimar Republic, during which time both the Reich and the individual states significantly enlarged their commercial interests, and became involved in power generation, chemicals, food, metals, coal and iron mining, construction and municipal building, insurance, finance and banking, agriculture, forestry, etc.. However, nationalisations reached their peak after World War II. This growth can be explained by the need in many countries¹⁰ to rebuild the domestic industry destroyed by the war and to rationalise the production system.¹¹ During this period, the main driver of nationalisation was to rescue firms or whole sectors of the economy. Accordingly, where the effects of the war had been less significant, such as Sweden and Norway, there was no real nationalisation process.

From the late 1970s waves of privatisation led to progressive erosion of the public sector. This trend in Europe increased after the political changes in the former Eastern Bloc.¹² Here the main causes for privatisation were the need to balance the budget deficit created by overburdened systems of the welfare state, and to revitalise and develop economies. At the same time, pressure was coming from other privatising countries worried about unfair competition from foreign state-owned and government-protected companies, and from international and supranational organisations concerned with limiting the disruptive effects on the process of international integration of national aid to SOEs.¹³

1.5 *The scope of SOEs' involvement in the economy*

Despite the large privatisation programs of the 1980s and 1990s, SOEs are still widespread in many economies¹⁴ and to some extent the recent financial crisis has contributed to an increase of state ownership which has been used as a form of industrial bailout or rescue package for those businesses effected by the financial crisis.

Work by the World Bank concludes that SOEs still play a critical role in many economies, particularly in the Middle East, Africa and Asia. A World Bank study from 1995 estimated that worldwide, SOEs account for between 8-10% of GDP in industrialised countries. In low income countries, SOEs account for a 15% share in GDP.¹⁵ These percentages can be significantly higher in less developed

¹⁰ Western European countries provide many examples of extensive nationalisation programs, e.g. in England, Italy, France, the Netherlands, and Spain. In Latin America, indirect state intervention to stimulate economic recovery was also fostered.

¹¹ Two important exceptions to the general trend, apart from the United States, were Germany and Japan. In Germany the post-war reconstruction involved the partial dismantling of the huge public structure established under the Nazi regime. In Japan the state intervention was indirect, and took the form of economic planning.

¹² The "transition economies" significantly affected the number of transactions in relation to privatisation, which reached 2.655 in 1988-93. See World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, 1995.

¹³ Bellini, *The Decline of State-Owned Enterprise and the New Foundations of the State-Industry Relationship*, in *The Rise and Fall of State-Owned Enterprise in the Western World*, eds. Toninelli, Cambridge University Press, 2000.

¹⁴ World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, 1995.

¹⁵ Kikeri and Kolo, *State Enterprises*, World Bank Note 304, 2006 (noting the prevalence of SOEs around the world); La Porta, Lopez-de-Silanes, Shleifer and Robert Vishny, *The Quality of Government*, 15 J.L. Econ. & Org. 222, 1999 (noting that SOEs are more common in countries which have a French civil code or Socialist legal origin).

countries and emerging economies.¹⁶ The most recent estimate of the size of SOEs in OECD countries is based on the OECD Indicators of Product Market Regulation (PMR)¹⁷ which estimate the government ownership in companies.

The most recent PMR figures are summarised in the table below.

Table 1. The extent of state control: an international comparison (2008)¹⁸

	OECD average	OECD emerging markets ¹	Euro area ²	United States	Russia
State control	2.03	2.54	2.19	1.10	4.39
Public ownership	2.91	3.46	3.08	1.30	4.28
- Scope of public enterprise sector	3.10	3.54	3.23	2.25	4.64
- Direct Control over business enterprises	2.86	3.67	2.93	0.68	4.19
- Government control in infrastructure sectors	2.76	3.18	3.08	0.99	4.02
Involvement in business operations	1.15	1.61	1.30	0.90	4.50
- Use of command and control regulation	1.52	1.94	1.88	1.30	4.00
- Price controls	0.78	1.29	0.71	0.50	5.00

Czech Republic, Hungary, Korea, Mexico, Poland, Turkey.

Austria, Belgium, Finland, France, Germany, Italy, Luxembourg, Netherlands, Portugal, Spain.

Note: Index scale of 0-6 from least to most restrictive.

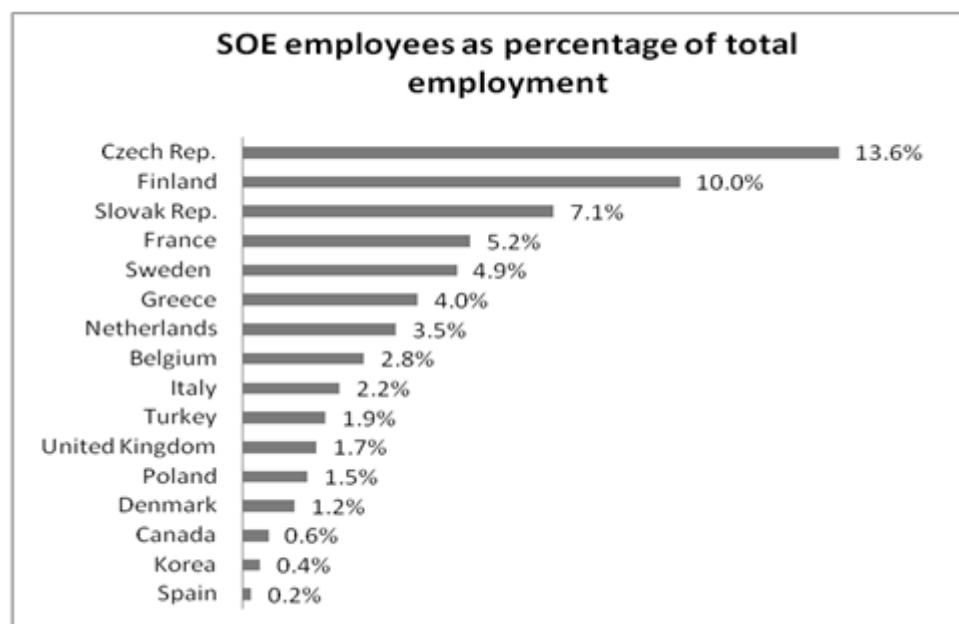
The publication *Corporate Governance of State-Owned Enterprises* (OECD, 2005) of the Working Group on privatisation and Corporate Governance of State-Owned Assets includes another relatively recent stocktaking of SOEs' weight in OECD countries. However, as statistical documentation was not the primary objective of the publication, the data collected at the time was, at best, cursory. In the publication, the most reliable indications of SOEs' importance can be derived from member countries' estimates of SOE employment as a per cent of economy-wide employment. This data, which is available for 16 OECD countries, is reproduced in the table below. From the table it appears that the share of the total national payroll in OECD countries employed in SOEs in 2003 varied from near-zero to 13%. This would lend itself to the assumption that SOEs' share of the respective economies may also be found within this range.¹⁹

¹⁶ According to the OECD, SOEs represent a significant part of the biggest emerging economies, in terms of share of GDP and employment: one third for Russia and China; between 10 and 20 % for India; just under 10% for Brazil (of both GDP and employment). Moreover, as a result of high national growth rates, the value added of SOEs has grown significantly in absolute terms. It has doubled in China and increased by 70% in India since the mid-1990's [see OECD, *The Role of State-Owned Enterprises in the Economy: An Initial Review of the Evidence*, DAF/CA/PRIV(2008)9].

¹⁷ The Indicators of Product Market Regulation are prepared by the OECD Economics Department as part of its work for the OECD Economic Policy Committee.

¹⁸ Extract from OECD Economic Survey of the Russian Federation, July 2009.

¹⁹ However, the figures need to be interpreted with extreme caution. For instance, it is not clear that all respondents to the 2003 questionnaire applied the same – or even comparable – definitions of SOEs. For example, it seems counterintuitive that Poland's share of SOE employment is less than a fifth of the similar figures for the Czech Republic. Also, countries like Korea and Spain which retain significant public utilities under government control have apparently applied a narrow definition of SOEs as they demonstrated an employment share beneath 0.5%. Similarly, Finland only appears so high because it applied a special definition of SOEs that brought Nokia, with a small state minority share, under the SOE umbrella.

Figure 1. SOE employees as percentage of total employment²⁰

In Eastern Europe and the former Soviet Union, the public sector share of GDP varies from as little as around 20% (Czech Republic, Slovakia and Hungary) to as much as 80% (Belarus). Twenty of twenty six transition countries were in the range of 20 to 40% of GDP for the state sector share of GDP.²¹ These numbers do not reflect recent developments around the world where the financial crisis has caused a number of countries to nationalise some struggling firms.

Box 2. State-owned enterprises in Russia²²

The Russian Federation exemplifies how extensive the presence of the state in the economy can be. Reflecting the legacy of the Soviet era as well as the backlash after the chaotic early years of transition to a new system, state control in the Russian economy is extensive, via both direct state ownership and control over economic activity. State-owned enterprises are found across a wide range of sectors and often occupy a dominant position in their industry. Furthermore, there is a pervasive blurring of the line between the public and private sectors, arising not only from the extensive role of state-owned enterprises but also by close ties between government (at all levels) and major private firms.

In recent years, the policy of the Russian government with respect to state-owned enterprises has been aimed at increasing its stake in strategic enterprises to a controlling level and divesting minority stakes of firms in non-

²⁰ OECD, Corporate Governance of State-Owned Enterprises, 2005.

²¹ World Bank, Economies in Transition: An OED Evaluation of World Bank Assistance, 2004. Please note that the state sector is different from the SOE sector as it includes military, administration, police, hospitals, etc.

²² This box summarises the conclusions of the OECD Economic Survey of the Russian Federation, July 2009. See also OECD, The Role of State-Owned Enterprises in the Economy: An Initial Review of the Evidence, DAF/CA/PRIV(2008)9.

strategic sectors. Reflecting this, the number of majority stakes of the federal government increased from 25% of total holdings in 2005 to 61% in 2008.²³ The government has also established a number of state corporations that have the special legal status of a non-commercial organisation and are not subject to the bankruptcy law nor controlled by the Audit Chamber of the Russian Federation.²⁴ Disclosure rules for these entities are also less stringent than for joint-stock companies.

According to data from the Federal Service for State Statistics, 9% of all registered firms were fully state owned in 2007 while 2% had mixed ownership. However, SOEs tend to be bigger than private-sector companies so these figures understate the extent of government control over economic activity²⁵. A recent statistics shows that 58% of SOEs in 2006-08 employed more 1000 people, compared with 30% in enterprises with a different form of ownership.²⁶ In terms of the employment share, around 10% of all employees worked for fully state-owned companies in 2007 with another 7% employed by companies with mixed state and private-sector ownership.²⁷ Despite widely held perceptions that the size of the state enterprise sector is increasing in Russia, both measures have been in decline over recent years, although the bulk of privatisations were carried out in the 1990s. At the same time, the government has been increasing its level of ownership among the largest Russian listed companies. In particular, the share of market capitalisation of the Russian equity market controlled by the state has increased from 24% in 2004 to 40% in 2007.²⁸

A related development is the emergence of large state-controlled conglomerates which have, in some cases, been established through the consolidation of existing SOEs. As well as being relatively large in size, these SOEs operate across a diverse range of sectors, many of which are inherently competitive.²⁹

2. Competition issues related to state-owned enterprises

Governments may create an uneven-playing field in markets where an SOE competes with private firms,³⁰ as they have a vested interest in ensuring that state-owned firms succeed. Accordingly, despite its role as regulator the government may, in fact, restrict competition through granting SOEs various benefits not offered to private firms. While in some areas this preferential treatment will be direct and obvious, there may also be indirect preferential treatment through other means. SOE regulation may also be arbitrary with the governments' only guiding principle being that of protecting its SOEs over all other

²³ Sprenger, The Role of State Owned Enterprises in the Russian Economy, 2008, paper written for the OECD Roundtable on Corporate Governance of SOEs.

²⁴ Sprenger The Role of State Owned Enterprises in the Russian Economy, 2008, for a more detailed description.

²⁵ In a survey of 822 Russian enterprises conducted by the Higher School of Economics Moscow and the Institute of Economic Research of Hitotsubashi University Tokyo in 2005, the median number of employees of SOEs was 880 compared to 414 for private firms. The corresponding figures for sales volume was 350 million roubles and 195 million roubles respectively. Accordingly these statistics indicate that SOEs are, on average, roughly twice as large as private sector firms. See Sprenger, The Role of State Owned Enterprises in the Russian Economy, paper written for the OECD Roundtable on Corporate Governance of SOEs.

²⁶ Survey conducted by the Institute of Economy in Transition, Moscow. Cited in OECD Economic Survey of the Russian Federation, July 2009.

²⁷ OECD Economic Survey of the Russian Federation, July 2009, Figure 5.5A.

²⁸ Troika Dialog, Who owns Russia, Corporate Governance Annual 2008.

²⁹ Indeed, with the exception of Poland, Russian SOEs are more ubiquitous across different sectors of the economy than in all other OECD countries. See OECD Economic Survey of the Russian Federation, July 2009, Table 5.2 and Figure 5.A2.1.

³⁰ Fox, An Anti-Monopoly Law for China - Scaling the Walls of Protectionist Government Restraints, 75 Antitrust L.J. 173, 2008.

goals.³¹ High barriers to entry may result, limiting the ability of the market, through competition, to serve as a check on the poor decision-making of SOEs.

The following sections will discuss some of the differences between SOEs and privately-owned firms and the consequences that these differences may have in terms of SOEs' incentives and ability to engage in anti-competitive market strategies. This section will also review some of the most common anti-competitive practices that have been investigated by competition authorities around the world and it will briefly discuss the conditions for the application of the state action defence to anti-competitive conduct by SOEs which are mandated by law. Finally, this section will discuss some antitrust cases brought by competition authorities around the world involving anti-competitive practices by SOEs in the postal sector.

2.1 *Differences between SOEs and private companies*

In most instances, SOEs enjoy privileges and immunities that are not available to their privately-owned competitors. These privileges give SOEs a competitive advantage over their rivals. Such advantages are not based on better performance, superior efficiency, better technology or superior management skills but are merely government-created and distort competition in the market.³² For example, preferential treatment by the government in the protection of their SOEs may take the form of favourable lending rates vis-à-vis private firms thereby reducing the SOE's cost of capital. This may have the effect of an implicit subsidy. Governments may use public resources to provide for lower borrowing rates than market rates. SOEs also may benefit from discriminatory regulation. SOEs may not be required to pay taxes or may be immune from antitrust. Moreover, SOEs may benefit from information asymmetries as they have access to data that is not available to private competitors. A multi-product SOE may also use economies of scale and scope to create high barriers to entry that effectively foreclose competition by efficient competitors.

The following sections will discuss some of these artificial advantages.

2.1.1 *Monopoly power and exclusive rights conferred to SOEs*

In many cases, governments entrust SOEs with exclusive or monopoly rights over some of the activities that the SOE is mandated to pursue. This can be seen, for example, in postal services, utilities and other universal services that the state decided to pursue through state-controlled entities. In the United States for example, the federal government grants the US Postal Service exclusive monopoly over both the delivery of letters and the use of customers' mailboxes. Similarly, Amtrak has a monopoly over the carriage of passengers on intercity railroad routes.³³ The creation of a monopoly may have implications as to how the monopoly power is used by the SOE. In particular, the ability of the SOE to use the monopoly rent to cross-subsidise other activities where it faces competition from privately-owned enterprises can be problematic.

2.1.2 *Preferential access to credit and other financial services*

SOEs may have access to favourable credit rates or enjoy government-provided credit guarantees which reduce their cost of borrowing and enhance their competitiveness vis-à-vis their privately-owned

³¹ Irwin and Yamamoto, Some Options for Improving the Governance of State-owned Electricity Utilities, World Bank Energy and Mining Sector Board Discussion Paper Series No. 11, 2004.

³² For a general discussion on special privileges and immunities enjoyed by SOEs see Geddes, Case Studies of Anticompetitive SOE Behavior, in *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes eds., Hoover Institution Press, 2004.

³³ See Geddes, Case Studies of Anticompetitive SOE Behavior, in *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes eds., Hoover Institution Press, 2004.

rivals. In the United States, for example, the Postal Service is allowed to borrow directly from the Federal Financing Bank which guarantees public bonds at interest charges which are lower than the market rates for private companies of comparable risk.³⁴ The federal government also guarantees the US Postal Service debt. Even in cases where SOEs do not explicitly enjoy preferential credit rates or possess government guarantees, the market generally views SOEs as enjoying implicit guarantees from their government. This allows SOEs the benefit of significant cost savings through preferential credit conditions.

2.1.3 *Captive equity*

As opposed to privately-owned firms, SOE's equity is somewhat "locked in". In other words, while the stock of privately-owned firms is tradable and corporate control can be transferred to others, control of an SOE cannot be transferred as easily. Therefore, where an SOE performs badly, those who have funded the operation of the SOE, i.e. the taxpayers, cannot withdraw their funds.³⁵ The inability to transfer ownership rights will result in a number of advantages for SOEs, such as:

- SOEs are generally absolved from paying dividends or indeed any expected return to shareholders to induce them to invest in the company; this allows SOEs to incur losses without fear of the owners selling their equity stake;
- SOEs will be more inclined to engage in anti-competitive (and rarely profitable) exclusionary pricing strategies, such as predation, without fear of falling stock prices when losses are incurred due to the below-cost pricing.
- The SOEs' management will have less incentives to operate the company efficiently as it is not subject to the threat of takeovers and generally impervious to the disciplining effects of capital markets, unlike the management of their private competitors.

2.1.4 *Exemption from bankruptcy rules*

Another privilege which is often enjoyed by SOEs is the exemption from bankruptcy rules. Because equity capital is locked, SOEs can generate losses for a long period of time without fear of going bankrupt.³⁶ This lack of a bankruptcy constraint provides SOEs with a significant competitive advantage over their privately-owned competitors. In particular, the fact that SOEs are not subject to bankruptcy rules will create incentives for them to become involved in competitive ventures on favourable terms and therefore compete unfairly and inefficiently with privately-owned companies.³⁷ In addition, privately-owned competitors will be discouraged from entering the marketplace knowing that they would face unfair competition from an SOE.

³⁴ MacAvoy and McIssac, *The Current File on the Case for Privatization of the Federal Government Enterprises*, in *Deregulation and Privatization in the United States*, Hume Papers on Public Policy 3, eds. MacAvoy, Edinburgh University Press, 1995.

³⁵ Taxpayers can of course exercise their voting rights and attempt to change the government preferences and its policies.

³⁶ According to Geddes, in the United States Amtrak has lost \$908 million in 2000, \$819 million in 2001, and \$752 million in 2002; the US Postal Service lost \$200 million in 2000, \$1.7 billion in 2001 and \$676 million in 2002, but both firms continue to operate indicating an ability to sustain long term losses. See Geddes, *Case Studies of Anticompetitive SOE Behavior*, in *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes eds., Hoover Institution Press, 2004.

³⁷ Crew and Kleindorfer, *Privatizing the U.S. Postal Service*, in *Mail @ the Millenium*, eds. Hudgins, Washington D.C., Cato Institute, 2000.

2.1.5 *Information advantages*

SOEs may also benefit from information asymmetries. Information asymmetries occur when SOEs have access to data and information which are not available to their private competitors or only available to a limited extent. Some public sector agencies may have the power to collect data for public purposes. Private sector businesses rely on these public sector agencies to get access to that data. Public sector businesses may have the advantage of using this data on terms and conditions that are more favourable than those offered to the private sector.

2.1.6 *Direct and indirect subsidies*

Some SOEs receive direct subsidies from their government or benefit from other public forms of financial assistance to sustain their commercial operations. For example, in the United States, as of 2002, Amtrak had received over \$44 billion in direct federal subsidies since it began its operations.³⁸ Such government intervention lowers the SOE's operating costs and provides it with a significant competitive advantage over its privately-owned rivals. Direct subsidies, which involve a direct cash transfer to the recipient, are the most simple but arguably the least frequently used form of supporting an SOE. Indirect subsidies are more subtle and more common, and can significantly distort competition between SOEs and their privately-owned competitors. Indirect subsidy is a broad term, covering any form of subsidy that does not involve a direct money transfer. For example, the favourable tax regimes or exemptions from certain taxes that are enjoyed by SOEs are tantamount to selective government subsidies. These exemptions artificially lower the SOEs' costs and enhance their ability to price more efficiently than competitors subject to a full tax regime.

2.1.7 *Other government granted privileges and immunities*

Regulatory exemptions may apply to SOEs, lowering their operating costs. In some cases, SOEs have been excluded from antitrust liability or are not subject to the same costly regulatory regimes as private firms. These exemptions may range from compliance with disclosure requirements to securities regulators, to exemptions from building permit regulations or from zoning regulations, to exemption from local or national taxes. In the United States, for example, the US Postal Service has the power of eminent domain; it is immune from paying parking tickets for its vehicles and from paying the vehicle registration fee; it can purchase fuel tax free and it does not have to apply for building permits or conform to local zoning regulations.³⁹

2.2. *SOEs' incentives to behave anti-competitively*

In many cases, SOEs are requested to pursue objectives other than pure profit maximisation.⁴⁰ However, this does not prevent SOEs from acting as aggressively and competitively on the market place as a private, profit-maximising firm would. In fact, while SOEs may be less concerned than private firms with generating profits, they may have even stronger incentives than private firms to engage in anti-competitive conduct.⁴¹ In fact, even if an SOE's management is not focussed primarily on maximising profits, it may

³⁸ Geddes, Case Studies of Anticompetitive SOE Behavior, in *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes eds., Hoover Institution Press, 2004.

³⁹ Geddes, Case Studies of Anticompetitive SOE Behavior, in *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes eds., Hoover Institution Press, 2004.

⁴⁰ For example, when setting rates the US postal service is required to consider fairness, equity and simplicity of its rate structure, as well as the relationship between prices, costs and the value of the service offered.

⁴¹ Sappington and Sidak, Competition Law for State Owned Enterprises, 71 *Antitrust Law Journal* No. 2, 2003. See also Lott, Are Predatory Commitments Credible? Who Should the Court Believe?, 1999.

still have an interest in expanding the scope and scale of the SOE's operations. This is because in many cases the SOE's performance (and consequently the management success) is inferred from the size of the operation that the managers are responsible for. This preference for expanding the scale and scope of the SOE's operations suggests that management can be more concerned about the SOE's revenues than its profits.⁴² Therefore, unlike a private firm that aims to maximise its profits, an SOE may find it equally advantageous to expand its revenues even when costs increase significantly as a result.

This can have consequences for an SOE's incentives to behave anti-competitively. An SOE may find it advantageous to pursue anti-competitive strategies that help it expand its own output and revenue even if those practices do not generate profits. Therefore, the different objectives that an SOE may pursue as compared to a privately-owned competitor have a direct impact on the SOE's pricing strategy. In particular, Sappington and Sidak conclude that an SOE that maximises a combination of profit and revenues effectively discounts the marginal costs of producing its services more than a private, profit-maximising firm.⁴³ In other words, the SOE will be less concerned than its private competitor about the extra cost it incurs when it expands its output. Consequently, the reduced focus on profits can lead the SOE to set particularly low prices for products on which it faces intense competition to expand its output and revenues. Indeed, an SOE is more likely than a privately-owned competitor to set prices below its marginal costs even absent a predatory intent.⁴⁴ According to Sappington and Sidak, an SOE is particularly likely to price below cost when its focus on profits is more limited and when demand is more price sensitive, or both.⁴⁵

2.3 *SOEs' ability to behave anti-competitively*

Having established that SOEs' reduced focus on profits may affect the SOE's *incentives* to act anti-competitively, the literature has identified a number of reasons why SOEs also have the *ability* to do so.⁴⁶

- Where a firm, for whatever reason, does not seek to strictly maximise profits, it may be able to sustain prices below cost for extended periods of time (or even indefinitely),⁴⁷ as this loss-making strategy can be supported by either prices above cost in some other segment or by some other source of funds.⁴⁸
- While privately-owned firms who decide to price below costs must have the prospect of recouping their short-term losses by raising prices above the competitive level in the future once

⁴² Rees, A Positive theory of the Public Enterprise, in *The Performance of Public Enterprises: Concepts and measurements*, in Marchand, Pestieau and Tulkens eds., 1984; Baumol, *Business Behaviour, Value and Growth*, 45, 1959.

⁴³ Sappington and Sidak, *Competition Law for State Owned Enterprises*, 71 *Antitrust Law Journal* No. 2, 2003.

⁴⁴ Lott, *Predation by Public Enterprises*, *Journal of Public Economics* 43, 1990.

⁴⁵ Even if profit declines as a consequence of the below cost pricing, revenue can still increase.

⁴⁶ Sappington and Sidak, *Competition Law for State Owned Enterprises*, 71 *Antitrust Law Journal* No. 2, 2003.

⁴⁷ Even if below cost pricing does not lead to prices subsequently being raised above cost, it may still be of public policy concern, due to the effect on productive efficiency. Distortionary pricing might induce a more efficient firm to leave or to not enter the competitive market. See OECD Report *Promoting Competition in Postal Services*, 1999 (DAFFE/CLP(99)22).

⁴⁸ OECD Report *Promoting Competition in Postal Services*, 1999 [DAFFE/CLP(99)22]; Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19]

the predatory strategy has succeeded,⁴⁹ recoupment of the losses is not necessarily required for an SOE. Unlike private companies, SOEs have a substantial ability to carry losses forward in the future and more importantly via direct support from public resources. For multi-product SOEs, recouping the of losses may happen during the predatory phase simply by raising prices in markets where there is a statutory monopoly.

- While for private firms it is difficult and costly to raise barriers to entry for competitors that will be attracted by the high prices during the recoupment period, SOEs may benefit from statutory provisions which allow them to raise the entry costs for competitors. This can be the case if the SOE is allowed to define the scope of its statutory monopoly, and consequently the scope of the services which are supplied in competition.
- Finally, as discussed above, SOEs may enjoy a number of privileges and immunities, other than direct financial help from the government, which that facilitate the recoupment of any loss incurred in anti-competitive pricing practices.

2.4 *Anti-competitive practices by SOEs*

The characteristics of SOEs discussed above can lead them to adopt pricing and other commercial strategies which may have anti-competitive effects. These strategies include pricing products below costs, raising rivals operating costs or erecting barriers to preclude entry of more efficient rivals in the market.

2.4.1 *Predation*

Government support of SOEs through government created immunities and privileges allow SOEs to price below marginal cost.⁵⁰ This creates a situation, unlike the typical antitrust predation case, which does not require recoupment for successful SOE predation.⁵¹ When predator firms benefit, this reduces consumer welfare. When SOEs operate at the same time in reserved and non-reserved markets, the concern is that the SOE can exclude competitors by pricing below costs and cross-subsidise to the competitive sector from the reserved sector without the need to recoup its losses in the post-predation period.

In some jurisdictions predatory behaviour does not violate the law unless the predator could recoup its losses,⁵² the principle being if loss recoupment is not possible then competition has not been harmed. However, public enterprises do not always aim to maximise profits and therefore do not recover losses in the same way as private companies. Therefore, the ability of SOEs to engage in non-recoupment predatory pricing raises important issues as to whether there is any consumer harm if prices do not go up as a result

⁴⁹ Areeda and Turner, Predatory pricing and Related Practices Under Section II of the Sherman Act, 88 Harvard Law Review, 1975; OECD, Report, Predatory Foreclosure, 2005 [DAF/COMP(2005)14].

⁵⁰ Lott, Are Predatory Commitments Credible?: Who Should the Courts Believe? 77 (1999) (arguing “government enterprises also face higher returns from below-cost pricing since they benefit not only from the long-term reduction in competition, but also from the short term increase in their output required to undertake the below-cost pricing strategy.”).

⁵¹ Sappington and Sidak, Competition Law for State-Owned Enterprises, 71 Antitrust L.J., 2003. An increasing economic literature notes that predatory pricing may be rational in other settings for profit maximising firms as well. See Bolton, Brodley and. Riordan, Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L. J., 2000 (describing that “modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational” and thus that “the consensus view in modern economics [is] that predatory pricing can be a successful and fully rational business strategy.”).

⁵² OECD, Report, Predatory Foreclosure, 2005 [DAF/COMP(2005)14].

of the predation and if there should be a different legal standard for SOE's predatory strategies. The supporters of enforcement of antitrust laws against non-recoupment predatory pricing by SOEs argue that when an SOE can pursue a successful predation strategy, this reduces the resources of a competitor to innovate or operate. The "but for" case is that there might have been even lower prices and more innovation. Successful predation also may have reputational effects if a firm competes in multiple product markets. This reputational effect creates a credible threat that allows firms to reap the benefits of predation even in markets in which they did not predate. This in turn negatively affects the overall market.⁵³

2.4.2 *Raising rivals' costs and raising barriers to entry*

Predation must be distinguished from raising a rival's costs.⁵⁴ Predation requires antitrust laws to balance short-term losses against long-term benefits. In raising rival's costs, the goal is to increase the price of output for rivals rather than decrease price. A successful costs raising strategy would enable the dominant firm to ensure its average costs increased less than the incremental costs of a rival. This allows a dominant firm to create an asymmetric impact on costs relative to its rival and to induce competitors to reduce their output or increase their prices.⁵⁵ In this way, the SOE will see the demand for its product increase leading to broader economies of scale for its operations.

The ultimate goal of raising rivals' cost differs from predation. A successful costs raising strategy does not require the firm with higher costs to exit the market, merely to allow the dominant firm to raise its price above the competitive level.⁵⁶ As Sappington and Sidak suggest, "[c]onsequently, even though an SOE may value the profit that its anti-competitive activities can generate less highly than does a private profit-maximising firm, the SOE may still find it optimal to pursue aggressively anti-competitive activities that expand its own output and revenue."⁵⁷

Given that an SOE may have revenue rather than profit-enhancement objectives, it can more effectively absorb higher costs than its privately-owned rivals.⁵⁸ When an SOE can pursue an effective strategy for raising a rival's costs, it can expand the scope of its operations. Predation or raising rivals' cost takes away the ability for competitors to invest in increased research and development and limits their ability to roll out new products and services and processes that increase dynamic gains from innovation.⁵⁹ SOEs may have particular incentives to raise the costs of their rivals. As the rivals' marginal cost increases,

⁵³ Milgrom, Predatory Pricing, in *The New Palgrave Dictionary of Economics*, Eatwell, Murray Milgate and Newman eds., 1987.

⁵⁴ Cope, *Regulating Market Activities in the Public Sector*, 7 OECD J. Comp. L. & Pol'y, 2005; Sappington and Sidak, *Competition Law for State-Owned Enterprises*, 71 Antitrust L.J., 2003.

⁵⁵ Martin, *Advanced Industrial Economics*, 2d ed., 2002.

⁵⁶ Krattenmaker and Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J., 1986.

⁵⁷ Sappington and Sidak, *Competition Law for State-Owned Enterprises*, 71 Antitrust L.J., 2003.

⁵⁸ Scheffman and Higgins, *20 Years of Raising Rivals' Costs: History, Assessment, and Future*, 12 Geo. Mason L. Rev., 2003.

⁵⁹ Fox, *US and European Merger Policy--fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices*, 10 Geo. Mason L. Rev., 2002 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 50-53 (D.C. Cir. 2001)).

it may be costly to the SOE but it simultaneously increases the demand for the SOE's product or service. Since the SOE's main objective is to maximise revenues, the SOE benefits from the increased demand.⁶⁰

Strategies to raise rivals' costs can take a variety of dimensions. For example: incumbent can attempt to prevent rivals from gaining access to essential infrastructures or inputs or increase the market price of those inputs by purchasing excessive amounts of the input;⁶¹ confronted with new environmental regulations, incumbent companies can lobby hard to obtain grandfather clauses;⁶² incumbents may lobby the government to adopt restrictive regulation that would make entry into the market more costly, unprofitable or even impossible for new entrants; incumbents can tailor their product or service such that consumers cannot easily switch to a rival's product;⁶³ or companies can vigorously pursue patent extension applications and one of the objectives of this behaviour could be to impose additional (litigation and other) costs on rivals to delay or thwart their entry.

2.4.3 *Cross-subsidisation*

Many SOEs are active in both a monopolised market and in one or more competitive markets where the SOE competes with privately-owned rivals. In this case, the SOE is in a position to exploit the economies of scope and cost complementarities between the two markets. One of the most straightforward ways for an SOE to use its privileges in order to exclude rivals is to shift costs away from the competitive activities and charge them to the monopolised activities.⁶⁴ If an SOE is allowed to cross-subsidise, it can price below costs and reduce its competitors' share of the market or force them out of business or deter the entry of new competitors. This is the case even if the competitors may be more efficient than the SOE. Moreover, a statutory monopoly prevents an efficient entrant in the second competitive market from achieving the same economies of scope as the SOE, thus lowering its marginal cost for supplying the competitive product. In addition to the economies of scope, the SOE may also indirectly benefit through economies of scale. If the SOE can set prices below cost by cross-subsidising between competitive and monopolised activities, the SOE output of the competitive product may increase. If that happens, the SOE will experience economies of scale that its rivals cannot achieve. The increased output will result in a decline in the SOE's unit cost of operation in the competitive market and will cause a further shift in sales from the rivals to the SOE's product.

2.4.4 *Strategic choice of inefficient technology*

If an SOE is in a position to strategically chose the technology, e.g. it has a choice among various production technologies that it can implement, it may use this opportunity to operate with an inefficient technology that secures a relatively low marginal cost at the expense of a particularly high overhead (fixed) costs.⁶⁵ The reason for pursuing such a strategy would be to secure an abnormally low level of marginal

⁶⁰ Sappington and Sidak, Incentives for Anticompetitive Behavior by Public Enterprises, 22 Rev. Indus. Org., 2003.

⁶¹ Sappington and Sidak, Competition Law for State-Owned Enterprises, 71 Antitrust L.J., 2003.

⁶² These clauses allow the incumbent businesses to continue to operate under the older rules for a length of time while forcing any new business to meet the standards immediately. This can create significant cost asymmetries between incumbents and entrants with considerable harm to competition.

⁶³ Such restrictive contracts, with lock-in periods, have been found in industries such as telecommunications, natural gas, electricity generation and banking.

⁶⁴ OECD Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19].

⁶⁵ Sappington and Sidak, Incentives for Anticompetitive behaviours by Public Enterprises, Review of Industrial Organization, 22, 2003.

costs in order to relax a binding prohibition on pricing below costs.⁶⁶ The less profit-oriented the SOE is, the higher its incentive to over invest in capital because the higher it values revenue relative to profit, the more it will benefit from an expanded output and revenues that can be achieved with a lower price. Hence, the greater is the technological inefficiency the lower its pricing will be.

2.5 *Antitrust exemptions applicable to SOEs⁶⁷ – The State Action Doctrine*

Many activities of state-owned enterprises are established by law or find their justification in public policies. Public entities may give SOEs the power to set prices or other terms and conditions in their commercial activities. The question is whether such activities, which can entail serious price or output restrictions, should be subject to antitrust scrutiny although they are compelled or authorised by law. Under the *state action defence* there is no antitrust liability if the challenged business conduct (by both privately-owned and state-owned firms) is determined by lawful public measures.⁶⁸

The Supreme Court of the United States first addressed antitrust liability for conduct directed by the government in 1947 in *Parker v. Brown*. In *Parker*, a group of raisin producers agreed on output restrictions, an agreement subsequently ratified by a state department of agriculture. The Supreme Court held that anti-competitive conduct is immunised from antitrust enforcement if two cumulative conditions are met:

- The conduct “must flow from a clearly articulated and affirmatively expressed state policy”; and
- Be subject to “active state supervision”.

Under *Parker*, therefore, a conduct that follows the direction of clearly articulated and affirmatively expressed state policy and is subject to active state supervision, is protected from antitrust liability. The state action defence has been applied in a number of cases after *Parker*, including trade association cases, in which US courts have refined and clarified the interpretation of the two *Parker* conditions. In particular, courts have applied close scrutiny to the meaning of ‘clear articulation of a state policy’, refusing to extend the defence to every governmental activity; courts have also closely scrutinised the application of the ‘active supervision’ criteria, objecting to the defence where such supervision is *de facto* rarely or never exercised.⁶⁹ For example, in *Retail Liquor Dealers Association v. Midcal Aluminium Co.*,⁷⁰ the defence was denied to a trade association’s ‘price posting’ system because, although the system was established by law, it was not properly supervised as prices continued to be left to the discretion of the participating dealers.

⁶⁶ See also Baseman, Open Entry Costs and Cross-Subsidization in Regulated Markets, in Gary Fromm eds., *Studies in Public Regulation*, Cambridge MA, The MIT Press, 1981; Brennan, Cross-Subsidization and Cost Misallocation by Regulated Monopolies, *Journal of Regulatory Economics*, Vol. 2, 1990.

⁶⁷ This paper does not address the possible exemptions from antitrust enforcement that SOEs can benefit from under specific sector regulations. In the United States, for example, the US Postal Service enjoyed an express immunity from antitrust liability for conduct undertaken at Congress’ command under the Postal Reorganisation Act of 1970. The new Postal Reorganization Act of 2007, however, explicitly allows for the application of antitrust law to the US Postal Service for competitive services.

⁶⁸ Muris, State Intervention/State Action - A U.S. Perspective, October 2003, George Mason Law & Economics Research Paper No. 04-18; Delacourt, and Zywicki, The FTC and State Action: Evolving Views on the Proper Role of Government, *Antitrust Law Journal*, Vol. 72, No. 3, 2005.

⁶⁹ *FTC v. Ticor Tiles Inc.*, 504 US 621 (1992), cert. denied, 114 S.Ct. 1292 (1994).

⁷⁰ 445 US 97 (1980).

In Europe, the European Court of Justice (ECJ) has considered the issue of state measures with anti-competitive effects and their relationship with the competition provisions in the EC Treaty since the seventies⁷¹. Most cases, however, discuss the state action doctrine, which outlaws state measures hampering the effectiveness of the EC competition rules applicable to undertakings, rather than the state action defence, which immunises private behaviour fully determined by lawful public measures from the competition rules. As early as 1977, the ECJ concluded that: “*while it is true that Article [82] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness*”,⁷² that is, a wide obligation to abstain from depriving Article 82 of its effectiveness. Likewise, continued the Court, “*Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles [81] to [89] of the Treaty*”.⁷³

The scope of the duty of Member States not to enact or maintain state measures which may affect the application of the competition rules of the Treaty was clarified over the years by the European courts in a number of cases. In *Eycke*,⁷⁴ the ECJ re-stated the principle established in *GB-Inno-BM* that the EC Treaty requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules and clarified that “*such would be the case, [...], if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [81] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere*”.⁷⁵

As for the state action defence, which is the natural complement to the state action doctrine, the Court held that the Member states’ obligations under the Treaty are *distinct* from the antitrust liability of the private entities under the EC competition rules.⁷⁶ According to the Court, the state action defence is very narrow and it does not exempt private entities from antitrust liability as such. Under EC law, companies are not responsible if their anti-competitive behaviour is required by a public measure and companies had no space for ‘autonomous conduct’. The ECJ held that such defence is based on “*the general Community-law principle of legal certainty*”.⁷⁷ However, the undertakings are responsible under the EC competition rules and may incur fines if the public measure “*merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct*”. In such cases, antitrust liability can be established but the national legal framework may be taken into account as a ‘mitigating factor’ to reduce the fine imposed.⁷⁸

⁷¹ Cruz, *The State Action Doctrine*, in Amato & Ehlermann, *EC Competition Law – A Critical Assessment*, Hart Publishing, 2007.

⁷² Case 13/77, *GB-Inno-BM*, [1977] ECR 2115, para 31.

⁷³ *Id.* at para 33.

⁷⁴ Case 267/86, *Van Eycke*, [1988] ECR 4769.

⁷⁵ See para 16. The meaning of terms such as ‘requiring’ or ‘favouring’ an illegal conduct and ‘reinforcing’ the effects of such conduct or ‘delegating’ to private entities public regulatory functions was clarified in a number of cases: Case C-2/91, *Meng*, [1993] ECR I-5751; Case C-245/91, *Ohra*, [1993] ECR I-5851; Case C-185/91, *Reiff*, [1993] ECR I-5801.

⁷⁶ Case C-198/01, *Consortio Industrie Fiammiferi*, [2003] ECR I-8055, para 51.

⁷⁷ *Id.* at para 54.

⁷⁸ *Id.* at para 56-57.

2.6 *Antitrust enforcement – Examples from the postal sector*

In general, the enforcement of competition law is neutral as to ownership of companies. Competition law applies to conduct of both private and public economic entities. Most OECD countries do not exclude public sector businesses from competition law (except a few specific enterprises that are exempted in some countries). However, there may be partial exemptions that protect some types of public sector businesses or some aspects of their business activities. Commercial activity by non-corporatised government-related entities in competition with the private sector is often enough to make those entities “undertakings” or otherwise subject them to competition law jurisdiction.

In a number of OECD countries, competition rules on abuse of dominance and monopolisation have provided the basis for investigating and sanctioning business conduct by SOEs. These cases, mostly related to pricing abuses, have shown the complexity of enforcing competition law against public entities. The difficulty in calculating the appropriate measure of costs of public business entities and to benchmark these costs against similar private firms can be daunting, particularly when the governance arrangements for the government businesses lack transparency or their accounting practices are poor. These difficulties combined with conflicting incentives between SOEs and privately-owned firms, can result in a variance in the application of antitrust standards between private companies and SOEs.

The postal sector is a good examples of an industry sector where anti-competitive practices by SOEs are common. This is due to a number of reasons. First, in many countries, the level of government involvement in the postal sector is significant. Most postal services are (or used to be) government-owned entities. Second, the SOEs are very large companies with significant market presence. Third, many public postal operators still enjoy monopoly rights over a number of postal services (such as letter delivery) and at the same time compete with private firms in a number of other markets (such as parcel or express mail delivery). In the postal sector, moreover, complaints of cross-subsidisation and predatory pricing are common.

2.6.1 *Deutsche Post*

On March 2001, the Commission issued its first Article 82 EC decision in the postal sector, finding that the German postal operator, Deutsche Post AG (DPAG), had abused its dominant position in the market for business parcel services by granting fidelity rebates and engaging in predatory pricing.⁷⁹ DPAG was fined EUR 24 million in respect of the foreclosure resulting from its long-standing scheme of fidelity rebates. No fine was imposed in relation to predatory pricing given that the economic cost concepts used to identify predation were not sufficiently developed at the time.⁸⁰ From the investigation, it transpired that DPAG was using revenues from the letter delivery monopoly to finance below-cost selling in the open market for business parcel services. The Commission decided that any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector. Any cost coverage below this level is to be considered predatory pricing. The investigation revealed that DPAG, for a period of five years, did not cover the incremental costs for providing the mail-order delivery service. This decision was of a particular interest, as the

⁷⁹ Case COMP/35.141 (OJ L 125, 5.5.2001).

⁸⁰ To address the concerns raised by the Commission during the investigation, DPAG undertook to create a separate company to supply business parcel services which would be free to procure the ‘inputs’ necessary for its services either from DPAG (at market prices) or from third parties or to produce these inputs itself. In addition, DPAG undertook that all inputs it supplies to the new company would be supplied to its competitors at the same price and under the same conditions.

European Commission considered that a derogation under Article 86(2) EC⁸¹ was not applicable because termination of the fidelity rebates and an increase in DPAG's price to cover at least the incremental cost of providing mail-order parcel services would not prevent DPAG from complying with its statutory obligation to perform a service of general economic interest ('carrier of last resort').

In the same year, the European Commission issued another decision against Deutsche Post AG⁸² finding that DPAG had abused its dominant position in the German letter market by intercepting, surcharging and delaying incoming international mail which it erroneously classified as circumvented domestic mail (so-called A-B-A remail). In particular, the Commission found that DPAG had abused its dominant position in the German market for the delivery of international mail in four ways: (i) discriminating between different customers, (ii) refusing to provide its delivery service, (iii) charging an excessive price for the service offered and (iv) limiting the development of the German market for the delivery of international mail and of the UK market for international mail bound for Germany. During the course of the proceedings, DPAG had given an undertaking to the effect that it would no longer intercept, surcharge or delay international mail of the type to which the case related. Because of the legal uncertainty that prevailed at the time of the infringement, the Commission decided to impose on DPAG a 'symbolic' fine of EUR 1.000.

2.6.2 US Postal Service

In the in *United States Postal Service v. Flamingo Industries*⁸³ the Supreme Court of the United States was called to decide if the US Postal Service (USPS) enjoyed antitrust immunity. When the USPS decided to terminate a contract with Flamingo Industries, a supplier of mail-sacks, Flamingo sued in U.S. district court claiming that the Postal Service declared a "fake emergency in the supply of mail sacks" so it could give no-bid contracts to cheaper foreign manufacturers without allowing U.S. companies to compete for them. Flamingo claimed that with its behavior the USPS had sought to suppress competition and created a monopoly in mail sack production and that this violated federal antitrust laws (among other charges). The district court dismissed the antitrust claim reasoning that the federal government is protected by sovereign immunity. The Ninth Circuit Court of Appeals reversed on the antitrust immunity count. It ruled that the 1970 Postal Reorganization Act (PRA) waived the Postal Service's sovereign immunity and that it could be sued under federal antitrust laws as a "person". The Supreme Court ruled that USPS was not subject to antitrust liability. According to the Court, in both form and function, the USPS is not a separate antitrust person from the United States but is part of the government, and as such it is not controlled by the antitrust laws.⁸⁴

⁸¹ Under Article 86(2) EC, "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 this Treaty, 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 Community."

⁸² Case COMP/36.915 (OJ L 331, 15.12.2001).

⁸³ 540 U.S. 736 (2004).

⁸⁴ To come to this conclusion, the Court applied the two-step analysis of *FDIC v. Meyer* (510 U. S. 471, 484). Under *Meyer* the Court held that to establish antitrust liability a two-step analysis must be applied. First, one has to check if there is a waiver from sovereign immunity. If there is, the second step is to check whether the substantive prohibitions of the Sherman Act apply to an independent establishment of the executive branch of the United States. According to the Court, in the case of USPS, Meyer's first step was met because the PRA's "sue-and-be-sued" clause (39 U. S. C. §401) effects a waiver of sovereign immunity for actions against the Postal Service. However, Meyer's second step for finding liability--whether the Sherman Act's substantive prohibitions apply to the Postal Service--was not satisfied. The

Hence the Supreme Court concluded that, absent an express congressional statement that the Postal Service can be sued for antitrust violations despite its status as an independent establishment of the government, the PRA does not subject the Postal Service to antitrust liability. The Court found this conclusion consistent with the nationwide, public responsibilities of the Postal Service, which has different goals from private corporations, the most important being that it does not seek profits. It also has broader obligations, including the provision of universal mail delivery and free mail delivery to certain classes of persons, and increased public responsibilities related to national security. Finally, the Court found that the Postal Service has powers and characteristics which makes it more like a government than a private enterprise, including its state-conferred monopoly on mail delivery, the powers of eminent domain and the power to conclude international postal agreements.

For purposes of this paper, it is interesting to note that the Supreme Court in *United States Postal Service v. Flamingo Industries* took a different position than some of the literature discussed in previous sections. In particular, the Court said that:

“On the other hand, but in ways still relevant to the non- applicability of the antitrust laws to the Postal Service, its powers are more limited than those of private businesses. It lacks the prototypical means of engaging in anti-competitive behavior: the power to set prices. This is true both as a matter of mechanics, because pricing decisions are made with the participation of the separate Postal Rate Commission, and as a matter of substance, because price decisions are governed by principles other than profitability”.

Under this reasoning, an SOE does not have an incentive to drive competitors out of business. However, as discussed earlier, economic theory suggests that an SOE may be driven by purposes other than profit maximisation. An SOE, for example, could also be motivated by revenue maximisation and by an interest in increasing the scope and scale of its services and the number of its employees. The reasoning of the Supreme Court also disregards the possibility of no-recoupment predation due to government ownership and of raising rivals’ cost strategies.

Since the Supreme Court decision in *United States Postal Service v. Flamingo Industries*, and in part as a consequence of the Court judgment, the new Postal Reorganization Act of 2007 explicitly allows for the application of antitrust law to the USPS for competitive services.

2.6.3 *Belgian Post (De Post-La Poste)*

In 2001,⁸⁵ the European Commission found that the Belgian postal operator De Post/La Poste had abused its dominant position by making a preferential tariff in the general letter mail service subject to

Sherman Act imposes liability on any “person,” defined “to include corporations and associations existing under or authorized by the laws of ... the United States” (15 U. S. C. §7). In particular the Court observed that, if the definition of “person” included the United States, the government would be exposed to liability as an antitrust defendant, a result Congress could not have intended. Although the antitrust statutes were later amended to allow the United States to bring antitrust suits, Congress did not mean to change the statutory definition of “person”. The Court also argued that for purposes of the antitrust laws, USPS was not a separate person from the United States. The PRA’s designation of the Postal Service as an “independent establishment of the executive branch of the government of the United States” (39 U. S. C. §201), was not consistent with the idea that the Postal Service is an entity existing outside the government. Indeed, the designation indicates just the contrary. The PRA gives the Postal Service a high degree of independence from other government offices, but it remains part of the government.

⁸⁵

Case COMP/37.859 (OJ L 61, 2.3.2002).

acceptance of a supplementary contract covering a new business-to-business ('B2B') mail service⁸⁶. This new service competed with the 'document exchange' B2B service provided in Belgium by Hays plc, a private operator in postal services based in the United Kingdom. Hays complained that La Poste was trying to eliminate the Hays' document exchange network, which it had been operating in Belgium since 1982. In particular, Hays argued that it could not compete with the tariff reduction offered by La Poste in the monopoly area and was accordingly losing most of its traditional clients in Belgium.

According to the European Commission, by tying the tariff reduction in the monopoly area to the subscription of its B2B service, La Poste made it impossible for Hays to compete on a level playing field because it could not offer a similar advantage. The effects of this tying practice were to eliminate Hays from the Belgian market. The overnight cross-border exchange of documents between Belgium, the United Kingdom and France offered by Hays would cease if Hays disappeared from the Belgian market. The infringement therefore had a negative impact on trade between Member States and sent a strong negative signal to foreign competitors, who wished to do business in Belgium. As La Poste exploited the financial resources of the monopoly it enjoys in general letter delivery in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission imposed a fine of EUR 2.5 million.

2.6.4 *Japan Post*

The Japanese postal service has also been investigated for predatory pricing claims. In a private suit,⁸⁷ both the Tokyo District Court and Tokyo High Court rejected the plaintiff's predatory pricing claim against Japan Post. The resolution of the case turned around the question of whether the plaintiff had brought sufficient evidence to prove its predatory pricing claim. As the Japan Federal Trade Commission ("JFTC") had not bought a case of its own first, the plaintiff could not obtain the necessary cost data from the defendant to prove its claim that Japan Post had priced its services below cost.

This case is, however, interesting because the High Court argued that Japan Post's cost in commercial parcel delivery should not be calculated on a "stand-alone" basis (i.e., separately from the cost incurred for the provision of the regulated postal delivery). The Court argued that it is economically rational for an enterprise, when it enters into new business, to make use of its resources in its existing business. In 2006, the JFTC published an opinion on the case as a study group report, arguing that a "standalone" approach should be used for allocating common fixed costs when a monopolist in market A entered market B.⁸⁸ The Tokyo High Court in Yamato rejected the "standalone" cost method because it was not sufficiently established as a legal test.

3. Policy solutions to the competition issues raised by SOEs

SOEs and private firms compete in many markets and in a variety of commercial activities. The first part of this paper reviewed the differences in terms of objectives and incentives between SOEs and private firms and showed how SOEs can benefit from government-granted privileges and immunities which are not available to privately-owned firms. All such privileges and immunities can confer an SOE significant advantages which can be used in anti-competitive and exclusionary behaviour. Solutions to these concerns

⁸⁶ B2B mail services are offered only to a closed group of subscribers for the mutual exchange of business-related documents. B2B mail services offer overnight delivery and time-certain pick-up and delivery. B2B mail therefore differs significantly from the general letter mail services covered by the monopoly. La Poste and Hays compete in providing B2B services to insurance companies in Belgium.

⁸⁷ Yamato v. Japan Post, Tokyo High Court decision, 2006 (Ne) No. 1078, LEX/DB Legal Database No. 28140088 (28 November 2007).

⁸⁸ <http://www.jftc.go.jp/e-page/pressreleases/2006/July/060721.pdf>.

can vary considerably, and *ex post* competition enforcement is only one of them. Other solutions can include:

- renewed privatisations;
- improving the corporate governance of SOEs, separating commercial and non-commercial activities;
- improving standards of transparency and disclosure for SOEs;
- increasing the independence and accountability of government representatives and accelerating appointments of independent and accountable directors on SOE boards;
- using regulatory alternatives to command-and-control regulation and direct intervention;
- reducing barriers to entrepreneurship and increased competition.

Some of these alternatives will be briefly discussed below.

3.1 *Privatisation*

The most effective way to eliminate the SOEs' opportunities to engage in anti-competitive practices is for the government to divest all or part of the SOEs' share to ensure that the company is subject to a stronger market discipline.⁸⁹ Past privatisation experiences in many developed, transition and developing countries have shown that private ownership typically leads to improvements in firm profitability, output and efficiency.⁹⁰ Privatisations of SOEs, however, should be preceded by the establishment of an appropriate regulatory framework.⁹¹ This framework should include effective antitrust rules and enforcement to ensure a healthy degree of competition and specialised regulation to oversee activities where an element of monopoly is likely to persist.⁹²

⁸⁹ Some countries like the United States have always limited the level of federal, state and local government involvement in commercial activities to the minimum. This approach recognises that it is virtually impossible to eliminate all of the advantages public sector businesses receive due to government ownership. For example, governments are unlikely to allow their businesses to face the commercial disciplines of potential bankruptcy. There is often a temptation for governments to intervene in the operation of these businesses to achieve political objectives, customers may trust these businesses more because they are government owned, and there is at least a perception among private sector competitors that the close links between these businesses and the government provides the business with advantages.

⁹⁰ See, among others, Megginson and Netter, *From State to Market: A Survey of Empirical Studies on Privatisations*, *Journal of Economic Literature*, Vol. 39, No. 2, 2001; Kikeri and Nellis, *An Assessment of Privatisation*, *The World Bank Research Observer*, Vol. 19, No. 1, 2004.

⁹¹ OECD, *Privatisation in the 21st Century: recent Experiences of OECD Countries*, Report on Good Practices, [DAF/CA/PRIV(2008)8/FINAL].

⁹² According to Prof Whish, "The problems for competition policy that arise where former monopolists are 'released' into the free market are obvious: in so far as there is no effective competition, which is particularly likely to be the case in the early years, they may be able to charge excessive prices; and they may also be able to adopt tactics intended to foreclose new competitors from entering the market. At the same time it is necessary to ensure that former monopolists provide adequate services of an appropriate standard." (Whish, *Competition Law*, Sixth Edition, Oxford University Press 2009).

Since 1980, close to one trillion US dollars worth of state-owned assets have been privatised throughout the world, more than three-quarters of which has been in the OECD member countries.⁹³ During the late 1970s and the 1980s, the poor performance of the state-owned enterprises had come to be acknowledged and various attempts at improving performance and reducing the financial burden of these enterprises were undertaken. However by the mid 1980s and particularly in the 1990s the policies increasingly focussed on the change in ownership. In pursuing privatisation, the governments sought to meet multiple and often inter-related objectives.

Box 3. Main policy objectives of privatisation in the OECD member countries⁹⁴

Fiscal objectives: The need to reduce budget deficits and debt has provided a strong impetus for governments to shed non-core activities in order to reduce expenditures arising from subsidies to loss making state-owned enterprises (SOEs), to generate windfall gains, to reduce debt, and realise potential future tax revenues arising from improvements in corporate efficiency and performance of former SOEs.

Attracting investment: Fiscal constraints have meant that state-owned enterprises were often starved of capital. The need to attract investment for the SOEs, in particular for the maintenance and improvement of infrastructure services, and to meet the demand for new and growing services such as telecommunications has been an important privatisation objective in the OECD.

Improving corporate efficiency and performance of state-owned enterprises: Improving the efficiency and performance of state-owned enterprises has been one of the key objectives of privatisation in OECD countries. Through the change in ownership governments have sought to provide companies with clearer goals, better incentive structures for management and staff, and exposure to market forces and freedom to fail.

Introducing competition into monopolistic sectors of the economy: One of the important objectives of privatisation is to introduce competition into sectors dominated by state-owned monopolies. Overall competition can be enhanced through pre-privatisation sector restructuring where governments replace state-owned monopolies with several competing firms and, in the case of network industries, establish third party access regimes and enforce

⁹³

Privatisation in the majority of OECD countries did not begin in earnest until the 1990s. Prior to that only a few OECD countries undertook large scale privatisation programmes. Except for the UK and France (in Europe) and countries such as New Zealand, Mexico and Canada (outside of Europe) the programmes were rudimentary and rather narrow in their scope. In the UK, the sale of BP in 1979 signalled the launch of large-scale privatisation that continued throughout the 1980s and well into the mid 1990s. In France, a large privatisation programme began in 1986, but due to political reasons came to a halt in 1988 and remained dormant until 1993. Outside of Europe countries such as New Zealand and Mexico embarked upon massive privatisation programmes, but while these were large relative to the size of their respective economies and had a broad scope spanning a wide range of industries and activities, they were quite small relative to the scale and scope of privatisation that took place during the 1990s. Finally, while Japan's privatisation activities were large in terms of the proceeds raised, they remained very limited in scope and have been largely concentrated in a few sectors, namely the railways and telecommunications sector. However, by the middle of the 1990s, privatisation had gained momentum in most OECD Member countries. In Europe activity accelerated especially among those who had joined the Economic and Monetary Union, as they embarked on an ambitious economic reform programme in order to meet the requirements of the convergence criteria of the Maastricht Treaty. In Australia, the Commonwealth and state governments embarked on a large scale privatisation programme which emphasised competition and pre privatisation restructuring. OECD privatisations were also boosted by the massive economic and institutional overhaul of Member countries such as Poland, Czech Republic, Hungary and Slovak Republic, as well as that of the former East Germany. During this period OECD privatisation proceeds in each year averaged at around 0.3% of the GDP.

⁹⁴

Privatising State-Owned enterprises in the OECD Area: An Overview of Policies and Practices. [DAFFE/CA/PRIV(2002)1].

competition rules effectively.

Capital market development: Privatisation has served as a vehicle to achieve capital market objectives such as increasing share ownership, and making equity markets deeper and wider. For many OECD countries the need for well developed equity markets as a means of channelling investments to corporations and the desire to strengthen the institutional investor presence in the domestic equity market underscores the importance of capital market development as an explicit objective of privatisation.

Reducing the role of state in the economy: Reducing the role of the state in the economy has been one of the policy objectives of privatisation in a number of OECD countries, along with some or all of the above noted objectives. However, in the special case of the former transition economy, the transformation from a planned to a market economy with limited state participation has in itself been the primary objective.

The inter-related and at times conflicting nature of privatisation objectives has meant that important policy choices and trade-offs need to be made. For example, privatisation proceeds would often be maximised at the expense of the objective of introducing competition, because monopoly rights can sell at a premium. But empirical evidence suggests that efficiency improvements are greater when firms are divested into a competitive sector. Therefore, revenue maximisation could end up being in conflict with efficiency improvements. Similarly, the policy objective of broader share ownership can be in conflict with a revenue maximisation objective given the costs of under pricing associated with such a policy. Good practice normally calls for exposing as much as possible of an SOE's value chain to competition no later than at the time of privatisation. Whether or not effective competition is feasible when competition-exposed elements of the value chain remain vertically integrated with monopolistic elements may vary between individual cases. However, if privatised SOEs with monopoly elements are allowed to remain vertically integrated then this further highlights the need for independent regulation.

3.2 *Competitive neutrality frameworks*

While privatisation eliminates competition distortions, it is not necessarily the preferred way for all countries. Competitive neutrality reforms provide an alternative for dealing with an SOE's competitive advantages when the government does not wish to privatise. For governments that are adopting privatisation, competitive neutrality policy can also form part of the interim strategy for preparing the market for competition by levelling the playing field between state-owned and privately-owned enterprises, that is to eliminate the advantages that SOEs enjoy because of their government ownership. Countries have developed a range of options for dealing with competitive neutrality issues, influenced by their circumstances and policy priorities.⁹⁵

Competitive neutrality frameworks focus on reforming the environment that public and private entities compete in. Introducing a competitive neutrality framework involves a systematic review of the legislative and administrative landscape in which SOE's operate, and a reform of that landscape so that the conditions in which SOE's operate are as closely matched to those faced by private sector competitors as possible. Competitive neutrality also improves the transparency and accountability of government business activities by presenting their costs in a comparable manner to the private sector. In other words, competitive neutrality aims to promote efficient competition by minimising competitive advantages government business activities may enjoy over their private sector competitors simply because they are government owned. They improve transparency by clearly specifying the conditions under which private firms compete against government business activities.

⁹⁵

For a broader discussion on the principle of competitive neutrality see OECD Report on Regulating Market Activities by the Public Sector, [DAF/COMP(2004)36] and the Issues Paper prepared by the Secretariat on Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises [DAF/COMP/WP3(2009)3].

An explicit targeted competitive neutrality framework will draw together those components of competition laws and governance reforms that redress competitive neutrality problems and extend the reform program to cover smaller government business activities and any remaining competitive advantages. C neutrality frameworks also include *ex post* mechanisms to monitor the implementation and effectiveness of the competitive neutrality framework and rectify any remaining issues. Despite appearing to be a catch-all solution, CNF's are not, as yet, the common procedure in many countries.

The source of the competitive neutrality problem must be considered. If the competitive distortions arise from a deliberate decision by a government to favour its businesses, then advocacy may be the most effective approach. Alternatively, if the competition distortions are the unintended consequences of other government policies, then transparency rules and specific competitive neutrality policies may be more effective. Nearly all countries use advocacy, to some extent, to encourage efficient and fair competition between public and private sector businesses. As we have seen above, some countries are using remedies that deal with competitive neutrality problems *ex post*, for example applying competition law to require public sector businesses to cease actions that have a detrimental impact on competition. The use of competition law can help address competitive neutrality problems where the government businesses fall within the scope of competition law because they are of sufficient size, have sufficient impact on the market and are not covered by any specific exclusions. Such competition law-based approaches can stimulate a competitively neutral environment, but can only deal with specific problems after they have occurred.

Other countries deal with competitive neutrality issues *ex ante*, through policies that change the governance arrangements of public sector businesses to reduce the scope of the advantages these businesses have, changing and enforcing procurement policy in a way that equalises competition between the public and private sectors, or reforming the approach to subsidising public services to ensure that these subsidies do not advantage public sector businesses over private sector businesses. The effectiveness of these policies depends on whether they cover all government organisations providing commercial services in competitive or potentially competitive markets, whether the policies address all the sources of competitive advantages and disadvantages, and how the policies are implemented and enforced.

3.2.1 *Competitive neutrality in the European Union*⁹⁶

Some countries have special competition-law rules to deal with the effects of distortions in competition between government and private entities. Countries that use the EU model often have a provision like Article 86 EC, setting the rules for entities that perform services of general economic interest or are granted special or exclusive rights. Broadly, Article 86 EC provides that the services performed by government entities, or private entities on behalf of the government, should be subject to the competition provisions of the EC Treaty unless the application of such rules obstructs the performance of the particular tasks assigned to them under the law.

⁹⁶

See the paper submitted by European Commission to the OECD Competition Committee Roundtable on Regulating Market Activities by the Public Sector, [DAF/COMP(2004)36].

Box 4. Article 86 EC

1. 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 this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. 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 this Treaty, 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 Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

The first characteristic of the EU approach is that the principle of neutrality was recognised in the Treaty of the European Union for more than 50 years. Article 86 of the Treaty clearly establishes that public companies fall under the scope of competition law, and that member states of the EU are not entitled to do anything contrary to this rule. Public companies are also subject to rules on monopolisation and state aids (subsidies). The second characteristic of the system is that the Treaty empowers the European Commission with the tools to tackle problems concerning the economic activities of public sector companies. The Commission can require the member states to apply competition rules to public companies. And, if a public company infringes competition rules, the Commission itself can issue a decision against that company requiring it to stop the conduct, and can impose fines. If the public company infringes competition law with the assistance of the government, or due to governmental influence (for example the government requiring the company to charge abusive prices), the Commission can address a directive or a decision to the member state, requiring it to stop these practices.

In addition to Article 86 EC, the European rules on state aid and subsidies apply to all subsidies and state aids that member states or other public bodies provide to any company, public or private. They are particularly important in the context of public companies, given the specific relationship public bodies have with public companies. State aids cover not only capital injections or grants, but also tax reductions or tax holidays, reductions in the social security costs and warranties. State aids are generally forbidden, though there are exceptions. The member states are obliged to notify the Commission if they plan to grant state aid to any company. The Commission then scrutinises the planned measure and decides whether to authorise it. Another tool used by the Commission to achieve competitive neutrality between public and private firms is the transparency directive,⁹⁷ which concerns the financial relationships between public bodies and public companies. The transparency directive requires separate accountability. Public companies that have both commercial and non-commercial activities need to separate their accounts to demonstrate how their budget is divided between commercial and non-commercial activities. These tools have been used in many sectors, including the postal, energy and transport sectors.

⁹⁷

Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980, p. 35). This Directive has been amended several times, most recently by Directive 2005/81/EC (OJ L 312, 29.11.2005, p. 47) and codified by Commission Directive 2006/111/EC of 16 November 2006 (OJ L 318, 17.11.2006, p. 17-25).

3.2.2 *Competitive neutrality in Australia*⁹⁸

Australia has a specific competitive neutrality policy but it is less integrated with competition policy than in Europe. Australia's competitive neutrality policy is based on the principle that government businesses operating in competitive or potentially competitive markets should not enjoy net competitive advantages over the private sector because of their public ownership. The competition authority, the Australian Competition and Consumer Commission (ACCC), does not play a major role in implementing the competitive neutrality principle. The National Competition Council and the Productivity Commission are in charge of implementation.

Australia had already begun corporatizing government businesses by the time of a 1993 review of competition policy – the Hilmer Report. That review found that while subjecting government business activities to the provisions of competition law was important, this would not address all concerns about the cost advantages and pricing policies of government businesses. For example, market distortions would still arise where government businesses were exempted from certain taxes or received subsidies. It also found that where problems arose from within governments, it was appropriate to address them through ex-ante policy measures. Therefore, the governmental agreement in 1995, signed by all Australian governments, introduced competitive neutrality policy.

The responsibility for implementing this policy rests with government policy agencies for several reasons. Firstly, competitive neutrality is not based in competition law; rather it has been developed and implemented within government. At the national level, the policy is the responsibility of the Australian Treasury. Secondly, it seeks to encourage policy implementation. It takes an educative approach such that competitive neutrality policy and enforcement bodies work with governments to achieve implementation. It also recognises that individual governments may retain some flexibility, for example where they are at different stages of reform, while competition law is applied uniformly across all jurisdictions. Thirdly, sanctions are provided for through a system of financial penalties upon recommendation by an independent body, the National Competition Council.

Compliance measures at the federal level are consistent with state arrangements. A Complaints Unit was established in the independent Productivity Commission, which is the primary advisor to the Australian Government on microeconomic reform issues. There have been relatively few formal complaints. These arrangements do not restrict the power of the ACCC to take action under competition law.

The goal in Australia is to remove any distortions in a market that arise because a business is publicly owned. The policy applies: where there is a market; to significant government business activities (this is where the gains are greatest); to all levels of governments; and only to the extent that the benefits outweigh the costs of the implementation. It does not apply to non-business, non-profit activities. The key principles under competitive neutrality are:

- taxation neutrality, which requires that a government business is not advantaged by taxation exemptions or advantages not available to its competitors;
- debt neutrality, which requires that a government business is subject to similar borrowing costs to its competitors;

⁹⁸

See the paper submitted by Australia to the OECD Competition Committee Roundtable on Regulating Market Activities by the Public Sector, [DAF/COMP(2004)36].

- regulatory neutrality, which requires that a government business is not advantaged by operating in a different regulatory environment to its competitors;
- commercial rate of return, entities are required to earn a return sufficient to justify a long-term retention of assets in the business and pay commercial dividends; and
- prices reflect costs, which requires agencies undertaking significant business activities as part of a broader range of functions to set prices to reflect full cost attribution for their business activities, in part to ensure that public funds provided for non-business, non-profit activities are not used to subsidise business activities.

Australia's approach also addresses where governments seek to subsidise non-commercial service obligations. Such subsidies may enable government businesses to achieve a competitive advantage, for example cross-subsidise other activities. In Australia, non-commercial service obligations must be clearly identified and funded so that prices reflect full cost attribution. The National Competition Council assesses whether commercial service obligations have been clearly specified and funded appropriately.

Australia's competitive neutrality policy has worked well for the following reasons: (1) it deepened the reform of public enterprises in Australia; (2) it has been implemented by large governmental businesses, which led to significant efficiency gains; and (3) it substantially eliminated the advantages of government ownership.

3.3 *Improved corporate governance of SOEs*

Competitive neutrality problems could be reduced by reforming the governance arrangements of government businesses so that these businesses have a commercial focus, operate efficiently and face all normal business costs. Such reforms could significantly reduce the advantages and disadvantages these businesses have compared with their private sector competitors. The characteristics of state-owned enterprises raise specific challenges for their governance. Firstly, SOEs are often protected from two major threats that are essential in policing management behaviour: the threat of takeover and bankruptcy. Secondly, accounting and disclosure may be oriented towards public expenditure control and therefore may not meet the private sector standards. Without appropriate governance arrangements to counter these characteristics, the management of SOEs may have more discretion afforded to them than private firms and demands on the government's budget for investment and expansion programmes may become excessive.

Governments of OECD countries have faced complex issues and trade-offs in reforming the corporate governance of state-owned enterprises. Achieving a sound organisation and effective exercise of the ownership function within the state administration requires an ownership policy that is active while at the same time avoiding undue interference in day-to-day management. In addition, the chain of accountability needs to ensure that the boards and management of SOEs make responsible decisions with appropriate information disclosure to the public. For this it is important to create the maximum transparency around non-commercial objectives of SOEs, including on their subsidisation, if any. It is also necessary to clearly separate state ownership from the regulatory and policy-making roles and ensure that efficient decision making processes are in place.

Box 5. OECD Guidelines on corporate governance of state-owned enterprises

The OECD Report on Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries⁹⁹ provides a comprehensive inventory of current practices and recent experiences in reforming governance

⁹⁹

Corporate Governance of State Owned Enterprises: a Survey of OECD Countries, OECD, 2005.

arrangements for SOEs in OECD countries. Reform has focused on a number of areas including the way in which the boards of SOEs are nominated, their composition, functions, and the way they perform their main tasks. Disclosure rules, for the SOEs themselves and the ownership entity within government, have also been reformed in a number of countries as have provisions to protect minority shareholders, where they exist, and the way in which SOEs relate to stakeholders.

Incentive structures and the ways in which senior executives in SOEs are nominated and remunerated has also been the target of reform. Provided they are soundly structured and effectively implemented, governance reform can improve SOE efficiency and access to capital, while contributing to fair competition by ensuring a level-playing field between companies in the private and public sectors. Improved corporate governance of SOEs can also strengthen overall public governance through better transparency and improve fiscal discipline. OECD experience has also shown that good corporate governance of SOEs is an important prerequisite for effective privatisation, since it makes the enterprises more attractive to prospective buyers and enhances their commercial value.

To help governments meet the challenges of public sector governance the OECD has published guidelines on the corporate governance of SOEs.¹⁰⁰ In broad terms, these guidelines cover the following areas: i) Ensuring an Effective Legal and Regulatory Framework for SOEs; ii) The State Acting as an Owner; iii) Equitable Treatment of Shareholders; iv) Relations with Stakeholders; v) Transparency and Disclosure; vi) The Responsibilities of Boards of State-Owned Enterprises. These guidelines complement the OECD's Corporate Governance Principles (Revised 2004) and have been widely endorsed and welcomed by OECD and non-OECD governments.

3.4 *Elimination of barriers to entrepreneurship*

Historically, policy-makers have sometimes had sound economic and social reasons for imposing constraints on the number and type of firms. Particularly where protecting state ownership was a significant factor, the concern is that such regulations can end up having detrimental effects on the level of competition in the market with a potentially adverse impact on consumer welfare. A number of rules and regulations can have the effect of limiting the actual number or the type of suppliers of goods and services in the marketplace. This is likely to be the case if the proposal:

- Significantly raises the cost of entry or exit by a supplier;
- Grants exclusive rights for a company to supply a product or service;
- Establishes a license, permit or authorisation process as a requirement of operation;
- Limits the ability of some types of firms to participate in public procurement;
- Creates a geographic barrier to the ability of companies to supply goods or services, invest capital or supply labour.

There is a wide literature on the beneficial effects on competition of regulatory reforms, which suggests that poorly designed regulations are a serious impediment to competition, employment, productivity and growth in many economies.¹⁰¹ These studies show that competition forces companies to be more efficient and to increase labour or multi-factor productivity, for instance by adopting new

¹⁰⁰ OECD Guidelines on Corporate Governance of State Owned Enterprises, OECD, 2005.

¹⁰¹ For a comprehensive analysis see Wölfl, Wanner, Kozluk and Nicoletti, Ten Years of Product Market Reform in OECD Countries – Insights from a Revised PRM Indicator, OECD Economics Department Working Papers No. 695.

technologies and being innovative. In particular, Nicoletti and Scarpetta¹⁰² show that countries in which public ownership in the business sector is limited and barriers to entry are low are more successful at improving productivity growth than countries with stringent anti-competitive regulation. Some studies find a positive link between regulation and productivity at the firm level¹⁰³ thus complementing the industry-level analyses. These studies suggest that burdensome regulations are harmful for the ability of the economy to allocate resources to the most efficient firms and for productivity growth in firms operating close to the technological frontier.

The work undertaken at the OECD on the relationship between competition, employment, productivity and growth has been one of the foundations of the advocacy work undertaken by this institution in the area of regulatory reform. Member countries have been urged to undertake systematic regulatory reform programs, to consider regulatory impact assessments for new laws or regulations and to be peer reviewed on the quality of their regulation. In this context, tools have been designed to identify unnecessary restraints and develop alternative, less restrictive policies that still achieve government objectives, such as the “Competition Assessment Toolkit” of the OECD.¹⁰⁴ Similar instruments have been devised in a number of countries. These tools can be used in different ways. The most common use for these instruments is an overall evaluation of existing laws and regulation (in the economy as a whole or in specific sectors). But these instruments can also be used to evaluate draft new laws and regulations (for example, through regulatory impact assessment programs at the centre of government).

Box 6. The OECD Competition Assessment Toolkit

The OECD Competition Assessment Toolkit was approved for release by the OECD Competition Committee in 2007. It provides a general methodology for identifying unnecessary restraints of competition and developing alternative, less restrictive policies that still achieve government objectives. One of the main elements of the Toolkit is a Competition Checklist that asks a series of simple questions to screen for laws and regulations that have the potential to unnecessarily restrain competition. This screen focuses limited government resources on the areas where competition assessment is most needed. The Checklist probes three kind of government restrictions on competition: 1) Restrictions on starting new businesses; 2) Regulations that affect the ability of businesses to compete; and 3) Regulations that affect business behaviour by changing the incentive of businesses to act as vigorous rivals.

The OECD Competition Assessment Toolkit can be used by governments in three main ways:

1. In an overall evaluation of existing laws and regulation (in the economy as a whole or in specific sectors)
2. In the evaluation of draft new laws and regulations (for example, through regulatory impact assessment programs at the centre of government)
3. By government bodies engaged in development and review of policies, such as ministries that develop laws or the competition authority in its evaluation of competitive impacts of regulations.

The Toolkit is designed for use in a decentralised fashion across government at both national and sub-national levels. The reason for designing the materials with this flexibility is that restrictions on competition can be implemented at many different levels of government and competition assessment can be helpful at all these levels.

¹⁰² Nicoletti and Scarpetta, Regulation, Productivity and Growth, Economic Policy, Vol. 18, No. 36, April 2003.

¹⁰³ Arnold, Nicoletti and Scarpetta, Regulation, Allocative Efficiency and Productivity in OECD Countries: Industry and Firm-level Evidence, Economics Department Working Paper, No. 616, 2008, OECD.

¹⁰⁴ See www.oecd.org/competition/toolkit.

4. Conclusions

Despite the extensive privatisation programs implemented in many countries in the 1980s and 1990s, SOEs are still widespread in many OECD member and non-member countries. To some extent the recent financial crisis has contributed to an increase in state ownership in many countries, particularly where governments have decided to nationalise private businesses deeply affected by the financial crisis as a form or rescue measure. In most instances, SOEs enjoy privileges and immunities that are not available to their privately-owned competitors. These privileges give SOEs a competitive advantage over their rivals. Such advantages are not based on better performance, superior efficiency, better technology or superior management skills but are merely government-created. These privileges and immunities distort competition in the market between state-owned and privately-owned rivals.

In many cases, SOEs are instructed by governments to pursue goals other than commercial ones and to carry out public service requirements. This may require the adoption of commercial strategies, including pricing strategies, incompatible with profit-maximisation (e.g. the supply of universal services at “reasonable” prices for consumers). Even if SOEs may be less concerned than private firms with generating profits, they may have even stronger incentives than private firms to engage in anti-competitive conduct. The broader set of SOEs’ objectives can lead them to adopt pricing and other commercial strategies which may have anti-competitive effects. As opposed to privately-owned firms, SOEs may find it beneficial to foreclose competitors and expand the scope of the SOE’s operations and its revenues even if such strategies generate losses. Examples of these strategies include pricing products below costs, cross-subsidisation between reserved and competitive activities, raising the rivals operating costs or erecting barriers to preclude entry of more efficient rivals in the market.

In general, the enforcement of competition law is neutral as to ownership of companies. Competition law applies to conduct of both private and public economic entities. In a number of OECD countries, competition rules on abuse of dominance and monopolisation have provided the basis for investigating and sanctioning business conduct by SOEs. While some of these activities may be caught by competition rules, in particular those on unilateral conduct of dominant firms, certain cases may benefit from explicit exemptions from antitrust enforcement. In a number of countries, courts and agencies, for example, have developed the so-called “state action doctrine”, under which some activities, expressly mandated by the government, are shielded from antitrust scrutiny if certain conditions apply.

Competition cases involving SOEs, mostly related to pricing abuses, have shown the complexity of enforcing competition law against public entities. The difficulty in calculating the appropriate measure of costs of public business entities and to benchmark these costs against similar private firms can be daunting, particularly when the governance arrangements for the government businesses lack transparency or their accounting practices are poor. Due to these difficulties and the differences in incentives and ability of SOEs and privately-owned firms to engage in anti-competitive practices, it is questionable whether *ex post* antitrust intervention is the most effective way of dealing with competition issues arising from the presence of an SOE in a competitive market.

Solutions other than *ex post* antitrust intervention can be taken into account to address the concerns raised by SOEs. These can include privatisation and exit from public ownership; reforms of an SOE’s corporate governance and adoption of competitive neutrality frameworks (e.g. separating the SOE’s commercial activities from non-commercial policy objectives; improving standards of transparency and disclosure for SOEs; increasing the independence and accountability of government representatives and accelerating appointments of independent and accountable directors, etc.); and using regulatory alternatives to command-and-control regulation and direct intervention.

MAIN REFERENCES

- Areeda and Turner, Predatory pricing and Related Practices Under Section II of the Sherman Act, 88 Harvard Law Review 637, 1975
- Arnold, Nicoletti and Scarpetta, Regulation, Allocative Efficiency and Productivity in OECD Countries: Industry and Firm-level Evidence, Economics Department Working Paper, No. 616, 2008, OECD, Paris
- Baseman, Open Entry Costs and Cross-Subsidization in Regulated Markets, in Gary Fromm eds., Studies in Public Regulation, Cambridge MA, The MIT Press, 1981
- Baumol, Business Behaviour, Value and Growth, 45, 1959
- Bellini, The Decline of State-Owned Enterprise and the New Foundations of the State-Industry Relationship, in The Rise and Fall of State-Owned Enterprise in the Western World, eds. Toninelli, Cambridge University Press, 2000
- Bolton, Brodley and. Riordan, Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L. J., 2000
- Bös, Public Enterprise Economics: Theory and Application, Amsterdam, 1989
- Boycko, Shleifer and Vishny, A Theory of Privatization, 106 Econ. J. 309, 1996
- Brennan, Cross-Subsidization and Cost Misallocation by Regulated Monopolies, Journal of Regulatory Economics, Vol. 2, 1990, p. 37-51
- Cope, Regulating Market Activities in the Public Sector, 7 OECD J. Comp. L. & Pol'y 32, 2005
- Crew and Kleindorfer, Privatizing the U.S. Postal Service, in Mail @ the Millenium, eds. E.L. Hudgins, Washington D.C., Cato Institute, 2000
- Cruz, The State Action Doctrine, in Amato & Ehlermann, EC Competition Law – A Critical Assessment, 2007, Hart Publishing, pp. 551-590
- Cuervo and Villalonga, Explaining the Variance in the Performance Effects of Privatization, 25 Acad. Manag. Rev. 581 (2000)
- Delacourt, and Zywicki, The FTC and State Action: Evolving Views on the Proper Role of Government, Antitrust Law Journal, Vol. 72, No. 3, 2005
- Dixit, Power of Incentives in Private versus Public Organisations, The American Economic Review, Vol 87, Nr 2, 1997
- Faulhaber, Cross-subsidization: Pricing in Public Enterprises, The American Economic Review, Vol. 65, No 5, December 1975

- Fox, An Anti-Monopoly Law for China - Scaling the Walls of Protectionist Government Restraints, 75 Antitrust L.J. 173, 2008
- Fox, US and European Merger Policy--fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices, 10 Geo. Mason L. Rev., 2002
- Galambos, State-Owned Enterprises in a Hostile Environment: The U.S. Experience in The Rise and Fall of State-Owned Enterprise in the Western World, eds. Toninelli, Cambridge University Press, 2000
- Geddes, Case Studies of Anticompetitive SOE Behavior, in Competing with the Government, Anticompetitive Behaviour and Public Enterprises, Geddes eds., Hoover Institution Press, 2004
- Geradin and Sidak, The Future of the Postal Monopoly: American and European Perspectives After the Presidential Commission and Flamingo Industries, World Competition: Law and Economics Review, Vol. 28, No. 2, 2005
- Goodrich, Government Promotions of American Canals and Railroads. New York, 1960
- Grout and Stevens, The Assessment: Financing and Managing Public Services, 19 Oxford Rev. Econ. Pol'y, 2003
- Irwin and Yamamoto, Some Options for Improving the Governance of State-owned Electricity Utilities, World Bank Energy and Mining Sector Board Discussion Paper Series No. 11, 2004
- Jensen and Murphy, Performance Pay and Top-Management Incentives, 98 J. Pol. Econ. 225, 1990
- Kaldor, Public or Private Enterprises: The Issues to be Considered, in Baumol eds., Public and Private Enterprises in a Mixed Economy, 1980
- Kikeri and Kolo, State Enterprises, World Bank Note 304, 2006
- Kikeri and Nellis, An Assessment of Privatisation, The World Bank Research Observer, Vol. 19, No. 1, 2004
- Krattenmaker and Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J., 1986
- La Porta, Lopez-de-Silanes, Shleifer and Robert Vishny, The Quality of Government, 15 J.L. Econ. & Org., 1999
- Laffont and Tirole, Privatization and Incentives, 7 J. L. Econ. & Org., 1991
- López-de-Silanes, Determinants of Privatization Prices, 112 Q. J. Econ., 1997
- Lott, Are Predatory Commitments Credible? Who Should the Court Believe?, 1999
- Lott, Predation by Public Enterprises, Journal of Public Economics 43, 1990
- Martin, Advanced Industrial Economics, 2d ed., 2002
- Meggison and Netter, From State to Market: A Survey of Empirical Studies on Privatisations, Journal of Economic Literature, Vol. 39, No. 2, 2001

- Meggison, Nash and van Randenborgh, The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis, 49 J. Fin., 1994
- Milgrom, Predatory Pricing, in The New Palgrave Dictionary of Economics 937, 938 in Eatwell, Murray Milgate and Newman eds., 1987
- Muris, State Intervention/State Action - A U.S. Perspective, October 2003, George Mason Law & Economics Research Paper No. 04-18
- Nicoletti and Scarpetta, Regulation, Productivity and Growth, Economic Policy, Vol. 18, No. 36, April 2003
- North, Government and the American Economy, in American Economic Growth: An Economist's History of the U.S., eds. Davis, Easterlin, and Parker, New York, 1972
- OECD, Corporate Governance of State Owned Enterprises: a Survey of OECD Countries, 2005
- OECD, Corporate Governance of State-Owned Enterprises, 2005
- OECD, Economic Survey of the Russian Federation, 2009
- OECD, Guidelines on Corporate Governance of State Owned Enterprises, OECD, 2005
- OECD, Privatisation in the 21st Century: Recent Experiences of OECD Countries, Report on Good Practices, [DAF/CA/PRIV(2008)8/FINAL]
- OECD, Privatising State-Owned Enterprises in the OECD Area: An Overview of Policies and Practices, [DAFFE/CA/PRIV(2002)1]
- OECD, Report on Competition and Financial Markets, 2009 [DAF/COMP(2009)11]
- OECD, Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19]
- OECD, Report on Regulating Market Activities by the Public Sector, 2003 [DAF/COMP(2004)36]
- OECD, Report Promoting Competition in Postal Services, 1999 [DAFFE/CLP(99)22]
- OECD, Report, Predatory Foreclosure, 2005 [DAF/COMP(2005)14]
- OECD, The Role of State-Owned Enterprises in the Economy: An Initial Review of the Evidence, 2008 [DAF/CA/PRIV(2008)9]
- Phillips, Competition Policy and reform: Regulation of State Owned Enterprises, paper presented at the SAIC International Symposium on Competition Policy and Legislation, 27-28 June 2005
- Rees, A Positive theory of the Public Enterprise, in The Performance of Public Enterprises: Concepts and measurements, 179, in Marchand, Pestieau and Tulkens eds 1984
- Sappington and Sidak, Are Public Enterprises the only Credible Predators?, The University of Chicago Law Review, Vol. 67, Nr 1, 2000

- Sappington and Sidak, Competition Law for State-owned Enterprises, 71 Antitrust Law Journal, No. 2, 2003
- Sappington and Sidak, Incentives for Anticompetitive Behavior by Public Enterprises, 22 Rev. Indus. Org., 2003
- Sappington and Stiglitz, Privatization, Information, and Incentives, 6 J. Policy Analysis and Manag., 1987
- Scheffman and Higgins, 20 Years of Raising Rivals' Costs: History, Assessment, and Future, 12 Geo. Mason L. Rev., 2003
- Scheiber, Ohio Canal Era: A case study of Government and the Economy, Athens, Ohio, 1969
- Scott, Strengthening the Governance and Performance of State-Owned Financial Institutions, World Bank Policy Research Working Paper No. 4321, 2007
- Shapiro and Willig, Economic Rationales For the Scope of Privatization, in The Political Economy of Public Sector Reform and Privatization, Ezra Suleiman & John Waterbury eds., 1990
- Shirley and Walsh, Public vs. Private Ownership: The Current State of the Debate, World Bank Policy Research Working Paper No. 2420, 2001
- Shleifer, State Versus Private Ownership, 12 J. Econ Persp., 1998
- Sokol, Competition Policy and Comparative Corporate Governance of State Owned Enterprises, not yet published .
- Sprenger, The Role of State Owned Enterprises in the Russian Economy, 2008, paper written for the OECD Roundtable on Corporate Governance of SOEs
- Stiglitz, The Economic Role of the State, Oxford, 1989
- Toninelli eds., The Rise and Fall of State-Owned Enterprise in the Western World, Cambridge University Press, 2000
- Toninelli, Nascita di una Nazione: Lo Sviluppo Economico degli Stati Uniti (1780-1924), Bologna, 1993
- Troika Dialog, Who owns Russia, Corporate Governance Annual, 2008
- Vagliasindi, Governance Arrangements for State Owned Enterprises, World Bank Policy Research Working Paper No. 4542, 2008
- Villalonga, Privatization and Efficiency: Differentiating Ownership Effects from Political, Organizational, and Dynamic Effects, 42 J. Econ. Behavior & Org., 2000
- Whish, Competition Law, Sixth Edition, Oxford University Press, 2009
- Wintrobe, The Market for Corporate Control and the Market for Political Control, 3 J.L. Econ. & Org., 1987
- Wölfl, Wanner, Kozluk and Nicoletti, Ten Years of Product Market Reform in OECD Countries – Insights from a Revised PRM Indicator, OECD Economics Department Working Papers No. 695

DAF/COMP(2009)37

World Bank, Bureaucrats in Business: The Economics and Politics of Government Ownership, 1995

World Bank, Economies in Transition: An OED Evaluation of World Bank Assistance, 2004

NOTE DE RÉFÉRENCE

Par le Secrétariat

Ces trente dernières années, de nombreux pays ont mis en œuvre de vastes plans de privatisation et transféré le contrôle d'entreprises publiques au secteur privé. Pour autant, les entreprises publiques continuent d'occuper une place importante dans des secteurs clés de l'économie (énergie, télécommunications, services postaux et de santé, etc.) de nombreux pays membres et non membres de l'OCDE. Dans les pays de la zone OCDE, de nombreuses entreprises publiques produisent des biens et des services en concurrence avec les entreprises du secteur privé ou dans des domaines où les entreprises privées pourraient éventuellement les concurrencer. Le présent document traite du problème des distorsions de la concurrence qui surviennent dans les marchés concurrentiels ou potentiellement concurrentiels en raison des avantages dont certaines entreprises publiques bénéficient au motif qu'elles appartiennent à l'État.

Ce document est organisé en trois grandes parties :

- Une partie introductive passe en revue les avantages et les contraintes des entreprises publiques, et donne un aperçu historique de leur implication dans le marché.
- Une deuxième partie aborde les principaux problèmes de concurrence inhérents à la présence des entreprises publiques dans les marchés concurrentiels, et notamment leurs incitations et leur capacité à se livrer à des comportements anticoncurrentiels, les principales pratiques anticoncurrentielles qu'il leur arrive d'adopter et les exemptions qu'elles peuvent solliciter à l'application du droit de la concurrence. Cette partie passe ensuite en revue un certain nombre d'affaires de concurrence qui ont impliqué des entreprises publiques du secteur postal.
- Enfin, ce document propose un tour d'horizon de quelques-unes des solutions – hors application *a posteriori* de mesures coercitives - envisagées par les pouvoirs publics pour régler les problèmes de concurrence posés par la présence des entreprises publiques sur les marchés concurrentiels.

Les principales conclusions de ce document sont les suivantes :

- Malgré les vastes programmes de privatisation mis en œuvre dans les années 1980 et 1990, les entreprises publiques sont toujours très nombreuses dans beaucoup de pays membres et non membres de l'OCDE. En un sens, la récente crise financière a accru le niveau de participation de l'État actionnaire dans de nombreux pays, en particulier dans ceux dont le gouvernement a décidé de nationaliser des entreprises privées profondément touchées par la crise financière, à titre de mesure de sauvetage.
- Dans la plupart des cas, les entreprises publiques jouissent toujours de privilèges et d'immunités dont ne bénéficient pas leurs concurrents du secteur privé. Ces privilèges, qui ne sont pas fondés sur des critères tels qu'une supériorité des performances, une plus grande efficience, une meilleure technologie ou de meilleures compétences managériales, mais qui sont laissés à l'appréciation des pouvoirs publics, confèrent aux entreprises publiques des avantages

considérables sur leurs rivales. Ces privilèges et immunités faussent le jeu de la concurrence sur le marché entre concurrents publics et privés.

- Souvent, les gouvernements assignent aux entreprises publiques des objectifs autres que commerciaux et leur attribuent des missions de service public. Cela peut nécessiter l'adoption de stratégies, notamment en matière de prix, qui sont incompatibles avec la maximisation des bénéfices.
- Bien que les entreprises publiques soient peut-être moins soucieuses de générer des bénéfices que les entreprises privées, elles peuvent être en fait davantage incitées que ces dernières à adopter des comportements anticoncurrentiels. De par l'éventail plus large de leurs objectifs, les entreprises publiques peuvent être amenées à adopter des politiques de prix et d'autres stratégies commerciales susceptibles de comporter des effets anticoncurrentiels. Contrairement aux entreprises privées, les entreprises publiques peuvent avoir intérêt à exclure des concurrents, à élargir leur champ d'activités et à augmenter leur chiffre d'affaires, et ce, quitte à subir des pertes. Parmi ces stratégies, on notera la fixation de prix inférieurs aux coûts ou les subventions croisées entre activités réservées et activités concurrentielles, qui augmentent les coûts d'exploitation des rivaux ou constituent des barrières à l'entrée de concurrents plus efficaces sur le marché.
- Dans un certain nombre de pays de l'OCDE, les règles de la concurrence en matière d'abus de position dominante et de constitution de monopole forment le socle des enquêtes et des sanctions relatives aux pratiques commerciales des entreprises publiques. Ces affaires de concurrence, qui ont trait pour la plupart à des pratiques abusives en matière de prix, ont montré toute la complexité de l'application du droit de la concurrence aux entreprises publiques, tant il est difficile de déterminer précisément les coûts de ces dernières, en particulier lorsque leurs dispositifs de gouvernance manquent de transparence ou que leurs méthodes comptables sont inadéquates.
- L'application *a posteriori* du droit de la concurrence ne constitue toutefois que l'une des diverses réponses aux problèmes que posent les entreprises publiques. D'autres solutions peuvent être envisagées. Parmi ces dernières figurent la privatisation et la sortie du giron de l'État ; les réformes du gouvernement d'entreprise des entreprises publiques et l'adoption de cadres de neutralité concurrentielle (par exemple, en séparant les activités commerciales des entreprises publiques de leurs objectifs stratégiques non commerciaux, en améliorant leurs normes de transparence et de communication d'informations, en renforçant l'indépendance et la responsabilité des représentants des pouvoirs publics, en accélérant la nomination d'administrateurs indépendants et responsables, etc.) ; et le recours à des solutions réglementaires alternatives à la réglementation fondée sur la contrainte et l'intervention directe.

1. Introduction

Après une présentation du concept d'entreprise publique, les parties suivantes passeront en revue les raisons souvent mises en avant pour justifier la création de ces entités par les pouvoirs publics, ainsi que les arguments qui militent en faveur d'une présence limitée de l'État sur le marché. Enfin, ce chapitre donnera un aperçu historique de l'intervention de l'État dans l'économie et de l'importance des entreprises publiques sur le marché dans les pays membres et non membres de l'OCDE.

1.1 Les entreprises publiques

Également appelées entreprises d'État, les entreprises publiques sont, comme l'indique leur nom, des entités contrôlées par l'État plutôt que par des acteurs publics. Il n'existe pas de consensus politique autour de la définition de l'entreprise publique et l'OCDE n'en a arrêté aucune. La Banque mondiale utilise quant à elle la définition suivante : les entreprises publiques sont « *des entités économiques détenues ou contrôlées par l'État, qui tirent l'essentiel de leurs revenus de la vente de biens et de services*¹ ». Il existe d'un pays à l'autre quantité de définitions de l'entreprise publique. La plupart de ces définitions ont été élaborées à des fins administratives, pour le budget national, ou encore à l'initiative des organismes en charge de la gestion des actifs de l'État². Malgré l'absence d'accord général sur la définition de l'entreprise publique, il existe néanmoins un certain consensus autour des principaux critères qui permettent de distinguer une entreprise publique d'une entreprise privée :

- les entreprises publiques sont généralement soumises à des contraintes budgétaires moins fortes que les entreprises privées en raison (a) de la possibilité d'injecter des fonds publics et (b) des financements moins coûteux qu'elles peuvent obtenir parce qu'elles passent pour bénéficier des garanties de l'État ;
- les entreprises publiques sont en général chargées de réaliser un certain nombre d'objectifs non commerciaux³ ; et
- même lorsque les entreprises publiques ne sont pas utilisées par les pouvoirs publics pour accomplir des missions de service public, elles sont protégées contre le risque d'OPA et ont dans les faits une vocation commerciale souvent moins marquée que les autres entreprises, car elles sont davantage sous l'influence de groupes internes tels que le personnel d'encadrement ou le personnel syndiqué.

Deux précisions semblent importantes afin de cadrer la réflexion menée dans ce document. La première concerne la forme sociale des entreprises publiques. Les trois principales catégories d'entreprises publiques sont (1) les entreprises créées par la loi, qui fonctionnent en lien étroit avec un département de l'administration publique ou qui en font partie intégrante ; (2) les entreprises pleinement constituées en sociétés et contrôlées par l'État ; et (3) les entreprises publiques cotées en bourse et dont une partie minoritaire du capital est constituée d'actions émises sur les marchés. Cette dernière catégorie est de plus en plus répandue et, comme ces entreprises sont soumises à la fois au droit général des sociétés, au droit des valeurs mobilières, aux conditions d'admission à la cote, etc., elles posent beaucoup moins de problèmes de concurrence. Deuxième point important, les effets anticoncurrentiels de la présence d'entreprises publiques sur le marché ne sont pas nécessairement dus au fait que l'État en est le propriétaire. D'autres facteurs (tels que des structures de marché concentrées, des dysfonctionnements du marché, des monopoles naturels ou légaux, etc.) pourraient, dans des conditions similaires, s'appliquer de la même manière à des entreprises privées et les inciter tout autant à adopter des stratégies préjudiciables pour la concurrence. Ce document s'intéresse principalement aux incitations et à la capacité à adopter des

¹ Banque mondiale, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, 1995.

² Ces définitions ont souvent tendance à avoir une portée plutôt restrictive, ce qui pose des problèmes car, d'un point de vue analytique, cela implique que normalement, ni les entreprises publiques détenues aux échelons infranationaux, ni les entreprises non constituées en sociétés (les « quasi-entreprises », selon les définitions des comptes nationaux) n'appartiendraient à cette catégorie. Dans certains cas, cela signifie également que les entreprises détenues à hauteur de moins de 50 % en seraient exclues.

³ OCDE, *Report on Non-Commercial Service Obligations and Liberalisation*, 2003 [DAFFE/COMP(2004)19].

comportements anticoncurrentiels s'agissant 1) des entreprises publiques qui opèrent dans des environnements potentiellement concurrentiels et 2) des entreprises publiques dite « hybrides », c'est-à-dire des entreprises verticalement intégrées qui bénéficient de droits de monopole dans leur propre chaîne de valeur, mais qui sont exposées à la concurrence d'entreprises privées dans d'autres parties de la chaîne de valeur.

1.2 *Raisons justifiant la création d'entreprises publiques*

De nombreuses raisons poussent les pouvoirs publics à entrer sur le marché à la faveur de la création d'entités contrôlées par l'État⁴. Premièrement, la raison d'être des entreprises publiques peut avoir une origine politique et idéologique. Certains pays ont nationalisé des secteurs d'activité entiers car ils estimaient que la garantie d'une présence significative de l'État dans l'économie permettrait une meilleure répartition des richesses et des pouvoirs au sein de la société⁵. On retrouve cette motivation idéologique et politique principalement dans les pays dont les politiques publiques reposent sur l'idée que les gouvernements peuvent ordonner aux entreprises publiques de baisser les prix, notamment des biens consommés par les titulaires de bas salaires, et influencer ainsi la répartition des revenus réels en pouvoir d'achat au sein de la société⁶. Cette stratégie serait impossible à mettre en œuvre *via* les entreprises privées, étant donné que leurs politiques de prix sont conçues dans l'optique de maximiser les bénéfices dans l'intérêt de leurs actionnaires. Par ailleurs, les pouvoirs publics peuvent se servir des entreprises publiques pour contrôler des ressources stratégiques – un argument fréquemment avancé par certains pays émergents – ou pour pallier certaines insuffisances de la réglementation sectorielle.

Des raisons d'ordre social peuvent aussi constituer un moteur important du développement d'une forte présence des entreprises publiques sur le marché⁷. Les pouvoirs publics recourent en effet à cette catégorie d'entreprises pour garantir l'emploi, proposer de meilleures conditions de travail aux travailleurs et améliorer les relations de travail⁸. C'est pourquoi, en temps de crise, l'État actionnaire sert souvent utilisé à secourir des entreprises privées confrontées à des problèmes économiques et financiers profonds et systémiques⁹. De tels sauvetages d'entreprises privées en difficulté sont réalisés par les pouvoirs publics pour toute une série de raisons, et notamment au titre de la sauvegarde des emplois, de considérations de politique industrielle, et pour d'autres raisons d'ordre stratégique et politique.

Les gouvernements peuvent décider d'entrer sur le marché pour des raisons économiques¹⁰. L'intervention des pouvoirs publics dans l'économie est le plus souvent justifiée par des dysfonctionnements du marché. Dans le cadre d'un monopole naturel, par exemple, la présence d'une

⁴ Toninelli, *The Rise and Fall of State-Owned Enterprise, The Framework*, éd. Toninelli. *The Rise and Fall of State-Owned Enterprise in the Western World*, Cambridge University Press, 2000.

⁵ OCDE, *Report on Non-Commercial Service Obligations and Liberalisation*, 2003 [DAFFE/COMP(2004)19].

⁶ Bös, *Public Enterprise Economics: Theory and Application*, Amsterdam, 1989 ; Stiglitz, *The Economic Role of the State*, Oxford, 1989 ; Shleifer, *State Versus Private Ownership*, 12 *J. Econ Persp.*, 1998.

⁷ Wintrobe, *The Market for Corporate Control and the Market for Political Control*, 3 *J.L. Econ. & Org.*, 1987.

⁸ Boycko, Shleifer et Vishny, *A Theory of Privatization*, 106 *Econ. J.*, 1996.

⁹ OCDE, *Report on Competition and Financial Markets* (DAF/COMP(2009)11).

¹⁰ Grout et Stevens, *The Assessment: Financing and Managing Public Services*, 19 *Oxford Rev. Econ. Pol'y*, 2003 ; voir aussi Sappington et Stiglitz, *Privatization, Information, and Incentives*, 6 *J. Policy Analysis and Manag.*, 1987.

entreprise privée non réglementée peut aboutir à l'exploitation du marché en vue d'augmenter les prix¹¹, tandis qu'avec une entreprise publique, les autorités peuvent veiller à ce que les produits et services soient proposés aux consommateurs dans des conditions « équitables »¹².

Enfin, à travers les entreprises publiques, les pouvoirs publics peuvent favoriser la croissance économique dans des régions sous développées du pays ou promouvoir certains secteurs industriels. L'argument avancé dans ce cas est qu'une entreprise publique peut servir à prendre des décisions sur la base de considérations de long terme autres que la maximisation des bénéfices à court ou moyen terme¹³, étant entendu qu'une entreprise privée ne prendrait pas de telles décisions.

1.3 Raisons justifiant de limiter la présence d'entreprises publiques sur le marché

La raison essentielle que mettent en avant les publications hostiles à une présence marquée de l'État dans le marché est que les entreprises publiques ne sont pas aussi efficaces que les entreprises privées. Le principe selon lequel les bénéfices sont généralement le moteur des entreprises privées ne s'applique pas toujours aux entreprises publiques, dans la mesure où certaines (ou, dans un certain nombre de cas, la totalité) de leurs fonctions peuvent reposer sur des objectifs non commerciaux¹⁴. Comme on l'a vu, certaines entreprises publiques peuvent avoir des objectifs tels que l'emploi, des considérations sociales ou encore la répartition des richesses¹⁵. Par conséquent, les motivations des entreprises publiques peuvent s'en trouver sensiblement affectées, tout comme leurs performances sur le marché.

Boîte 1. Performance des entreprises publiques par rapport aux entreprises privées

L'hypothèse selon laquelle le statut public ou privé induit *per se* des bonnes ou des mauvaises performances n'a pas été prouvée, et les recherches empiriques menées à ce sujet ont abouti à des conclusions contradictoires. D'un côté, certains travaux économétriques montrent que lorsqu'on les compare à des entreprises privées similaires, les entreprises publiques s'avèrent moins performantes. Une série d'études suggère qu'une amélioration relativement modeste d'environ 5 % de l'efficacité des entreprises publiques dans un pays donné pourrait libérer des ressources financières correspondant approximativement à 1-5 % du PIB du pays. À l'inverse, la mauvaise gestion d'une entreprise publique peut accroître les coûts supportés par les pouvoirs publics, et ce, au détriment d'autres priorités. Par exemple, dans leur revue des publications consacrées à ce sujet, Shirley et Walsh constatent que sur 52 études examinées, cinq seulement font apparaître des entreprises publiques plus performantes que des entreprises privées¹⁶.

¹¹ Tandis que la plupart des pays européens ont opté pour une propriété et une gestion publiques afin d'éviter des déséconomies aux consommateurs, certains autres pays tels que les États-Unis ont préféré laisser ces activités entre les mains d'entreprises privées, tout en réglementant rigoureusement les prix et les conditions de fourniture.

¹² OCDE, Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19].

¹³ Kaldor, Public or Private Enterprises: The Issues to be Considered, Baumol (dir. pub.), Public and Private Enterprises in a Mixed Economy, 1980.

¹⁴ Il se peut que la raison d'être des entreprises publiques ne soit pas la maximisation de l'intérêt de l'actionnaire (du citoyen). Une entreprise publique peut mener des activités non commerciales et sa gestion courante est potentiellement soumise à des interférences politiques. Pire encore, si les éléments politiques de l'administration décident de la stratégie des entreprises publiques, cela revient à mettre fin à l'indépendance de leur conseil d'administration et à retirer à ces derniers leur autorité.

¹⁵ Il existe de toute évidence de nombreux cas où les entreprises publiques jouent un rôle significatif dans l'économie, mais pour la plupart, leurs stratégies ne reposent pas sur une logique d'efficacité.

¹⁶ Voir, entre autres, López-de-Silanes, Determinants of Privatization Prices, 112 Q. J. Econ., 1997 ; Megginson, Nash et van Randenborgh, The Financial and Operating Performance of Newly Privatized

En revanche, une partie de la littérature tend à attirer l'attention sur l'ambiguïté des preuves empiriques des performances des entreprises publiques vis-à-vis de celles des entreprises privées¹⁷. Ces études concluent que l'hypothèse selon laquelle les entreprises publiques seraient par essence moins efficaces et moins performantes que les entreprises privées n'est pas fondée et suggèrent plutôt que les inefficiences des entreprises publiques sont pour la plupart dues à la politisation et à la mauvaise gestion des participations de l'État.

Il peut arriver que certaines stratégies des entreprises publiques ne servent pas toujours les intérêts des bénéficiaires effectifs finaux, c'est-à-dire le grand public. Dans le cas d'une entreprise publique, l'État est l'actionnaire, mais les bénéficiaires effectifs finaux sont les contribuables¹⁸. Cette particularité ajoute une dimension supplémentaire aux problèmes classiques d'agence (actionnaires/dirigeants, actionnaires majoritaires / minoritaires) en ce sens que les motivations des représentants de l'administration peuvent ne pas coïncider avec celles du grand public, dont ils sont censés servir les intérêts. En ce qui concerne les entreprises publiques, les types d'aiguillons du marché qu'elles utilisent pour aligner les intérêts de l'entreprise sur ceux de ses actionnaires sont inexistantes ou plus limités¹⁹.

Une autre différence en matière d'efficacité est le fait que dans les entreprises privées, le processus décisionnel est moins lourd que dans les entreprises publiques, et qu'une plus grande importance y est accordée à l'obligation de rendre des comptes à partir des résultats des décisions arrêtées. Il est plus difficile de peser sur les acteurs publics que sur les acteurs privés, car ils sont moins tenus responsables des erreurs commises. En raison d'une chaîne de commandement²⁰ excessivement complexe, les entreprises publiques rencontrent en effet de nombreux problèmes de délégation des pouvoirs, d'où une responsabilité individuelle sensiblement réduite, en particulier lorsqu'il existe de multiples mandants. En outre, les dirigeants des entreprises publiques risquent moins d'être renvoyés par le conseil en cas de mauvaise

Firms: An International Empirical Analysis, 49 J. Fin., 1994 ; Cuervo et Villalonga, Explaining the Variance in the Performance Effects of Privatization, 25 Acad. Manag. Rev., 2000 (selon lesquels les entreprises privatisées sont plus performantes, mais à des degrés variables) ; Villalonga, Privatization and Efficiency: Differentiating Ownership Effects from Political, Organizational, and Dynamic Effects, 42 J. Econ. Behavior & Org., 2000 (qui passe en revue 153 études publiées sur la privatisation), Vagliasindi, Governance Arrangements for State Owned Enterprises, Policy Research Working Paper n° 4542 de la Banque mondiale, 2008 ; Shirley et Walsh, Public vs. Private Ownership: The Current State of the Debate, Policy Research Working Paper n° 2420 de la Banque mondiale, 2001.

¹⁷ Aharoni, The Performance of State-Owned Enterprises, dans The Rise and Fall of State-Owned Enterprise in the Western World, Toninelli (dsir. Pub.), Cambridge University Press, 2000.

¹⁸ À la différence des entreprises privées, il existe des restrictions au droit de propriété des entreprises publiques. La transférabilité des actions des entreprises privées constitue une porte de sortie pour les actionnaires insatisfaits des décisions prises par la direction. Il s'agit là d'un mécanisme de contrôle non négligeable, étant donné que la baisse du cours d'une action représente une menace pour la direction sur le marché du contrôle des entreprises, menace à laquelle les entreprises publiques sont exposées dans une nettement moindre mesure. Par conséquent, les divers mécanismes internes et externes visant à limiter les problèmes de coût d'agence dans les entreprises privées sont de loin moins efficaces s'agissant des entreprises publiques. Les différents mécanismes de gouvernance traditionnels peuvent s'avérer inadaptés à telle ou telle entreprise publique dont le moteur n'est pas la création de bénéfices. Il va de soi que les citoyens (les actionnaires finaux des entreprises publiques) peuvent toujours exercer leur droit de vote et influencer les politiques publiques, mais l'impossibilité de transférer les droits de propriété se traduit par un actionnariat de l'État par définition moins efficace qu'un actionnariat privé.

¹⁹ Jensen et Murphy, Performance Pay and Top-Management Incentives, 98 J. Pol. Econ., 1990.

²⁰ Il se peut que les gouvernements ne dotent pas les entreprises publiques des fonctions de surveillance nécessaires, ou que celles qu'ils confient à différents membres de l'administration soient inefficaces (voir Scott, Strengthening the Governance and Performance of State-Owned Financial Institutions, Policy Research Working Paper n° 4321 de la Banque mondiale, 2007).

décision, et l'État est davantage enclin à accorder une assistance financière à une entreprise publique mal gérée. En théorie, les entreprises privées devraient être plus performantes, puisque les motivations des dirigeants et des actionnaires sont davantage axées sur l'amélioration des performances dans les entreprises²¹.

1.4 Aspects historiques de l'intervention de l'État dans l'économie

L'histoire de la présence de l'État dans l'économie peut être divisée en trois grandes périodes²². La première phase couvre la période allant de la Renaissance à la fin du 19^e siècle. La deuxième s'étend jusqu'à la Deuxième Guerre mondiale, et la troisième va de la Deuxième Guerre mondiale à aujourd'hui.

Les premières années, jusqu'à la Révolution industrielle, se sont caractérisées par des nationalisations occasionnelles et sporadiques²³. Cependant, après la Révolution industrielle, et plus particulièrement au 19^e siècle, les relations entre l'État et la société, entre le public et le privé, ont commencé à changer, parallèlement aux évolutions d'ordre économique, politique et idéologique. Plus récemment, l'attitude des États vis-à-vis de l'économie a suivi deux tendances opposées : le modèle d'Europe continentale, avec une intervention plus forte des pouvoirs publics, et le modèle américain, caractérisé par une intervention directe limitée de l'État dans l'économie et un recours plus fréquent à la réglementation publique. La différence tient à la priorité accordée à un État soit « entrepreneur », soit « régulateur ».

Les principales expériences associées au modèle de l'Europe continentale – lequel a été appliqué d'abord dans le cadre des politiques de contrôle étatique, qui ont atteint leur apogée avant la Deuxième Guerre mondiale puis, après la guerre, lors de la mise en place des économies mixtes de l'Europe occidentale – ont été 1) la tradition française en faveur d'une administration fortement centralisée et autoritaire, dotée de solides pouvoirs en matière d'ordre public, de travaux publics, de politique fiscale et de justice ; 2) la nouvelle vision idéaliste de l'État développée en Allemagne, avec la conviction que les actions individuelles ne pouvaient résoudre les problèmes relevant de l'intérêt public ; 3) le socialisme scientifique inspiré par Marx ; et 4) l'influence de l'économie keynésienne. De l'autre côté de l'Atlantique, le contrôle et la réglementation de l'activité économique ont été le fruit d'un système juridico-administratif dans lequel ont convergé la tradition de *common law* britannique et les influences politiques, culturelles et juridiques françaises²⁴.

²¹ Laffont et Tirole, *Privatization and Incentives*, 7 J. L. Econ. & Org., 1991 ; Sappington et Stiglitz, *Privatization, Information and Incentives*, 6 J. Pol'y Analysis & Mgmt., 1987 ; Shapiro et Willig, *Economic Rationales For the Scope of Privatization*, dans *The Political Economy of Public Sector Reform and Privatization*, Suleiman & Waterbury, 1990.

²² La partie consacrée au contexte historique s'inspire en grande partie de l'ouvrage intitulé *The Rise and Fall of State-Owned Enterprise in the Western World*, P. A. Toninelli (dir. pub.), Cambridge University Press, 2000.

²³ Les nationalisations sont intervenues principalement dans les secteurs industriels considérés comme stratégiques en matière de défense nationale, comme la métallurgie et l'industrie minière. Parmi les exceptions célèbres à cette règle, on notera la nationalisation des manufactures royales (vêtements, verrerie, tapisseries, etc.) encouragée en France par Henri IV au 16^e siècle, suivie d'opérations analogues en Russie, en Prusse, en Autriche et en Espagne.

²⁴ Goodrich, *Government Promotions of American Canals and Railroads*. New York, 1960 ; North, *Government and the American Economy*, dans *American Economic Growth : An Economist's History of the U.S.*, Davis, Easterlin, et Parker (dir. pub.), New York, 1972 ; Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy*, Athens, Ohio, 1969 ; Toninelli, *Nascita di una Nazione: Lo Sviluppo Economico degli Stati Uniti (1780-1924)*, Bologna, 1993 ; Galambos, *State-Owned Enterprises in a Hostile Environment: The U.S. Experience in The Rise and Fall of State-Owned Enterprise in the Western World*, Toninelli (dir. pub.), Cambridge University Press, 2000.

Les trois décennies qui ont suivi la Grande Crise des années 1930 ont été l'âge d'or de la nationalisation et de l'expansion de l'entreprise publique dans de nombreux secteurs industriels. Cette tendance s'illustre bien dans l'essor de la République de Weimar, sous laquelle à la fois le Reich et les différents États ont massivement accru leurs participations commerciales et se sont impliqués dans la production d'énergie, la chimie, l'alimentation, la métallurgie, l'extraction du charbon et du fer, la construction et les bâtiments municipaux, l'assurance, la finance et la banque, l'agriculture, la sylviculture, etc. Toutefois, le pic des nationalisations a été enregistré après la Deuxième Guerre mondiale. Cette expansion peut s'expliquer par la nécessité de nombreux pays²⁵ de reconstruire leur industrie nationale détruite par la guerre et de rationaliser leur système de production²⁶. Pendant cette période, le principal moteur des nationalisations était le sauvetage d'entreprises ou de pans entiers de l'économie. C'est pourquoi aucun véritable processus de nationalisation n'est intervenu dans les pays où la guerre avait fait moins de dégâts, comme la Suède ou la Norvège.

À compter de la fin des années 1970, différentes vagues de privatisation ont entraîné une érosion progressive du secteur public. Cette tendance en Europe s'est accentuée après les changements politiques intervenus dans l'ancien bloc de l'Est²⁷. Pour ces pays, la principale raison à l'origine des privatisations a été la nécessité de ramener à l'équilibre le déficit budgétaire créé par les systèmes excessivement onéreux de l'État providence, et pour revitaliser et développer les économies. Simultanément, les autres pays qui procédaient également à des privatisations ont fait pression sur eux car ils étaient préoccupés par la concurrence déloyale que représentaient les entreprises étrangères d'État ou placées sous la protection de l'État, une pression également exercée par les organisations internationales et supranationales soucieuses de limiter les effets déstabilisateurs des aides nationales accordées aux entreprises publiques pour le processus d'intégration internationale²⁸.

1.5 Portée de l'implication des entreprises publiques dans l'économie

Malgré les grands programmes de privatisation des années 1980 et 1990, les entreprises publiques sont toujours très présentes dans de nombreuses économies²⁹ et, dans une certaine mesure, la récente crise financière a contribué à accroître les participations de l'État en qualité d'actionnaire, qui ont été utilisées comme un moyen de renflouer des secteurs ou comme plan de sauvetage des entreprises touchées par la crise financière.

Les travaux menés par la Banque mondiale indiquent que les entreprises publiques jouent toujours un rôle déterminant dans de nombreuses économies, et notamment au Moyen-Orient, en Afrique et en Asie.

²⁵ On trouve dans les pays d'Europe occidentale de nombreux exemples de vastes programmes de nationalisation, par exemple en Angleterre, en Italie, en France, aux Pays-Bas ou encore en Espagne. En Amérique latine, l'intervention indirecte de l'État en vue de stimuler la reprise économique a également été encouragée.

²⁶ Outre les États-Unis, l'Allemagne et le Japon ont été deux exceptions importantes à la tendance générale. En Allemagne, la reconstruction d'après-guerre a impliqué le démantèlement partiel de l'énorme structure publique mise en place sous le régime nazi. Quant au Japon, l'intervention de l'État y était indirecte et se faisait à travers la planification économique.

²⁷ Les « économies de transition » ont sensiblement pesé sur le nombre d'opérations de privatisation, qui a atteint 2 655 de 1988 à 1993. Voir Banque mondiale, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, 1995.

²⁸ Bellini, *The Decline of State-Owned Enterprise and the New Foundations of the State-Industry Relationship*, dans *The Rise and Fall of State-Owned Enterprise in the Western World*, Toninelli (dir. pub.), Cambridge University Press, 2000.

²⁹ Banque mondiale, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, 1995.

Une étude de la Banque mondiale réalisée en 1995 dans le monde entier a estimé que les entreprises publiques représentaient 8 à 10 % du PIB dans les pays industrialisés. Dans les pays à faible revenu, cette proportion atteint 15 % du PIB³⁰. Ces pourcentages peuvent être sensiblement plus élevés dans les pays moins développés et dans les économies émergentes³¹. L'estimation la plus récente de la taille des entreprises publiques dans les pays de l'OCDE se fonde sur les Indicateurs de l'OCDE relatifs à la réglementation des marchés de produits (RMP)³², qui évaluent la participation de l'État dans les entreprises.

Les chiffres des indicateurs de RMP les plus récents sont récapitulés dans le tableau suivant.

Tableau 1. Étendue du contrôle de l'État : comparaison internationale (2008)³³

	Moyenne de l'OCDE	Marchés émergents de l'OCDE ¹	Zone euro ²	États- Unis	Russie
Contrôle de l'État	2.03	2.54	2.19	1.10	4.39
Propriété de l'État	2.91	3.46	3.08	1.30	4.28
-Étendue du secteur des entreprises publiques	3.10	3.54	3.23	2.25	4.64
- Contrôle direct sur des entreprises commerciales	2.86	3.67	2.93	0.68	4.19
- Contrôle des pouvoirs publics sur les secteurs d'infrastructure	2.76	3.18	3.08	0.99	4.02
Implication dans les activités commerciales	1.15	1.61	1.30	0.90	4.50
- Utilisation d'une réglementation fondée sur la contrainte	1.52	1.94	1.88	1.30	4.00
- Contrôle des prix	0.78	1.29	0.71	0.50	5.00

1 République tchèque, Hongrie, Corée, Mexique, Pologne, Turquie.

2 Allemagne, Autriche, Belgique, Espagne, Finlande, France, Italie, Luxembourg, Pays-Bas, Portugal.

Remarque : L'échelle des valeurs s'étend de 0 à 6, du contrôle le moins restrictif au plus restrictif.

La publication *Gouvernance des entreprises publiques* (OCDE, 2005) du Groupe de travail sur la privatisation et la gouvernance d'entreprise des actifs appartenant à l'État inclut un autre bilan relativement récent du poids des entreprises publiques dans les pays de l'OCDE. Toutefois, étant donné que la collecte de statistiques n'était pas l'objectif premier de cette publication, les données recueillies à cette occasion

³⁰ Kikeri et Kolo, *State Enterprises*, Note 304 de la Banque mondiale, 2006 (qui indique la prévalence des entreprises publiques dans le monde) ; La Porta, Lopez-de-Silanes, Shleifer et Robert Vishny, *The Quality of Government*, 15 J.L. Econ. & Org. 222, 1999 (qui indique que les entreprises publiques sont plus courantes dans les pays dotés d'un code civil français ou ayant une origine légale socialiste).

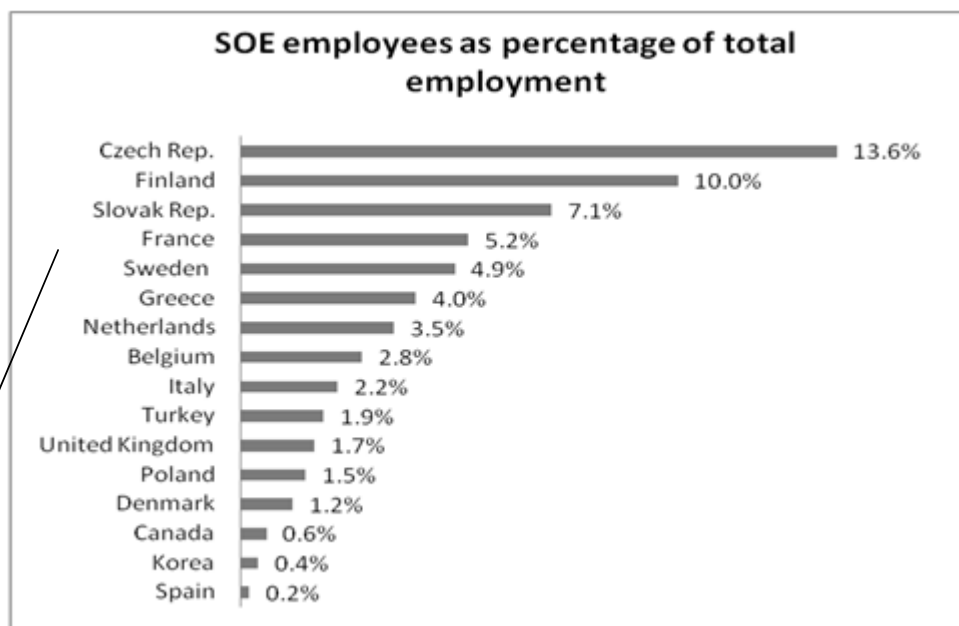
³¹ D'après l'OCDE, les entreprises publiques représentent une partie substantielle des principales économies émergentes en termes de part de PIB et d'emploi : un tiers pour la Russie et la Chine ; entre 10 et 20 % pour l'Inde ; juste en dessous de 10 % pour le Brésil (à la fois en termes de PIB et d'emploi). Par ailleurs, en raison du niveau élevé des taux de croissance nationaux, la valeur ajoutée des entreprises publiques a sensiblement augmenté en valeur absolue. Elle a doublé en Chine et augmenté de 70 % en Inde depuis le milieu des années 1990 [voir OCDE, *Le rôle des entreprises publiques dans l'économie : Premier état des informations disponibles*, 2008, DAF/CA/PRIV(2008)9].

³² Les Indicateurs de réglementation des marchés de produits sont mis au point par le Département des Affaires économiques de l'OCDE dans le cadre des travaux qu'il effectue pour le Comité de la politique économique.

³³ Extrait de l'Étude économique de l'OCDE : Fédération de Russie, juillet 2009.

sont pour le moins superficielles. Les indications les plus fiables de cette publication concernant l'importance des entreprises publiques peuvent être déduites des estimations fournies par les pays membres sur l'emploi des entreprises publiques en pourcentage de l'emploi dans toute l'économie. Ce chiffre, disponible pour 16 pays de l'OCDE, est reporté dans le graphique ci-après. Ce graphique fait apparaître qu'en 2003, la part du total national de salariés employés dans les entreprises publiques dans les pays de l'OCDE variait de presque zéro à 13 %. Cette indication laisse à penser que la part des entreprises publiques dans les économies respectives se situe probablement dans cette fourchette³⁴.

Graphique 1. Salariés des entreprises publiques en pourcentage de l'emploi total³⁵



Rép. tchèque, Finlande, Ré. slovaque, France, Suède, Grèce, Pays-Bas, Belgique, Italie, Turquie, Royaume-Uni, Pologne, Canada, Corée, Espagne

En Europe de l'Est et dans l'ex-Union soviétique, la part du secteur public en pourcentage du PIB varie de 20 % environ (République tchèque, Slovaquie et Hongrie) à 80 % (Biélorussie). Vingt des 26 pays en transition se situent dans une fourchette de 20 à 40 % du PIB³⁶. Ces chiffres ne reflètent pas les récentes évolutions intervenues dans le monde, où la crise financière a poussé un certain nombre de pays à nationaliser des entreprises en difficulté.

³⁴ Ces chiffres doivent toutefois être interprétés avec la plus grande prudence. Par exemple, il n'est pas certain que tous les répondants au questionnaire de 2003 aient appliqué une définition identique ou même comparable de l'entreprise publique. Il semble par exemple paradoxal que la part de l'emploi attribuée aux entreprises publiques polonaises soit inférieure à un cinquième de celle de la République tchèque. En outre, des pays tels que la Corée et l'Espagne, qui ont placé d'importantes entreprises de service public sous le contrôle de l'État, ont apparemment appliqué une définition restrictive de l'entreprise publique, car ils ont indiqué une part d'emploi inférieure à 0,5 %. De la même façon, les chiffres de la Finlande sont très élevés du fait qu'elle a appliqué une définition spéciale de l'entreprise publique englobant Nokia, dans laquelle l'État ne détient qu'une participation minoritaire.

³⁵ OCDE, Gouvernance des entreprises publiques, 2005.

³⁶ Banque mondiale, Economies in Transition: An OED Evaluation of World Bank Assistance, 2004. On notera qu'il existe une distinction entre secteur d'État et secteur des entreprises publiques, le premier incluant l'armée, l'administration, la police, les hôpitaux, etc.

Boîte 2. Les entreprises publiques en Russie³⁷

L'exemple de la Fédération de Russie illustre à quel point l'État peut être présent dans l'économie. L'héritage de l'ère soviétique et la réaction de rejet suscitée par le chaos des premières années de transition vers un nouveau système ont abouti à un contrôle très fort de l'État dans l'économie russe, sous la forme à la fois de participations directes et d'un contrôle de l'activité économique. Les entreprises publiques sont présentes dans un large éventail de secteurs et occupent souvent une position dominante dans leur secteur d'activité. En outre, la frontière entre les secteurs public et privé s'avère floue et perméable, en raison du rôle très important accordé aux entreprises publiques, mais aussi du fait que l'administration (à tous les niveaux) entretient des liens étroits avec les grandes entreprises privées.

Ces dernières années, l'action des pouvoirs publics russes en matière d'entreprises publiques a été axée d'une part sur l'augmentation des intérêts de l'État dans des entreprises stratégiques afin d'y obtenir une participation de contrôle, et d'autre part sur la cession de participations minoritaires dans des entreprises de secteurs non stratégiques. Le nombre de participations majoritaires du gouvernement fédéral est par conséquent passé de 25 % de la totalité de ses participations en 2005 à 61 % en 2008³⁸. Les pouvoirs publics ont également créé un certain nombre d'entreprises publiques qui bénéficient du statut juridique spécial d'organisations non commerciales et échappent au droit de la faillite et au contrôle de la Cour des comptes de la Fédération de Russie³⁹. Les règles en matière de communication d'informations applicables à ces entités sont également moins rigoureuses que celles imposées aux sociétés par actions.

D'après les données communiquées par le Service fédéral des statistiques nationales, 9 % des entreprises enregistrées étaient détenues à 100 % par l'État en 2007, tandis que 2 % des entreprises étaient des sociétés mixtes. Cela étant, les entreprises publiques ont tendance à être plus grosses que les entreprises du secteur privé, donc ces chiffres sous-évaluent l'étendue du contrôle de l'État sur l'activité économique⁴⁰. Selon une statistique récente, 58 % des entreprises publiques employaient en 2006-08 plus de 1 000 personnes, contre 30 % dans les autres entreprises⁴¹. En termes de part d'emploi, environ 10 % de l'ensemble des salariés travaillaient pour des entreprises entièrement détenues par l'État en 2007, et 7 % étaient employés par des sociétés mixtes détenues à la fois par l'État et le secteur privé⁴². Malgré la perception courante que le secteur des entreprises publiques russes est actuellement en expansion, ces deux indicateurs sont à la baisse ces dernières années, bien que la majeure partie des privatisations ait eu lieu dans les années 1990. Parallèlement, les pouvoirs publics ont augmenté le niveau de leurs participations dans les plus

³⁷ Cet encadré résume les conclusions de l'Étude économique de l'OCDE sur la Fédération de Russie, juillet 2009. Voir également Le rôle des entreprises publiques dans l'économie : Premier état des informations disponibles, OCDE, DAF/CA/PRIV(2008)9.

³⁸ Sprenger, The Role of State Owned Enterprises in the Russian Economy, 2008, document élaboré en vue de la Table ronde de l'OCDE sur le gouvernement d'entreprise des entreprises publiques.

³⁹ Pour une description plus détaillée, voir Sprenger, The Role of State Owned Enterprises in the Russian Economy, 2008.

⁴⁰ Dans une étude menée en 2005 auprès de 822 entreprises russes par le Haut Collège d'Économie de Moscou et l'Institute of Economic Research de l'Hitotsubashi University à Tokyo, le nombre moyen de salariés des entreprises publiques s'établissait à 880, contre 414 pour les entreprises privées. Leur volume moyen de vente était respectivement de 350 millions RUB 195 millions RUB. Ces statistiques indiquent donc que les entreprises publiques sont, en moyenne, environ deux fois plus grandes que les entreprises du secteur privé. Voir Sprenger, The Role of State Owned Enterprises in the Russian Economy, document élaboré en vue de la Table ronde de l'OCDE sur le gouvernement d'entreprise des entreprises publiques.

⁴¹ Étude menée par l'Institute of Economy in Transition de Moscou, citée dans l'Étude économique de l'OCDE sur la Fédération de Russie, juillet 2009.

⁴² Étude économique de l'OCDE sur la Fédération de Russie, juillet 2009, Graphique 5.5A.

grandes entreprises russes cotées. Plus particulièrement, la part de la capitalisation boursière contrôlée par l'État sur le marché russe des valeurs est passée de 24 % en 2004 à 40 % en 2007⁴³.

Parallèlement, de grands conglomérats contrôlés par l'État voient le jour, lesquels ont, dans certains cas, été créés par le regroupement d'entreprises publiques existantes. Outre leur taille relativement importante, ces entreprises publiques opèrent dans un éventail de secteurs variés, dont beaucoup sont, par définition, concurrentiels⁴⁴.

2. Questions de concurrence liées aux entreprises publiques

Les gouvernements peuvent créer des conditions de concurrence non équitables sur les marchés où une entreprise publique est en concurrence avec des entreprises privées⁴⁵, car ils ont un intérêt naturel au succès des entreprises publiques. Malgré leur rôle d'autorité de tutelle, les pouvoirs publics peuvent ainsi entraver en fait la concurrence en accordant aux entreprises publiques des avantages auxquels les entreprises privées n'ont pas droit. Tandis que, dans certains domaines, ce traitement privilégié se fera de manière directe et évidente, il pourra aussi être indirect *via* d'autres moyens. Il se peut également que la réglementation relative aux entreprises publiques soit arbitraire, et que l'unique principe directeur des autorités publiques soit de protéger leurs entreprises publiques au détriment de tout autre objectif⁴⁶. Ces comportements peuvent créer d'importantes barrières à l'entrée, limitant ainsi la capacité du marché de mettre à l'épreuve, par le jeu naturel de la concurrence, les mauvaises décisions prises par les entreprises publiques.

Les parties à suivre aborderont certaines des différences qui existent entre les entreprises publiques et privées, ainsi que les conséquences éventuelles de ces différences en termes d'incitation et de capacité des entreprises publiques à adopter des stratégies commerciales anticoncurrentielles. Cette partie passera également en revue certaines des pratiques anticoncurrentielles les plus courantes ayant fait l'objet d'enquêtes des autorités de la concurrence dans diverses régions du monde, puis examinera brièvement les conditions d'application du principe de « l'acte de gouvernement » aux comportements anticoncurrentiels des entreprises publiques prescrites par la loi. Enfin, cette partie s'intéressera à certaines affaires portées devant la justice par les autorités de la concurrence de diverses régions du monde, affaires qui impliquaient des pratiques anticoncurrentielles d'entreprises publiques du secteur postal.

2.1 Différences entre les entreprises publiques et privées

Dans la plupart des cas, les entreprises publiques jouissent de privilèges et d'immunités auxquels leurs concurrents privés n'ont pas droit. Ces privilèges confèrent aux entreprises publiques un avantage concurrentiel sur leurs rivales. Ces avantages ne sont pas fondés sur des critères de meilleure performance, d'efficacité supérieure, de technologie plus élaborée ou de meilleures compétences de gestion, mais sont laissés à la discrétion des autorités et faussent le jeu de la concurrence sur le marché⁴⁷. Le traitement de

⁴³ Troika Dialog, Who owns Russia, Corporate Governance Annual 2008.

⁴⁴ Effectivement, à l'exception de la Pologne, la propension des entreprises publiques russes à occuper plusieurs secteurs de l'économie est plus forte que dans tous les autres pays de l'OCDE. Voir l'Étude économique de l'OCDE sur la Fédération de Russie, juillet 2009, tableau 5.2 et graphique 5.A2.1.

⁴⁵ Fox, An Anti-Monopoly Law for China - Scaling the Walls of Protectionist Government Restraints, 75 Antitrust L.J. 173, 2008.

⁴⁶ Irwin et Yamamoto, Some Options for Improving the Governance of State-owned Electricity Utilities, Energy and Mining Sector Board, Discussion Paper Series n° 11 de la Banque mondiale, 2004.

⁴⁷ Pour une réflexion générale sur les privilèges et immunités spéciaux dont jouissent les entreprises publiques, voir Geddes, Case Studies of Anticompetitive SOE Behavior, in Competing with the

faveur que les pouvoirs publics réservent à leurs entreprises publiques pour les protéger peut prendre, par exemple, la forme de prêts à taux préférentiels par rapport à ceux que les entreprises privées peuvent obtenir, ce qui réduit les coûts de financement des entreprises publiques. Cette pratique peut avoir l'effet d'une subvention implicite. Les gouvernements peuvent utiliser les deniers publics pour proposer des taux d'emprunt inférieurs à ceux du marché. Les entreprises publiques peuvent aussi bénéficier de réglementations discriminatoires. Elles peuvent être exonérées du paiement de l'impôt ou bénéficier d'une immunité face au droit de la concurrence. En outre, les entreprises publiques peuvent profiter d'asymétries informationnelles, du fait qu'elles ont accès à des données auxquelles leurs concurrents privés ne peuvent accéder. Une entreprise publique produisant de multiples biens ou services peut également réaliser des économies d'échelle et de gamme afin de mettre en place d'importantes barrières à l'entrée et d'exclure ainsi efficacement la concurrence de concurrents efficaces.

Les parties suivantes abordent certains de ces avantages artificiels.

2.1.1 Pouvoir de monopole et droits exclusifs octroyés aux entreprises publiques

Les pouvoirs publics confient fréquemment aux entreprises publiques des droits exclusifs ou de monopole sur certaines activités que la loi leur impose. C'est le cas, par exemple, des services postaux, des services aux collectivités et d'autres services universels dont l'État décide de se charger par l'intermédiaire d'entités placées sous son contrôle. Aux États-Unis, par exemple, le gouvernement fédéral accorde à l'US Postal Service un monopole exclusif à la fois sur la livraison du courrier et sur l'utilisation des boîtes à lettres des clients. De même, Amtrak jouit d'un monopole pour le transport de voyageurs sur les liaisons ferroviaires interurbaines⁴⁸. La création d'un monopole peut avoir des implications quant à l'usage que fait l'entreprise publique de ce pouvoir de monopole. Plus précisément, la capacité de l'entreprise publique d'utiliser la rente d'un monopole pour faire bénéficier de subventions croisées d'autres activités pour lesquelles elle est confrontée à la concurrence d'entreprises privées peut être problématique.

2.1.2 Accès préférentiel au crédit et à d'autres services financiers

Les entreprises publiques peuvent avoir bénéficié de taux d'emprunt avantageux ou de garanties de crédit accordées par l'État, ce qui réduit leur coût de financement et favorise leur compétitivité vis-à-vis de leur rivales privées. Aux États-Unis, par exemple, le Postal Service est autorisé à emprunter directement auprès de la Federal Financing Bank qui garantit des obligations publiques à un taux d'intérêt inférieur à celui du marché pour des entreprises privées présentant un risque comparable⁴⁹. Le gouvernement fédéral cautionne aussi la dette de l'US Postal Service. Même lorsque les entreprises publiques ne bénéficient pas explicitement de taux de crédit préférentiels ou ne disposent pas de garanties de l'État, le marché considère généralement que ces dernières jouissent néanmoins de garanties implicites de la part des pouvoirs publics. Les entreprises publiques peuvent ainsi réaliser des économies de financement non négligeables grâce à ces conditions de crédit préférentielles.

Government, Anticompetitive Behaviour and Public Enterprises, Geddes (dir. pub.), Hoover Institution Press, 2004.

⁴⁸ Voir Geddes, Case Studies of Anticompetitive SOE Behavior, dans *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes (dir. pub.), Hoover Institution Press, 2004.

⁴⁹ MacAvoy et McIssac, The Current File on the Case for Privatization of the Federal Government Enterprises, dans *Deregulation and Privatization in the United States*, Hume Papers on Public Policy 3, éd. MacAvoy, Edinburgh University Press, 1995.

2.1.3 *Capital captif*

À l'inverse des entreprises privées, le capital des entreprises publiques est en quelque sorte « bloqué ». En d'autres termes, tandis que les actions d'une entreprise privée sont échangeables et que le contrôle de la société peut être transféré à quiconque, le contrôle d'une entreprise publique ne peut pas être transféré aussi facilement. Par conséquent, lorsqu'une entreprise publique affiche de mauvaises performances, ceux qui ont financé ses activités, c'est-à-dire les contribuables, ne peuvent retirer leurs fonds⁵⁰. L'impossibilité de transférer les droits de propriété confère un certain nombre d'avantages aux entreprises publiques, à savoir :

- les entreprises publiques sont généralement déchargées de l'obligation de distribuer des dividendes ou même tout bénéfice aux actionnaires pour les inciter à investir dans l'entreprise, ce qui permet à ces dernières d'encourir des pertes sans craindre de voir les propriétaires céder leurs participations ;
- les entreprises publiques auront une plus forte propension à adopter des stratégies anticoncurrentielles (rarement rentables), comme des prix d'éviction, sans craindre une chute du cours des actions lorsque des pertes sont encourues à la suite de la fixation de prix inférieurs aux coûts ;
- les directions des entreprises publiques sont moins enclines à exploiter l'entreprise de manière efficiente, car elles ne sont pas confrontées à la menace d'une OPA et se montrent en général indifférentes à la discipline imposée par le marché, contrairement aux directions de leurs concurrents privés.

2.1.4 *Exemption du régime des faillites*

Parmi les autres privilèges dont bénéficient les entreprises publiques, figure souvent l'exemption du régime des faillites. Étant donné que leurs fonds propres sont bloqués, les entreprises publiques peuvent générer des pertes sur une longue durée sans craindre la faillite⁵¹. Cette absence de contrainte relative à la faillite confère aux entreprises publiques un avantage concurrentiel significatif sur leurs concurrents privés. Plus particulièrement, le fait de ne pas être soumises au régime des faillites les incite à s'engager dans des projets concurrentiels dans des conditions qui leur sont favorables, et d'exercer une concurrence déloyale et inefficace vis-à-vis des entreprises privées⁵². Il s'ensuit également que les concurrents privés sont découragés d'entrer sur le marché en sachant qu'ils devraient alors faire face à la concurrence déloyale d'une entreprise publique.

⁵⁰ Les contribuables peuvent bien sûr exercer leur droit de vote et tenter de modifier les préférences et les politiques des pouvoirs publics.

⁵¹ D'après Geddes, Amtrak a perdu aux États-Unis 908 millions USD en 2000, 819 millions USD en 2001 et 752 millions USD en 2002, et l'US Postal Service a perdu quant à lui 200 millions USD en 2000, 1.7 milliard USD en 2001 et 676 millions USD en 2002, mais l'un comme l'autre continuent de fonctionner, ce qui montre une capacité de subir des pertes dans le long terme. Voir Geddes, *Case Studies of Anticompetitive SOE Behavior*, dans *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes (dir. pub.), Hoover Institution Press, 2004.

⁵² Crew et Kleindorfer, *Privatizing the U.S. Postal Service*, dans *Mail @ the Millenium*, Hudgins (dir. pub.), Washington D.C., Cato Institute, 2000.

2.1.5 *Avantages en matière d'information*

Les entreprises publiques peuvent également bénéficier d'asymétries informationnelles. On parle d'informations asymétriques lorsqu'une entreprise publique a accès à des données et informations auxquelles ses concurrents privés ont un accès limité ou aucun accès. Certaines administrations du secteur public peuvent être habilitées à collecter des données à des fins publiques. Les entreprises du secteur privé font appel à ces administrations publiques pour accéder à ces données. Il peut arriver que les entreprises du secteur public soient avantagées puisqu'elles peuvent utiliser ces données dans des conditions plus favorables que celles imposées au secteur privé.

2.1.6 *Subventions directes et indirectes*

Certaines entreprises publiques reçoivent des subventions directes de la part des pouvoirs publics ou bénéficient d'autres formes d'aides financières de l'État pour poursuivre leurs activités commerciales. Par exemple, aux États-Unis, en 2002, Amtrak avait reçu depuis le lancement de ses activités plus de 44 milliards USD au titre de subventions fédérales directes⁵³. Ce type d'intervention des pouvoirs publics abaisse les coûts d'exploitation des entreprises publiques et leur confère un avantage concurrentiel de taille sur leurs rivales privées. Les subventions directes, qui impliquent un transfert direct de trésorerie au profit du bénéficiaire, constituent le moyen le plus simple de soutenir une entreprise publique, mais sans doute le moins fréquemment utilisé. Les subventions indirectes sont plus subtiles, plus courantes et peuvent fausser sensiblement le jeu de la concurrence entre les entreprises publiques et leurs concurrents privés. L'expression « subvention indirecte » a un sens assez large et couvre toute forme de subvention n'impliquant pas un transfert direct de liquidités. Par exemple, les régimes fiscaux préférentiels ou les exemptions de certaines taxes dont bénéficient les entreprises publiques, équivalent à des subventions ciblées du gouvernement. Ces exemptions abaissent artificiellement les coûts des entreprises publiques et leur permettent de pratiquer des prix inférieurs à ceux de leurs concurrents soumis au régime fiscal normal.

2.1.7 *Autres privilèges et immunités octroyés par les pouvoirs publics*

Les entreprises publiques peuvent bénéficier d'exemptions réglementaires qui réduisent leurs coûts d'exploitation. Dans certains cas, les entreprises publiques ont été exonérées de la responsabilité découlant du droit de la concurrence ou ne sont pas soumises aux mêmes régimes réglementaires coûteux que les entreprises privées. Ces exemptions peuvent concerner le respect des règles relatives à la communication d'informations aux autorités de tutelle du secteur des valeurs mobilières, les réglementations en matière de permis de construire ou de plan d'occupation des sols, ou encore certains impôts locaux ou nationaux. Aux États-Unis, par exemple, l'US Postal Service a le pouvoir d'exproprier ; il est exempté du paiement des tickets de stationnement de ses véhicules et de leurs frais d'immatriculation ; il peut acheter du carburant détaxé et n'est pas tenu de demander des permis de construire ni de se plier aux réglementations en matière de plan local d'occupation des sols⁵⁴.

⁵³ Geddes, Case Studies of Anticompetitive SOE Behavior, dans *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes (dir. pub.), Hoover Institution Press, 2004.

⁵⁴ Geddes, Case Studies of Anticompetitive SOE Behavior, dans *Competing with the Government, Anticompetitive Behaviour and Public Enterprises*, Geddes (dir. pub.), Hoover Institution Press, 2004.

2.2. *Incitations des entreprises publiques à adopter des comportements anticoncurrentiels*

On impose souvent aux entreprises publiques de poursuivre des objectifs autres que la maximisation pure et simple des bénéfices⁵⁵. Pour autant, cela n'empêche pas ces dernières d'agir sur le marché de manière aussi agressive et concurrentielle que le ferait une entreprise privée tournée vers la maximisation des bénéfices. En fait, si les entreprises publiques sont peut-être moins soucieuses de générer des bénéfices que les entreprises privées, elles peuvent être plus incitées encore que ces dernières à adopter des comportements anticoncurrentiels⁵⁶. En réalité, si les dirigeants d'une entreprise publique ne donnent pas la priorité à la maximisation des profits, ils peuvent malgré tout avoir intérêt à étendre la gamme et l'étendue des activités de l'entreprise. Cela tient au fait que souvent, les performances d'une entreprise publique (et par conséquent le succès de ses dirigeants) reposent sur le volume de l'activité dont ils sont responsables. Cette propension à étendre le volume et la gamme des activités d'une entreprise publique laisse à penser que la direction peut être plus attentive au chiffre d'affaires de l'entreprise qu'à ses bénéfices⁵⁷. Par conséquent, à l'inverse d'une entreprise privée qui privilégie la maximisation de ses bénéfices, une entreprise publique peut trouver tout autant avantageux d'augmenter son chiffre d'affaires, même au prix d'une hausse sensible des coûts.

Cela peut avoir une incidence sur les incitations des entreprises publiques à agir de manière préjudiciable pour la concurrence. Une entreprise publique peut avoir intérêt à mener des stratégies anticoncurrentielles qui contribuent à augmenter sa production et son chiffre d'affaires, même si ces pratiques ne génèrent pas de bénéfices. En conséquence, les différents objectifs qu'une entreprise publique peut poursuivre par comparaison avec un concurrent privé ont un impact direct en termes de stratégie de prix. Plus précisément, Sappington et Sidak concluent qu'une entreprise publique qui maximise à la fois ses bénéfices et son chiffre d'affaires réduit dans les faits les coûts marginaux de production de ses services dans une plus grande mesure qu'une entreprise privée qui maximise ses bénéfices⁵⁸. En d'autres termes, l'entreprise publique attachera moins d'importance que son concurrent privé aux coûts supplémentaires engendrés par l'accroissement de sa production. En conséquence, l'attention moindre qu'elle accorde aux bénéfices peut pousser une entreprise publique à fixer des prix particulièrement bas pour des produits soumis à une rude concurrence, afin d'augmenter sa production et son chiffre d'affaires. Une entreprise publique est en effet plus susceptible qu'un concurrent privé de fixer des prix inférieurs à ses coûts marginaux, même sans avoir l'intention de mettre en œuvre une stratégie de prédation⁵⁹. D'après Sappington et Sidak, une entreprise publique est d'autant plus susceptible de fixer des prix inférieurs au coût lorsque les bénéfices sont moins prioritaires pour elle et lorsque la demande est plus sensible au prix, ou encore lorsque ces deux facteurs sont combinés⁶⁰.

⁵⁵ Par exemple, lorsqu'elle établit ses tarifs, l'US Postal Service est tenu de veiller à ce que ses barèmes soient raisonnables, équitables et simples, et doit être attentive au rapport entre les prix, les coûts et la valeur du service proposé.

⁵⁶ Sappington et Sidak, *Competition Law for State Owned Enterprises*, 71 *Antitrust Law Journal* No. 2, 2003. Voir également Lott, *Are Predatory Commitments Credible? Who Should the Court Believe?*, 1999.

⁵⁷ Rees, *A Positive theory of the Public Enterprise*, dans *The Performance of Public Enterprises: Concepts and measurements*, in Marchand, Pestieau et Tulkens (dir. pub.), 1984 ; Baumol, *Business Behaviour, Value and Growth*, 45, 1959.

⁵⁸ Sappington et Sidak, *Competition Law for State Owned Enterprises*, 71 *Antitrust Law Journal* n° 2, 2003.

⁵⁹ Lott, *Predation by Public Enterprises*, *Journal of Public Economics* 43, 1990.

⁶⁰ Même si le bénéfice diminue en raison de la vente à perte, le chiffre d'affaires peut néanmoins augmenter.

2.3 *Capacité des entreprises publiques à adopter des comportements anticoncurrentiels*

Après avoir établi que l'approche des entreprises publiques moins orientée sur les bénéfices peut influencer sur leur incitation à agir de manière anticoncurrentielle, nous allons maintenant nous intéresser aux publications qui ont recensé un certain nombre de raisons expliquant pourquoi les entreprises publiques ont également la capacité d'agir de la sorte⁶¹.

- Lorsque, pour une raison ou pour une autre, une entreprise ne cherche pas strictement à maximiser ses bénéfices, elle peut fixer ses prix inférieurs aux coûts pendant de longues durées (voire pour des durées indéfinies)⁶², car cette stratégie de vente à perte peut être soutenue soit par des prix supérieurs aux coûts sur d'autres segments d'activité, soit par d'autres sources de financement⁶³.
- Alors que les entreprises privées qui décident de vendre à perte doivent prévoir de récupérer leurs pertes encourues à court terme en élevant ultérieurement les prix au-dessus du niveau concurrentiel, une fois que la stratégie de prédation a porté ses fruits⁶⁴, la récupération des pertes ne s'impose pas nécessairement dans le cas d'une entreprise publique. Contrairement aux entreprises privées, les entreprises publiques ont une grande capacité à supporter des pertes dans le temps, d'autant plus qu'elles bénéficient du soutien direct de ressources publiques. Pour ce qui est des entreprises publiques fabriquant des produits multiples, la récupération des pertes peut se faire pendant la phase de prédation, *via* simplement une hausse des prix sur les marchés où elles jouissent d'un monopole légal.
- Alors qu'il est difficile et coûteux pour les entreprises privées de mettre en place des barrières à l'entrée pour les concurrents susceptibles d'être attirés par les prix élevés pratiqués pendant la période de récupération, les entreprises publiques peuvent, quant à elles, bénéficier de dispositions légales qui leur permettent d'élever les coûts d'entrée pour leurs concurrents. Il peut en être ainsi, par exemple, si l'entreprise publique est autorisée à définir la portée de son monopole légal, et par conséquent celle des services fournis sur le marché concurrentiel.
- Enfin, comme nous l'avons souligné auparavant, les entreprises publiques peuvent bénéficier d'un certain nombre de privilèges et d'immunités autres qu'une aide financière directe du gouvernement, ce qui facilite la récupération de toute perte encourue par des pratiques tarifaires anticoncurrentielles.

2.4 *Pratiques anticoncurrentielles des entreprises publiques*

Les caractéristiques des entreprises publiques évoquées précédemment peuvent amener ces dernières à adopter des stratégies en matière de prix et d'autres stratégies commerciales susceptibles de comporter

⁶¹ Sappington et Sidak, Competition Law for State Owned Enterprises, 71 Antitrust Law Journal n° 2, 2003.

⁶² Même si la fixation de prix inférieurs aux coûts n'entraîne pas ultérieurement une augmentation des prix au dessus du coût, cette pratique peut néanmoins susciter des questions en termes de politique publique, en raison de ses effets sur la productivité. Les politiques de prix qui faussent la concurrence peuvent amener une entreprise plus efficiente à quitter le marché concurrentiel ou la décourager d'y entrer. Voir Report Promoting Competition in Postal Services, OCDE, 1999 (DAFFE/CLP(99)22).

⁶³ OCDE, Report Promoting Competition in Postal Services, 1999 [DAFFE/CLP(99)22] ; Report on Non-Commercial Service Obligations and Liberalisation, 2003 [DAFFE/COMP(2004)19]

⁶⁴ Areeda et Turner, Predatory pricing and Related Practices Under Section II of the Sherman Act, 88 Harvard Law Review, 1975 ; OCDE, Rapport, Predatory Foreclosure, 2005 [DAF/COMP(2005)14].

des effets anticoncurrentiels. Parmi ces stratégies figurent la vente à perte, l'élévation des coûts d'exploitation des rivaux ou la mise en place de barrières afin d'exclure l'entrée de concurrents plus efficaces dans le marché.

2.4.1 *Prédation*

Le soutien apporté aux entreprises publiques par les pouvoirs publics au moyen d'immunités et de privilèges qu'ils créent eux-mêmes permet à ces dernières de fixer des prix inférieurs au coût marginal⁶⁵. Cela crée une situation où, contrairement aux cas typiques de prédation anticoncurrentielle, l'entreprise publique n'est pas tenue de récupérer ses pertes pour que son comportement prédateur soit efficace⁶⁶. L'entreprise prédatrice y trouve son intérêt, mais au détriment de celui du consommateur. Lorsqu'une entreprise publique opère à la fois dans des marchés réservés et non réservés, la crainte est de voir cette dernière exclure des concurrents en pratiquant des prix d'exclusion, et faire bénéficier le secteur concurrentiel de subventions croisées en provenance du secteur réservé, sans avoir à compenser ses pertes pendant la période suivant la prédation.

Dans certaines juridictions, le comportement prédateur n'est pas une infraction à la loi, sauf si le prédateur compense ses pertes⁶⁷, le principe étant que si les pertes ne peuvent être récupérées, on considère alors que la concurrence n'a pas subi de préjudice. Cela étant, les entreprises publiques ne cherchent pas toujours à maximiser leurs bénéfices et ne compensent donc pas leurs pertes de la même manière que les entreprises privées. Par conséquent, la capacité des entreprises publiques de pratiquer des prix d'éviction sans récupération pose la question importante de savoir s'il existe ou non un préjudice pour le consommateur dans le cas où les prix n'augmentent pas à la suite de la prédation, et aussi celle de savoir si une norme juridique spéciale devrait être mise en place s'agissant des stratégies d'éviction des entreprises publiques. Les partisans de l'application du droit de la concurrence aux stratégies de prix d'éviction sans récupération des entreprises publiques font valoir qu'une stratégie d'éviction menée avec succès par une entreprise publique a pour effet de réduire les ressources que ses concurrents peuvent allouer à l'innovation ou à leur exploitation. Leur argument consiste donc à dire qu'en l'absence de telles pratiques, les prix auraient pu être plus bas encore, avec davantage d'innovation. Une prédation réussie peut également avoir des effets en termes de réputation si l'entreprise opère sur de multiples marchés de produits. Cet effet sur la réputation crée une menace crédible qui permet aux entreprises de récolter le fruit de leur prédation y compris sur les marchés non visés par leur stratégie d'éviction, étant entendu que ce phénomène affecte ensuite négativement le marché dans son ensemble⁶⁸.

⁶⁵ Lott, Are Predatory Commitments Credible?: Who Should the Courts Believe? 77 (1999) (qui fait valoir que « les entreprises publiques tirent également des gains supérieurs de leurs pratiques de prix inférieurs aux coûts en ce qu'elles bénéficient non seulement de la réduction de la concurrence à long terme, mais aussi de l'augmentation à court terme de leur production, qui est indispensable pour la mise en œuvre de la stratégie de bradage ».)

⁶⁶ Sappington et Sidak, Competition Law for State-Owned Enterprises, 71 Antitrust L.J., 2003. Les publications économiques soulignent de plus en plus que les prix d'éviction peuvent être sensés dans d'autres contextes, y compris pour les entreprises cherchant à maximiser leurs bénéfices. Voir Bolton, Brodley et Riordan, Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L. J., 2000 (qui expliquent que « l'analyse économique moderne a élaboré des théories cohérentes sur la prédation, qui contredisent les ouvrages économiques précédents, selon lesquels les pratiques de prix d'éviction sont illogiques » et que, par conséquent, « [selon] le consensus de l'économie moderne, les pratiques de prix d'éviction peuvent s'avérer une stratégie commerciale concluante et parfaitement raisonnée ».

⁶⁷ OCDE, Rapport, Predatory Foreclosure, 2005 [DAF/COMP(2005)14].

⁶⁸ Milgrom, Predatory Pricing, dans The New Palgrave Dictionary of Economics, Eatwell, Murray Milgate et Newman (dir. pub.), 1987.

2.4.2 *Augmentation des coûts des rivaux et mise en place de barrières à l'entrée*

Il convient de distinguer la prédation de l'augmentation des coûts des entreprises rivales⁶⁹. La prédation exige que les règles de concurrence parviennent à équilibrer les pertes à court terme par rapport aux avantages à long terme. En faisant augmenter les coûts des rivaux, l'objectif visé est d'accroître les coûts de production des entreprises rivales plutôt que d'abaisser soi-même ses propres prix. Une stratégie réussie d'augmentation des coûts doit permettre à l'entreprise en position dominante de faire en sorte que ses coûts moyens augmentent moins que les coûts marginaux d'une entreprise rivale. Cela permet à une entreprise dominante de créer des asymétries de coûts entre elle et ses rivales et de pousser ses concurrents à diminuer leur production ou à augmenter leurs prix⁷⁰. De cette manière, l'entreprise publique verra augmenter la demande de ses produits, ce qui lui permettra de réaliser de plus grandes économies d'échelle sur ses activités.

Le but ultime d'une stratégie d'augmentation des coûts des rivaux est différent de celui de la prédation. En effet, une stratégie réussie d'augmentation des coûts ne contraint pas l'entreprise dont les coûts sont supérieurs à quitter le marché, mais simplement à laisser l'entreprise dominante élever ses prix au-dessus du niveau concurrentiel⁷¹. Comme le suggèrent Sappington et Sidak, « [p]ar conséquent, même si une entreprise publique tire peut-être un moindre profit de ses activités anticoncurrentielles qu'une entreprise cherchant à maximiser ses bénéfices, elle peut néanmoins juger optimal de poursuivre des activités anticoncurrentielles agressives destinées à augmenter sa production et son chiffre d'affaires »⁷².

Étant donné qu'une entreprise publique peut définir ses objectifs en termes de chiffre d'affaires plutôt que de bénéfices, elle peut absorber des augmentations de coûts plus efficacement que ses rivales privées⁷³. Lorsqu'une entreprise publique est en mesure de mener efficacement une stratégie visant à élever les coûts d'un rival, elle peut alors élargir son champ d'activité. Les techniques de prédation et d'augmentation des coûts des concurrents visent toutes deux à empêcher ces derniers d'accroître leurs investissements en recherche et développement, et restreignent leur capacité à développer de nouveaux produits et services et à déployer des processus propres à augmenter les gains dynamiques tirés de l'innovation⁷⁴. Des raisons précises peuvent pousser les entreprises publiques à vouloir faire augmenter les coûts de leurs rivales. Si cette stratégie entraîne une hausse du coût marginal de leurs concurrents, elle peut aussi s'avérer coûteuse pour celle qui la pratique, mais elle lui permet simultanément d'accroître la demande de son produit ou service. Étant donné que le principal objectif de l'entreprise publique est de maximiser son chiffre d'affaires, celle-ci tire alors parti de cette demande ainsi accrue⁷⁵.

⁶⁹ Cope, *Regulating Market Activities in the Public Sector*, 7 OCDE J. Comp. L. & Pol'y, 2005 ; Sappington et Sidak, *Competition Law for State-Owned Enterprises*, 71 Antitrust L.J., 2003.

⁷⁰ Martin, *Advanced Industrial Economics*, 2^e éd., 2002.

⁷¹ Krattenmaker et Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J., 1986.

⁷² Sappington et Sidak, *Competition Law for State-Owned Enterprises*, 71 Antitrust L.J., 2003.

⁷³ Scheffman et Higgins, *20 Years of Raising Rivals' Costs: History, Assessment, and Future*, 12 Geo. Mason L. Rev., 2003.

⁷⁴ Fox, *US and European Merger Policy--fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices*, 10 Geo. Mason L. Rev., 2002 (qui cite l'affaire États-Unis c. Microsoft Corp., 253 F.3d 34, 50-53 (D.C. Cir. 2001)).

⁷⁵ Sappington et Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, 22 Rev. Indus. Org., 2003.

Les stratégies utilisées dans ce but peuvent prendre des formes diverses. Par exemple : l'entreprise en place peut chercher à empêcher ses rivales d'accéder aux infrastructures ou aux ressources essentielles ou à faire augmenter le prix du marché de ces ressources en achetant des quantités excessives⁷⁶ ; face à une nouvelle réglementation environnementale, les entreprises en place peuvent exercer de fortes pressions pour bénéficier de clauses de droits acquis⁷⁷ ; les entreprises en place peuvent faire pression auprès des pouvoirs publics pour qu'ils adoptent des réglementations restrictives de nature à rendre l'entrée sur le marché plus coûteuse, moins rentable, voire impossible pour de nouveaux entrants ; les entreprises en place peuvent concevoir leur produit ou service de manière à ce que les consommateurs ne puissent pas facilement passer au produit d'une rivale⁷⁸ ; ou les entreprises peuvent tenter d'obtenir à tout prix une demande de prolongation de brevet, l'un des objectifs d'une telle tactique pouvant être d'infliger des coûts additionnels (frais de justice et autres) à leurs rivales afin de retarder ou d'empêcher leur entrée.

2.4.3 *Subventions croisées*

De nombreuses entreprises publiques opèrent à la fois dans un marché monopolistique et dans un ou plusieurs marchés concurrentiels où elles sont en concurrence avec des rivales privées. Dans ce cas, l'entreprise publique est en mesure d'exploiter les économies de gamme et les complémentarités de coûts entre les deux marchés. Pour une entreprise publique, l'une des manières les plus simples de tirer parti de ses privilèges dans le but d'exclure des rivales est de répercuter les coûts de ses activités concurrentielles sur ses activités de monopole⁷⁹. Si une entreprise publique est autorisée à recourir à des subventions croisées, elle peut pratiquer des prix inférieurs aux coûts et réduire la part de marché de ses concurrents, les contraindre à abandonner le marché ou encore dissuader l'entrée de nouveaux concurrents, et ce, même si les concurrents sont plus efficaces que l'entreprise publique. En outre, l'existence d'un monopole légal empêche un concurrent efficace nouvellement arrivé sur le deuxième marché concurrentiel de réaliser les mêmes économies de gamme que l'entreprise publique, et de diminuer ainsi le coût marginal de production de son produit exposé à la concurrence. En plus des économies de gamme, l'entreprise publique peut également bénéficier indirectement d'économies d'échelle. Si l'entreprise publique peut pratiquer des prix inférieurs aux coûts en recourant à des subventions croisées entre ses activités concurrentielles et ses activités réservées, elle peut augmenter la production de son produit concurrentiel. Dans ce cas, l'entreprise publique réalisera des économies d'échelle hors de portée de ses rivales. L'accroissement de la production entraînera une baisse du coût unitaire de production de l'entreprise publique sur le marché concurrentiel et se traduira par une diminution supplémentaire des ventes des entreprises rivales au profit du produit de l'entreprise publique.

2.4.4 *Choix stratégique d'une technologie inefficace*

Si une entreprise publique a la possibilité de choisir sa technologie selon des critères stratégiques, par exemple, si elle peut choisir parmi diverses technologies de production, elle peut en profiter pour opter pour une technologie inefficace garantissant un coût marginal relativement bas même si cela implique des

⁷⁶ Sappington et Sidak, *Competition Law for State-Owned Enterprises*, 71 *Antitrust L.J.*, 2003.

⁷⁷ Ces clauses leur permettent de continuer de fonctionner pendant un certain temps selon les règles auparavant en vigueur mais obligent les nouvelles entreprises à se conformer aux nouvelles règles sur-le-champ. Cela peut engendrer des asymétries de coûts significatives entre les entreprises en place et les nouvelles venues, et porter un lourd préjudice à la concurrence.

⁷⁸ Dans des secteurs comme les télécommunications, le gaz naturel, la production d'électricité et la banque, on rencontre des contrats assortis de clauses restrictives et de périodes d'engagement.

⁷⁹ OCDE, *Report on Non-Commercial Service Obligations and Liberalisation*, 2003 [DAFFE/COMP(2004)19].

frais généraux (fixes) particulièrement élevés⁸⁰. L'intérêt d'une telle stratégie serait de maintenir les coûts marginaux à un niveau anormalement bas afin de contourner une interdiction contraignante de fixation de prix inférieurs aux coûts⁸¹. Moins une entreprise publique axe ses efforts sur la maximisation des bénéfices, plus elle est incitée à investir en capital de manière excessive, car plus elle favorise le chiffre d'affaires par rapport aux bénéfices, plus elle peut afficher une production et un chiffre d'affaires importants, lesquels peuvent être réalisés grâce à un prix inférieur. Par conséquent, moins sa technologie sera efficiente, plus bas seront ses prix.

2.5 Exemptions du droit de la concurrence applicables aux entreprises publiques⁸² – La doctrine de l'acte de gouvernement

De nombreuses activités des entreprises publiques sont définies par la loi ou trouvent une justification dans les politiques publiques. Les organismes publics peuvent conférer aux entreprises publiques le pouvoir de fixer les prix ou de définir d'autres conditions générales relatives à leurs activités commerciales. Il y a lieu de se demander si de telles activités, qui peuvent entraîner d'importantes restrictions en matière de prix ou de production, devraient faire l'objet d'une surveillance particulière au regard du droit de la concurrence, même si elles ont été imposées ou autorisées par la loi. Selon la *doctrine de l'acte de gouvernement*, la responsabilité ne peut être engagée, en vertu du droit de la concurrence, si le comportement commercial contesté (qu'il s'agisse d'entreprises privées ou publiques) a été déterminé par des mesures légales prises par les pouvoirs publics⁸³.

La question de la responsabilité, en vertu du droit de la concurrence, découlant d'un comportement induit par l'État a été tranchée pour la première fois par la Cour suprême des États-Unis en 1947 dans l'affaire *Parker contre Brown*. Dans cette affaire, un groupe de producteurs de raisins secs a convenu d'appliquer des restrictions de production et cet accord a été ensuite ratifié par le ministère de l'Agriculture d'un État. La Cour suprême a décidé que ce comportement anticoncurrentiel bénéficiait d'une immunité vis-à-vis de l'application du droit de la concurrence si deux conditions étaient réunies en même temps :

- le comportement « doit découler d'une politique publique clairement formulées et affirmée par l'État » et
- faire l'objet de la « surveillance active de l'État ».

⁸⁰ Sappington et Sidak, Incentives for Anticompetitive behaviours by Public Enterprises, Review of Industrial Organization, 22, 2003.

⁸¹ Voir également Baseman, Open Entry Costs and Cross-Subsidization in Regulated Markets, éd. Gary Fromm., Studies in Public Regulation, Cambridge MA, The MIT Press, 1981 ; Brennan, Cross-Subsidization and Cost Misallocation by Regulated Monopolies, Journal of Regulatory Economics, Vol. 2, 1990.

⁸² Ce document ne traite pas des éventuelles exemptions de l'application du droit de la concurrence dont peuvent bénéficier les entreprises publiques au titre de réglementations sectorielles spécifiques. Aux États-Unis, par exemple, l'US Postal Service a bénéficié d'une immunité expresse concernant sa responsabilité découlant du droit de la concurrence dans le cadre de tout comportement répondant à une demande du Congrès en vertu du Postal Reorganization Act (loi relative à la réorganisation des services postaux) de 1970. Cela étant, le nouveau Postal Reorganization Act de 2007 soumet explicitement les services concurrentiels de l'US Postal Service au droit de la concurrence.

⁸³ Muris, State Intervention/State Action - A U.S. Perspective, octobre 2003, George Mason Law & Economics Research Paper n° 04-18 ; Delacourt et Zywicki, The FTC and State Action: Evolving Views on the Proper Role of Government, Antitrust Law Journal, Vol. 72, n° 3, 2005.

Par conséquent, en vertu de l'affaire *Parker*, un comportement allant dans le sens d'une politique publique clairement formulée et affirmée et faisant l'objet d'une surveillance active de l'État, est exonéré de la responsabilité découlant du droit de la concurrence. L'excuse de l'acte de gouvernement a été appliquée à un certain nombre d'affaires à la suite de l'affaire *Parker*, y compris à des affaires impliquant des associations commerciales, dans le cadre desquelles les tribunaux américains ont affiné et précisé plus en avant l'interprétation des deux conditions énoncées dans l'affaire *Parker*. Ils se sont notamment intéressés de près à la signification de l'expression « politique publique clairement formulée par l'État », refusant d'étendre cette excuse à toute action de l'État ; ils ont en outre suivi de près l'application du critère de « surveillance active », récusant cette excuse lorsque cette surveillance n'est guère ou jamais exercée dans la pratique⁸⁴. Ainsi, dans l'affaire *Retail Liquor Dealers Association contre Midcal Aluminium Co.*,⁸⁵ l'excuse a été récusée pour un dispositif d'affichage des prix d'une association commerciale car, bien que prévu par la loi, le dispositif en question ne faisait l'objet d'aucune surveillance convenable, puisque les prix étaient toujours laissés à la discrétion des commerçants qui y participaient.

En Europe, la Cour de justice des communautés européennes (CJCE) est confrontée depuis les années 70 au problème des mesures ayant des effets anticoncurrentiels prises par l'État et de leur interaction avec les clauses de concurrence du Traité de l'Union européenne⁸⁶. La plupart des arrêts rendus dans ces affaires, cependant, remettent en cause la doctrine de l'acte de gouvernement lorsqu'elle exempte les mesures prises par l'État éliminant l'effet utile des règles communautaires applicables aux entreprises en matière de concurrence, mais non lorsqu'elle exempte des règles de la concurrence les comportements privés résultant entièrement de mesures licites prises par les pouvoirs publics. Dès 1977, la CJCE statuait : « *que, dès lors, s'il est vrai que l'article [82] s'adresse aux entreprises, il n'en est pas moins vrai que le Traité impose aux États membres de ne pas prendre ou maintenir en vigueur des mesures susceptibles d'éliminer l'effet utile de cette disposition* »⁸⁷, imposant de ce fait une obligation générale de ne pas éliminer l'effet utile de l'article 82. Elle poursuivait en énonçant « *que, pareillement, les États membres ne sauraient édicter des mesures permettant aux entreprises privées de se soustraire aux contraintes imposées par les articles [81] à [89] du Traité* »⁸⁸.

Le champ d'application de l'obligation imposant aux États membres de ne pas prendre ou maintenir en vigueur des mesures susceptibles d'affecter les règles de la concurrence énoncées dans le Traité a été précisé plus en avant, au fil du temps, par les tribunaux européens dans un certain nombre d'affaires. Dans l'affaire *Eycke*⁸⁹, la Cour de justice des communautés européennes a réaffirmé le principe énoncé dans l'affaire GB-Inno-BM selon lequel le Traité de l'Union européenne impose aux États membre de ne pas prendre ou maintenir en vigueur des mesures, fussent-elles législatives, susceptibles de rendre inefficaces les règles de la concurrence, précisant que « *tel est le cas, [...], lorsqu'un État membre soit impose ou favorise la conclusion d'ententes contraires à l'article [81] ou renforce les effets de telles ententes, soit retire à sa propre réglementation son caractère étatique en déléguant à des opérateurs privés la responsabilité de prendre des décisions d'intervention en matière économique* »⁹⁰.

⁸⁴ FTC c. Ticor Tiles Inc., 504 US 621 (1992), cert. refusée, 114 S.Ct. 1292 (1994).

⁸⁵ 445 US 97 (1980).

⁸⁶ Cruz, The State Action Doctrine, dans Amato & Ehlermann, EC Competition Law – A Critical Assessment, Hart Publishing, 2007.

⁸⁷ Affaire 13/77, GB-Inno-BM, [1977] Rec. 2115, paragraphe 31.

⁸⁸ Id. paragraphe 33.

⁸⁹ Affaire 267/86, Van Eycke, [1988] Rec. 4769.

⁹⁰ Voir paragraphe 16. La signification des termes « impose » ou « favorise » un comportement illicite ou « renforce » les effets d'un tel comportement ou « délègue » à des structures privées des fonctions

En ce qui concerne l'excuse de l'acte de gouvernement, complément logique de la doctrine de l'acte de gouvernement, la Cour de justice des communautés européennes a arrêté que les obligations pesant sur les États membres en vertu du Traité sont *distinctes* de celles découlant pour les entreprises de la responsabilité incombant aux entités privées en vertu des règles communautaires⁹¹. Selon la Cour, l'excuse de l'acte de gouvernement a un sens très restrictif et n'exempte pas les entités privées de la responsabilité en tant que telle qui leur incombe en vertu du droit de la concurrence. En vertu du droit communautaire, la responsabilité des entreprises n'est pas engagée si leur comportement anticoncurrentiel est *imposé* par une mesure publique et si toute possibilité de « comportements autonomes » des entreprises est exclue. La Cour a précisé que cette excuse se fonde sur le « principe général de droit communautaire de la sécurité juridique »⁹². Cela étant, les entreprises sont responsables en vertu des règles communautaires en matière de concurrence et peuvent encourir des amendes si la mesure publique « *se limite à inciter ou à faciliter l'adoption, par les entreprises, de comportements anticoncurrentiels autonomes* ». Dans de telles affaires, leur responsabilité découlant du droit de la concurrence peut être établie, mais le cadre juridique national peut alors être retenu comme une « circonstance atténuante » pour alléger l'amende infligée⁹³.

2.6 Application du droit de la concurrence – Exemples du secteur postal

En général, l'application du droit de la concurrence est neutre vis-à-vis de la propriété des entreprises. Ce droit s'applique aux agissements des entités économiques, qu'elles soient privées ou publiques. La plupart des pays de l'OCDE n'excluent pas les entreprises du secteur public du droit de la concurrence (sauf certaines entreprises spécifiques qui bénéficient d'exemptions dans certains pays). Cela étant, on peut y trouver des exemptions partielles qui protègent certains types d'entreprises du secteur public ou certains segments de leurs activités commerciales. Le fait que des entités liées à l'État et non constituées en sociétés développent des activités commerciales en concurrence avec le secteur privé suffit souvent à faire d'elles des « entreprises » ou à les soumettre d'une manière ou d'une autre au droit de la concurrence.

Dans un certain nombre de pays de l'OCDE, les règles de concurrence relatives à l'abus de position dominante et à la constitution de monopole justifient que les autorités enquêtent sur les pratiques commerciales des entreprises publiques et les sanctionnent. Ces affaires, principalement liées à des pratiques de prix abusives, ont montré la complexité de l'application du droit de la concurrence aux entités publiques. La difficulté que posent le calcul précis des coûts des entreprises commerciales publiques et la comparaison de ces coûts avec ceux d'entreprises similaires privées peut paraître décourageante, notamment lorsque les dispositifs de gouvernance des entreprises publiques manquent de transparence ou que leurs méthodes comptables sont inadaptées. Ces difficultés, combinées à la divergence des objectifs des entreprises publiques et des entreprises privées, peut entraîner des contradictions dans l'application des règles de concurrence aux entreprises privées et publiques.

Le secteur postal est un bon exemple de secteur d'activité où les pratiques anticoncurrentielles des entreprises publiques sont courantes. Plusieurs raisons sont à l'origine de cette situation. Premièrement, dans beaucoup de pays, l'implication des pouvoirs publics dans le secteur postal est forte. La plupart des services postaux sont (ou ont été) des entités publiques. Deuxièmement, les entreprises publiques sont de très grandes entreprises jouissant d'une présence significative sur le marché. Troisièmement, de nombreux opérateurs postaux publics bénéficient toujours de droits de monopole sur un certain nombre de services postaux (comme la distribution des lettres) et sont parallèlement en concurrence avec des entreprises

réglementaires publiques a été précisée dans un certain nombre d'affaires : Affaire C-2/91, Meng, [1993] ECR I-5751 ; Affaire C-245/91, Ohra, [1993] Rec. I-5851 ; Affaire C-185/91, Reiff, [1993] Rec. I-5801.

⁹¹ Affaire C-198/01, Consorzio Industrie Fiammiferi, [2003] Rec. I-8055, paragraphe 51.

⁹² *Idem* au paragraphe 54.

⁹³ *Idem* aux paragraphes 56-57.

privées sur d'autres marchés (comme la livraison de colis ou les services de courrier exprès). En outre, dans le secteur postal, les plaintes portant sur des subventions croisées et des pratiques de prix prédateurs sont courantes.

2.6.1 *Deutsche Post*

En mars 2001, la Commission a rendu sa première décision fondée sur l'article 86 dans le secteur postal, en estimant que l'opérateur postal allemand, Deutsche Post AG (DPAG), avait abusé de sa position dominante sur le marché des services de colis aux entreprises en accordant des remises de fidélité et en pratiquant des ventes à perte⁹⁴. DPAG s'est vue infliger une amende de 24 millions EUR au titre de l'exclusion qu'a entraîné son système de remises de fidélité en place de longue date. Aucune amende n'a été imposée en lien avec les ventes à perte car les concepts de coûts économiques utilisés pour détecter les pratiques de prédation n'étaient pas suffisamment élaborés à l'époque⁹⁵. L'enquête a révélé que DPAG utilisait ses recettes tirées de son monopole de livraison de lettres pour financer les ventes à pertes pratiquées sur le marché concurrentiel des services de colis aux entreprises. La Commission a jugé que tout service fourni par le bénéficiaire d'un monopole sur tout marché ouvert à la concurrence devait couvrir au moins le coût additionnel ou marginal encouru par le lancement de ce nouveau service dans le secteur concurrentiel. Toute couverture des coûts inférieure à ce niveau doit être considérée comme un bradage des prix. L'enquête a montré que pendant cinq ans, DPAG n'a pas répercuté les coûts marginaux inhérents à la fourniture du service de livraison pour les entreprises de vente par correspondance. Cette décision est particulièrement intéressante, car la Commission européenne a estimé qu'une dérogation obtenue au titre de l'article 86(2) du Traité de l'Union européenne⁹⁶ n'était pas valable car la fin des remises de fidélité et une hausse des tarifs de DPAG pour couvrir au moins le coût marginal inhérent à la fourniture de services de livraison de colis pour les entreprises de vente par correspondance n'empêcheraient pas DPAG de satisfaire à son obligation légale de fournir un service d'intérêt économique général (« opérateur de dernier recours »).

La même année, la Commission européenne a rendu une autre décision à l'encontre de Deutsche Post AG⁹⁷, estimant que cette dernière avait abusé de sa position dominante sur le marché allemand du courrier en interceptant, en surtaxant et en retardant le courrier international entrant qu'elle classait à tort en tant que courrier exclusivement national (appelé repostage A-B-A). Plus précisément, la Commission a conclu que DPAG avait abusé de sa position dominante sur le marché allemand de la distribution du courrier international de quatre manières : (i) en établissant une discrimination entre différents clients, (ii) en refusant d'assurer son service de distribution, (iii) en appliquant un prix excessif au service offert et (iv) en limitant le développement du marché allemand de la distribution du courrier international et celui du marché britannique du courrier international sortant à destination de l'Allemagne. Au cours de la

⁹⁴ Affaire COMP/35.141 (JO L 125, 5.5.2001).

⁹⁵ En réponse aux préoccupations mises en avant par la Commission au cours de l'enquête, DPAG s'est engagée à créer une entreprise distincte pour la fourniture de services de livraison de colis aux entreprises, laquelle serait libre de « s'approvisionner » en services nécessaires à ses propres services soit auprès de DPAG (au prix du marché), soit auprès de tout tiers, ou encore de les produire elle-même. En outre, DPAG s'est engagée à veiller à ce que tout service qu'elle fournirait à la nouvelle entreprise soit proposé à ses concurrents au même prix et dans les mêmes conditions.

⁹⁶ En vertu de l'article 86(2) du Traité de l'Union européenne, « Les entreprises chargées de la gestion de services d'intérêt économique général ou présentant le caractère d'un monopole fiscal sont soumises aux règles du présent traité, notamment aux règles de concurrence, dans les limites où l'application de ces règles ne fait pas échec à l'accomplissement en droit ou en fait de la mission particulière qui leur a été impartie. Le développement des échanges ne doit pas être affecté dans une mesure contraire à l'intérêt de la Communauté ».

⁹⁷ Affaire COMP/36.915 (JO L 331, 15.12.2001).

procédure, DPAG s'était engagée à ne plus intercepter, surtaxer ni retarder le courrier international du type concerné en l'espèce. En raison de l'insécurité juridique qui existait à l'époque de l'infraction, la Commission a décidé d'imposer à DPAG une amende « symbolique » de 1 000 EUR.

2.6.2 *US Postal Service*

Dans l'affaire *United States Postal Service contre Flamingo Industries*⁹⁸, la Cour suprême des États-Unis a été saisie pour statuer si US Postal Service (USPS) bénéficiait d'une immunité vis-à-vis du droit de la concurrence. Lorsqu'USPS a décidé de résilier un contrat avec Flamingo Industries, fournisseur de sacs postaux, ce dernier a poursuivi USPS devant un Tribunal de district américain en arguant que Postal Service avait prétexté « une fausse urgence concernant la fourniture de sacs postaux », au titre de laquelle il était en droit d'attribuer des contrats sans appel d'offre à des fabricants étrangers meilleur marché sans permettre aux entreprises américaines de les concurrencer. Flamingo avait fait valoir qu'en agissant ainsi, USPS avait cherché à éliminer la concurrence et avait créé un monopole de la production de sacs postaux, violant ainsi les lois fédérales en matière de concurrence (entre autres accusations). Le *Tribunal* de district a récusé l'accusation de violation du droit de la concurrence au motif que le gouvernement fédéral est protégé par une immunité souveraine. Le tribunal régional d'appel a cassé cette décision concernant l'immunité vis-à-vis du droit de la concurrence. Il a estimé que la loi de réorganisation postale de 1970 (1970 Postal Reorganization Act - PRA) mettait fin à l'immunité souveraine de Postal Service et que ce dernier pouvait par conséquent être poursuivi en application des lois fédérales en matière de concurrence au même titre qu'une « personne ». La Cour suprême a estimé que la responsabilité d'USPS découlant du droit de la concurrence ne pouvait être engagée. D'après la cour, au vu de sa forme et de ses fonctions, USPS ne constitue pas une personne distincte des États-Unis aux fins d'application du droit de la concurrence, mais fait au contraire partie intégrante de l'administration, et n'est donc pas soumise au droit de la concurrence⁹⁹.

⁹⁸ 540 U.S. 736 (2004).

⁹⁹ Pour parvenir à cette conclusion, la Cour a analysé l'affaire *FDIC contre Meyer* (510 U. S. 471, 484) en deux étapes. Dans le cadre de cette affaire, la Cour a jugé que pour établir une responsabilité découlant du droit de la concurrence, il fallait appliquer une analyse en deux étapes. Premièrement, il convient de vérifier s'il existe une dérogation à l'immunité souveraine. Si tel est le cas, la deuxième étape consiste à vérifier si les interdictions fondamentales du Sherman Act s'appliquent à une entité indépendante de la branche exécutive des États-Unis. D'après la Cour, dans l'affaire USPS, le premier argument de Meyer était valable car la clause du PRA relative aux « poursuites engagées ou subies » (39 U. S. C. §401) prévoit une dérogation à l'immunité souveraine pour les actions en justice contre Postal Service. En revanche, la Cour n'a pu valider la deuxième étape de l'analyse de Meyer concernant l'établissement d'une responsabilité (c'est-à-dire la question de savoir si les dispositions fondamentales du Sherman Act s'appliquent à Postal Service. Le Sherman Act impose une responsabilité à toute « personne », définie comme « incluant les entreprises et associations existantes ou autorisées par la loi d[es] États-Unis » (15 U. S. C. §7). Plus particulièrement, la Cour a précisé que si la définition de « personne » incluait les États-Unis, l'administration serait alors exposée à une responsabilité en qualité de défendeur aux yeux du droit de la concurrence, ce qui ne pouvait être l'objectif recherché par le Congrès. Bien que les lois en matière de concurrence aient été modifiées par la suite afin de permettre aux États-Unis d'engager des poursuites en matière de concurrence, le Congrès n'a jamais eu l'intention de modifier la définition légale de la notion de « personne ». La Cour a également fait valoir qu'aux fins d'application du droit de la concurrence, USPS n'était pas une personne distincte des États-Unis. Le fait que le PRA désigne Postal Service comme un « établissement indépendant de la branche exécutive de l'administration des États-Unis » (39 U. S. C. §201), n'était pas cohérent avec l'idée que Postal Service est une entité existant en-dehors du gouvernement. Cette désignation indique en effet tout le contraire. Le PRA accorde à Postal Service une grande indépendance par rapport aux autres instances administratives, mais elle reste une partie intégrante de l'administration.

La Cour suprême a donc conclu qu'en l'absence d'une déclaration expresse du Congrès selon laquelle Postal Service peut être poursuivi au titre d'infractions au droit de la concurrence malgré son statut d'entité indépendante de l'administration, la PRA ne soumet pas Postal Service à la responsabilité découlant du droit de la concurrence. La Cour a jugé cette conclusion cohérente avec les responsabilités publiques à l'échelon national de Postal Service, à laquelle sont assignés des objectifs différents des entreprises privées, le premier d'entre eux étant qu'elle ne cherche pas à générer des bénéfices. Postal Service a également des obligations plus larges, dont notamment celle d'assurer la livraison universelle du courrier et la livraison gratuite du courrier pour certaines catégories de personnes, ainsi que des responsabilités publiques accrues relatives à la sécurité nationale. Enfin, la Cour a jugé que Postal Service détient des pouvoirs et présente des caractéristiques qui la font ressembler davantage à une administration qu'à une entreprise privée, notamment pour ce qui est de son monopole accordé par l'État sur la livraison du courrier, de son pouvoir d'expropriation et de celui de conclure des accords postaux internationaux.

Aux fins du présent document, il est intéressant de souligner que, dans l'affaire *United States Postal Service contre Flamingo Industries*, la Cour suprême a choisi une position différente de celle défendue dans certaines publications évoquées dans les paragraphes précédents. En particulier, elle a affirmé que :

« En revanche, mais concernant toujours la non-applicabilité des règles de concurrence à Postal Service, ses pouvoirs sont plus limités que ceux des entreprises privées. Elle ne dispose pas des moyens prototypes d'adopter un comportement anticoncurrentiel, c'est-à-dire du pouvoir de fixer les prix. Cette lacune traduit à la fois une réalité mécanique, étant donné que les décisions concernant la fixation des prix sont prises en concertation avec la Commission indépendante des tarifs postaux, mais aussi un principe de fond, vu que les décisions relatives aux prix sont régies par des principes autres que la rentabilité ».

Si l'on suit ce raisonnement, une entreprise publique n'a aucune raison de vouloir écarter ses concurrents de son activité. Cela étant, comme nous l'avons évoqué plus tôt, la théorie économique tend à montrer qu'une entreprise publique peut avoir d'autres objectifs que la maximisation des bénéfices. Elle peut, par exemple, chercher à maximiser son chiffre d'affaires et avoir intérêt à accroître l'échelle et la gamme de ses services, ainsi que le nombre de ses salariés. Le raisonnement de la Cour écarte également la possibilité de prédation sans récupération, dont disposent les entreprises publiques, et fait aussi abstraction des stratégies visant à augmenter les coûts des entreprises rivales.

Depuis l'arrêt rendu par la Cour suprême dans l'affaire *United States Postal Service contre Flamingo Industries*, et en partie en raison de cette décision, la nouvelle loi (Postal Reorganization Act) de 2007 prévoit explicitement l'application du droit de la concurrence à USPS, s'agissant de ses services concurrentiels.

2.6.3 La poste belge (*De Post-La Poste*)

En 2001¹⁰⁰, la Commission européenne a conclu que l'opérateur belge des services postaux De Post/La Poste avait abusé de sa position dominante en subordonnant l'application d'un tarif préférentiel pour le service de courrier général à l'acceptation d'un contrat supplémentaire relatif à un nouveau service de courrier interentreprises¹⁰¹. Ce nouveau service entre en concurrence avec le service d'échange de documents (« document exchange ») fourni en Belgique par Hays, un opérateur privé de services postaux

¹⁰⁰ Affaire COMP/37.859 (JO L 61, 2.3.2002).

¹⁰¹ Les services de courrier interentreprises sont réservés à un groupe restreint d'abonnés au système d'échange mutuel de documents professionnels. Ces services proposent une livraison à très court terme et à des heures particulières prédéterminées pour l'enlèvement et la livraison. Ces services diffèrent donc considérablement des services de courrier couverts par le monopole. La Poste et Hays sont en concurrence sur le marché des services interentreprises aux compagnies d'assurances en Belgique.

établi au Royaume-Uni. Hays a déposé une plainte au motif que La Poste cherchait à faire disparaître son réseau d'échange de documents, qu'il exploitait en Belgique depuis 1982. En particulier, Hays a allégué qu'il ne pouvait s'aligner sur les réductions de prix offertes par La Poste dans son domaine réservé, et qu'il perdait par conséquent la plupart de ses clients traditionnels en Belgique.

D'après la Commission européenne, en liant la réduction des tarifs dans un secteur réservé à la souscription de son service de courrier entre entreprises, La Poste a empêché Hays de la concurrencer sur un pied d'égalité puisque cette dernière n'était pas en mesure d'offrir un avantage similaire. Les effets de cette pratique de jumelage risquent de conduire à l'élimination de Hays du marché belge. Le service d'échanges transfrontaliers de documents en un jour entre la Belgique, le Royaume-Uni et la France, qui est actuellement proposé par Hays cesserait si Hays disparaissait du marché belge. L'infraction a dès lors eu une incidence négative sur les échanges entre les États membres et a envoyé un signal négatif clair aux concurrents étrangers qui souhaitent s'installer en Belgique. Étant donné que La Poste a utilisé les ressources financières de son monopole dans le secteur de la livraison générale de lettres pour étendre sa position dominante au marché séparé et distinct des services interentreprises, la Commission a décidé de lui infliger une amende de 2.5 millions EUR.

2.6.4 *Japan Post*

Le service postal japonais a également fait l'objet d'une enquête à la suite de plaintes pour bradage de prix. Dans le cadre d'une action privée¹⁰², le Tribunal de district de Tokyo et la Haute cour de Tokyo ont tous deux rejeté la plainte introduite contre Japan Post par le requérant pour bradage des prix. Le règlement de l'affaire dépendait de la question de savoir si le requérant avait recueilli les éléments suffisants pour prouver le bien-fondé de ses allégations de vente à perte. Étant donné que la Commission japonaise des pratiques commerciales équitables (Japanese Fair Trade Commission - JFTC) n'avait pas ouvert cette affaire à sa propre initiative, le requérant n'a pas pu obtenir du défendeur les données nécessaires relatives aux coûts pour étayer ses allégations, selon lesquelles Japan Post avait fixé des prix inférieurs au coût de ses services.

Cette affaire est toutefois intéressante car la Haute cour a fait valoir que le coût encouru par Japan Post pour la livraison de colis commerciaux ne devrait pas être calculé de manière individuelle (c'est-à-dire sans tenir compte du coût encouru pour assurer la distribution postale réglementée). La Cour a fait valoir l'argument que, d'un point de vue économique, il était logique pour une entreprise d'utiliser ses ressources tirées de ses activités existantes lorsqu'elle se lance dans une activité nouvelle. En 2006, la JFTC a publié sur l'affaire un avis suivant le rapport d'un groupe de travail dans lequel elle affirmait qu'une approche « individuelle » devrait être utilisée pour allouer les coûts fixes communs lorsque le détenteur d'un monopole sur un marché A entre sur un marché B¹⁰³. Dans l'affaire Yamato, la Haute cour de Tokyo a rejeté la méthode de calcul « individuel » des coûts au motif qu'elle n'était pas suffisamment reconnue en tant que critère légal.

3. **Solutions apportées par les pouvoirs publics aux problèmes de concurrence posés par les entreprises publiques**

Les entreprises publiques et les entreprises privées se font concurrence dans de nombreux marchés et dans tout un éventail d'activités commerciales. La première partie de ce document a passé en revue les différences en termes d'objectifs et d'incitations entre les entreprises publiques et les entreprises privées, et a apporté un éclairage sur la façon dont les entreprises publiques peuvent bénéficier de privilèges et

¹⁰² Yamato contre Japan Post, Décision de la Haute cour de Tokyo, 2006 (Ne) n° 1078, LEX/DB Base de données juridiques n° 28140088 (28 novembre 2007).

¹⁰³ <http://www.jftc.go.jp/e-page/pressreleases/2006/July/060721.pdf>.

d'immunités qui leur sont octroyés par les pouvoirs publics et auxquels les entreprises privées n'ont pas accès. Tous ces privilèges et immunités peuvent conférer à une entreprise publique des avantages considérables qui peuvent être exploités à des fins anticoncurrentielles et d'exclusion. Les réponses à ces préoccupations peuvent être très diverses, et l'application *ex post* du droit de la concurrence n'est que l'une des solutions possibles. Il peut également être envisagé de :

- recourir à la privatisation ;
- améliorer le gouvernement d'entreprise des entreprises publiques, séparer les activités commerciales des activités non commerciales ;
- améliorer les normes en matière de transparence et de communication d'information applicables aux entreprises publiques ;
- renforcer l'indépendance et la responsabilité des représentants des pouvoirs publics et accélérer la nomination d'administrateurs indépendants et responsables aux conseils d'administration des entreprises publiques ;
- recourir à des réglementations alternatives à la réglementation fondée sur la contrainte et à l'intervention directe ;
- diminuer les obstacles à l'esprit d'entreprise et à la promotion de la concurrence.

Certaines de ces solutions alternatives seront brièvement examinées ci-après.

3.1 *Privatisation*

Pour les pouvoirs publics, le moyen le plus efficace d'éliminer la possibilité qu'une entreprise publique se livre à des pratiques anticoncurrentielles reste la cession de tout ou partie de l'entreprise publique afin de s'assurer qu'elle sera soumise à une discipline de marché plus rigoureuse¹⁰⁴. Les expériences de privatisations intervenues par le passé dans de nombreux pays développés, en transition et en développement ont montré que la propriété privée se traduit en général par des améliorations en termes de rentabilité, de production et d'efficacité de l'entreprise¹⁰⁵. Les privatisations d'entreprises publiques devraient néanmoins être précédées de la mise en place d'un cadre réglementaire approprié¹⁰⁶. Ce cadre devrait prévoir des règles de concurrence efficaces et la mise en exécution de ces dernières afin de garantir

¹⁰⁴ Certains pays, comme les États-Unis, ont toujours limité au minimum l'implication de l'État fédéral, des États et des collectivités locales dans les activités commerciales. Cette approche reconnaît qu'il est quasiment impossible d'éliminer tous les avantages que les entreprises du secteur public reçoivent du fait qu'elles sont détenues par l'État. Par exemple, il est peu plausible que les pouvoirs publics laissent leurs entreprises s'exposer aux sanctions commerciales d'une faillite potentielle. Ils sont souvent tentés d'intervenir dans le fonctionnement de ces entreprises à des fins politiques ; les clients peuvent avoir davantage confiance en elles parce que l'État en est propriétaire, et la perception des concurrents du secteur privé est que les liens étroits qui unissent ces entreprises aux autorités leur garantissent des avantages.

¹⁰⁵ Voir, entre autres, Megginson et Netter, *From State to Market: A Survey of Empirical Studies on Privatisations*, *Journal of Economic Literature*, Vol. 39, n°2, 2001 ; Kikeri et Nellis, *An Assessment of Privatisation*, *The World Bank Research Observer*, Vol. 19, n°1, 2004.

¹⁰⁶ OCDE, *La privatisation au XXI^e siècle : expériences récentes des pays de l'OCDE - Rapport sur les bonnes pratiques*, [DAF/CA/PRIV(2008)8/FINAL].

une concurrence suffisante, et il devrait aussi prévoir une réglementation spéciale visant à surveiller les activités dans lesquelles un élément de monopole est susceptible de persister¹⁰⁷.

Depuis 1980, près de mille milliards USD d'actifs détenus par l'État ont été privatisés dans le monde, dont plus des trois quarts dans les pays de l'OCDE¹⁰⁸. À la fin des années 1970 et pendant les années 1980, la faiblesse des performances des entreprises publiques était admise de tous et différentes tentatives ont visé à améliorer leurs performances et réduire le fardeau financier qu'elles représentaient. Cependant, vers le milieu des années 1980 et plus particulièrement dans les années 1990, les politiques ont été de plus en plus axées sur le changement de propriété. En procédant à des privatisations, les gouvernements cherchaient à réaliser des objectifs multiples et souvent corrélés.

Boîte 3. Principaux objectifs des politiques de privatisation des pays de l'OCDE¹⁰⁹

Objectifs budgétaires : La nécessité de réduire les déficits budgétaires et la dette a largement incité les gouvernements à se débarrasser d'activités non essentielles dans l'optique de réduire les dépenses liées aux subventions versées à des entreprises publiques déficitaires, de générer des gains exceptionnels, de réduire la dette et de réaliser à l'avenir des recettes budgétaires potentielles grâce à l'amélioration de l'efficacité et de la performance

¹⁰⁷ D'après le Prof. Whish, « Les problèmes qui surgissent en matière de politique de concurrence lorsque des anciens monopoles sont « lâchés » dans le marché ouvert sont évidents : en l'absence de concurrence efficace, ce qui est fort probable pendant les premières années, ils peuvent pratiquer des prix excessifs et adopter des tactiques de nature à empêcher de nouveaux concurrents d'entrer sur le marché. Dans le même temps, il convient de veiller à ce que les anciens monopoles fournissent des services adéquats, d'un niveau de qualité correct ». (Whish, *Competition Law*, sixième édition, Oxford University Press 2009).

¹⁰⁸ Les privatisations dans la majorité des pays de l'OCDE n'ont commencé véritablement qu'à partir des années 1990. Auparavant, seuls quelques pays de l'OCDE ont engagé des programmes de privatisation à grande échelle. À l'exception du Royaume-Uni et de la France (pour ce qui est de l'Europe) et de pays comme la Nouvelle-Zélande, le Mexique et le Canada New (pour ce qui est du reste du monde), les programmes mis en œuvre étaient rudimentaires et d'une portée plutôt restreinte. Au Royaume-Uni, la cession de BP en 1979 a marqué le coup d'envoi d'une privatisation à grande échelle qui s'est poursuivie pendant toutes les années 1980 et une bonne partie des années 1990. En France, un vaste programme de privatisation a débuté en 1986, mais il a été stoppé en 1988 pour des raisons politiques et est resté en suspens jusqu'à 1993. Hors Europe, des pays tels que la Nouvelle-Zélande et le Mexique se sont lancés dans des programmes de privatisation de grande envergure, mais bien que ces derniers aient été importants par rapport à la taille de leurs économies respectives et que leur portée ait été large, couvrant un grand éventail d'industries et d'activités, ils sont néanmoins restés assez limités en comparaison avec l'ampleur et la portée des privatisations opérées dans les années 1990. Enfin, si les privatisations au Japon ont été très importantes en termes de recettes, leur portée est restée très limitée et elles se sont concentrées dans quelques secteurs essentiellement, comme les chemins de fer et les télécommunications. Cela étant, vers le milieu des années 1990, les privatisations avaient atteint un rythme soutenu dans la plupart des pays de l'OCDE. En Europe, cette tendance s'est particulièrement accélérée parmi ceux qui avaient adhéré à l'Union économique et monétaire, car ils se sont alors engagés dans un ambitieux programme de réforme économique visant à satisfaire aux exigences des critères de convergence du Traité de Maastricht. En Australie, le Commonwealth et les gouvernements des États se sont lancés dans un programme de privatisation de grande ampleur principalement axé sur la concurrence et la restructuration préalable à la privatisation. Les privatisations au sein de la zone l'OCDE ont également été stimulées par la réforme économique et institutionnelle majeure de pays membres tels que la Pologne, la République tchèque, la Hongrie et la République slovaque, ou encore de l'ancienne Allemagne de l'Est. Pendant cette période, les produits des privatisations dans la zone de l'OCDE ont avoisiné en moyenne 0.3 % du PIB chaque année.

¹⁰⁹ Privatising State-Owned enterprises in the OECD Area: An Overview of Policies and Practices., OCDE [DAFFE/CA/PRIV(2002)1].

des anciennes entreprises publiques.

Attirer les investisseurs : En raison des contraintes budgétaires, les entreprises publiques ont souvent cruellement manqué de capitaux. La nécessité d'attirer des investissements pour les entreprises publiques, en particulier pour la maintenance et l'amélioration des services d'infrastructure, et pour répondre à la demande de services nouveaux et en plein développement tels que les télécommunications a été l'un des principaux objectifs des privatisations réalisées dans la zone de l'OCDE.

Améliorer l'efficacité et les performances des entreprises publiques : L'amélioration de l'efficacité et des performances des entreprises publiques a été l'un des objectifs majeurs des privatisations effectuées dans les pays de l'OCDE. En les faisant passer d'un statut public à un statut privé, les gouvernements ont cherché à assigner aux entreprises publiques des objectifs plus clairs, à les doter de meilleurs dispositifs d'incitation pour leur personnel et leurs dirigeants et à les exposer aux mécanismes du marché et au risque de faillite.

Introduire la concurrence dans les secteurs monopolistiques de l'économie : Parmi les principaux objectifs des privatisations figure l'introduction de la concurrence dans les secteurs dominés par des monopoles d'État. De manière générale, la concurrence peut être stimulée par la restructuration préalable des secteurs où les pouvoirs publics remplacent des monopoles publics par plusieurs entreprises concurrentielles et, dans le cas d'industries de réseaux, par l'instauration de régimes d'accès de tiers et un renforcement efficace des règles de concurrence.

Développement des marchés financiers : Les privatisations ont servi à atteindre des objectifs liés aux marchés financiers, comme développer l'actionnariat ou encore élargir et approfondir les marchés des actions. Pour de nombreux pays de l'OCDE, la nécessité de disposer de marchés d'actions développés afin de canaliser les investissements jusqu'aux sociétés et la volonté de renforcer la présence de l'investisseur institutionnel sur le marché des actions national soulignent l'importance du développement d'un marché d'actions en tant qu'objectif explicite d'une politique de privatisation.

Réduire le rôle de l'État dans l'économie : La diminution du rôle de l'État dans l'économie grâce aux privatisations a été l'un des objectifs visés par les pouvoirs publics d'un certain nombre de pays de l'OCDE, en plus de certains ou de la totalité des objectifs indiqués ci-dessus. Toutefois, dans le cas particulier des anciennes économies en transition, le passage d'une économie planifiée à une économie de marché caractérisée par une participation limitée de l'État a été en soi le principal objectif visé.

En raison du caractère interdépendant et parfois contradictoire des objectifs des privatisations, des choix stratégiques importants et des compromis ont dû être faits. Par exemple, les recettes tirées des privatisations sont souvent maximisées au détriment de la promotion de la concurrence, car les droits de monopole peuvent être vendus à un prix particulièrement élevé. Mais les données d'expérience suggèrent que les gains d'efficacité sont supérieurs lorsque les entreprises sont cédées pour ouvrir un secteur à la concurrence. Par conséquent, maximisation des recettes et amélioration de l'efficacité pourraient s'avérer, en fin de compte, deux objectifs contradictoires. De même, l'objectif stratégique visant à élargir l'actionnariat et celui de maximiser les recettes peuvent s'avérer divergents, étant donné le coût de sous-valorisation des titres que suppose une telle politique. Les bonnes pratiques invitent normalement à exposer le plus possible la chaîne de valeur d'une entreprise publique à la concurrence au plus tard au moment de sa privatisation. La possibilité qu'une concurrence effective puisse être introduite lorsque des maillons de la chaîne de valeur exposés à la concurrence restent verticalement intégrés et comportent des éléments de monopole peut varier d'un cas à l'autre. Toutefois, si des entreprises publiques privatisées présentant des éléments de monopole sont autorisées à rester verticalement intégrées, alors une réglementation indépendante sera d'autant plus nécessaire.

3.2 Cadres de neutralité concurrentielle

Si la privatisation élimine les distorsions de concurrence, il ne s'agit pas nécessairement du moyen que tous les pays privilégient. Les réformes de neutralité sont une solution de rechange pour résoudre les

problèmes d'avantages concurrentiels d'une entreprise publique lorsqu'un gouvernement ne souhaite pas la privatiser. Pour les gouvernements qui optent pour les privatisations, une politique de neutralité concurrentielle peut aussi s'inscrire dans le cadre d'une stratégie transitoire visant à préparer le marché à la concurrence en harmonisant les conditions dans lesquelles les entreprises publiques et privées se font concurrence, c'est-à-dire en supprimant les avantages accordés aux entreprises publiques au motif qu'elles sont détenues par l'État. Selon leur situation et leurs priorités d'action publique, les pays ont mis au point toute une panoplie d'options pour résoudre les problèmes de neutralité concurrentielle¹¹⁰.

Les cadres de neutralité concurrentielle sont principalement destinés à réformer les conditions dans lesquelles les entreprises publiques et privées se livrent concurrence. Introduire un cadre de neutralité concurrentielle implique d'abord de procéder à un réexamen systématique du paysage législatif et administratif dans lequel les entreprises publiques opèrent, puis de réformer ce paysage, de sorte que les conditions dans lesquelles ces entreprises opèrent se rapprochent le plus possible de celles des concurrents du secteur privé. La neutralité concurrentielle permet également d'améliorer la transparence et la responsabilité des entreprises commerciales publiques, car elle nécessite la présentation de leurs coûts selon une méthode comparable à celle du secteur privé. En d'autres termes, la neutralité concurrentielle vise à promouvoir l'efficacité de la concurrence en réduisant au minimum les avantages concurrentiels dont les entreprises commerciales publiques peuvent bénéficier par rapport à leurs concurrents privés au seul motif qu'elles sont détenues par les États. Ces cadres améliorent la transparence en spécifiant précisément les conditions dans lesquelles les entreprises privées et les entreprises commerciales publiques se livrent concurrence.

Un cadre de neutralité concurrentielle explicite et ciblé doit rassembler les éléments des lois sur la concurrence et des réformes du gouvernement d'entreprise qui peuvent remédier aux problèmes de neutralité concurrentielle, et élargir le programme de réforme afin de couvrir des entreprises publiques plus petites et les éventuels avantages concurrentiels subsistants. Les cadres de neutralité concurrentielle incluent également des mécanismes *ex post* de contrôle de leur application et de leur efficacité, et de correction des éventuels problèmes persistants. Bien qu'ils apparaissent comme une solution globale, ces cadres ne sont pas, jusqu'à présent, la procédure courante dans de nombreux pays.

Il convient d'étudier la source du problème de neutralité concurrentielle. Si les distorsions de concurrence découlent d'une décision délibérée de l'État de favoriser ses entreprises, des mesures de sensibilisation peuvent constituer l'approche la plus adaptée. Par contre, si les distorsions de concurrence sont les conséquences imprévues d'autres interventions de l'État, des règles de transparence et des dispositions spécifiques en matière de neutralité concurrentielle peuvent s'avérer plus efficaces. Presque tous les pays ont recours, dans une certaine mesure, à des actions de sensibilisation pour favoriser une concurrence efficiente et loyale entre les entreprises des secteurs public et privé. Comme nous l'avons indiqué précédemment, certains pays recourent à des mesures correctives qui consistent à traiter les problèmes de neutralité concurrentielle *ex post*, notamment en appliquant le droit de la concurrence pour exiger des entreprises du secteur public qu'elles mettent un terme à tout agissement préjudiciable à la concurrence. Le recours au droit de la concurrence peut contribuer à régler des problèmes de neutralité concurrentielle lorsque les entreprises publiques visées entrent dans le champ d'application du droit de la concurrence, parce qu'elles sont d'une taille suffisante, ont un impact suffisant sur le marché et ne bénéficient d'aucune exclusion particulière. Ce type d'approche fondé sur le droit de la concurrence peut favoriser l'instauration de conditions de neutralité concurrentielle, mais il permet uniquement de régler des cas particuliers *a posteriori*.

¹¹⁰

Pour une étude plus approfondie du principe de neutralité concurrentielle, voir OCDE, Report on Regulating Market Activities by the Public Sector, [DAF/COMP(2004)36] ainsi que les documents d'analyse élaborés par le Secrétariat sur le gouvernement d'entreprise et le principe de neutralité concurrentielle pour les entreprises publiques [DAF/COMP/WP3(2009)3].

D'autres pays traitent les questions de neutralité concurrentielle *ex ante*, en prenant des dispositions qui modifient le régime de gouvernement des entreprises du secteur public, afin de réduire l'ampleur des avantages et désavantages qui les caractérisent ; en modifiant et en appliquant les règles relatives aux marchés publics de manière à harmoniser les conditions de concurrence entre les secteurs public et privé ; ou en réformant le système des aides financières accordées aux services publics de telle sorte que ces aides n'avantagent pas les entreprises publiques par rapport à leurs concurrents du secteur privé. L'efficacité de ces dispositions dépend du fait de savoir si elles s'appliquent à la totalité des organismes publics qui fournissent des services marchands sur des marchés effectivement ou potentiellement concurrentiels, si ces dispositions concernent toutes les sources d'avantages et de désavantages concurrentiels, et comment les pouvoirs publics mettent en œuvre et font appliquer ces dispositions.

3.2.1 Neutralité concurrentielle dans l'Union européenne¹¹¹

Certains pays disposent de règles spéciales en matière de droit de la concurrence qui ont pour vocation de traiter les effets des distorsions de concurrence entre les entreprises publiques et privées. Les pays qui suivent le modèle de l'Union européenne sont souvent dotés d'une disposition analogue à l'article 86 du Traité, qui fixe les règles applicables aux entités qui fournissent des services d'intérêt économique général ou qui bénéficient de droits spéciaux ou d'exclusivité. De manière générale, l'article 86 du Traité dispose que les services fournis par des entreprises publiques, ou des entreprises privées agissant pour le compte de l'État, doivent être soumis aux règles de concurrence du Traité instituant la Communauté européenne, à moins que cela ne remette en cause la performance des missions spécifiques assignées à ces entreprises en vertu de la loi.

Boîte 4. Article 86 du Traité instituant la Communauté européenne

4. Les États membres, en ce qui concerne les entreprises publiques et les entreprises auxquelles ils accordent des droits spéciaux ou exclusifs, n'éditent ni ne maintiennent aucune mesure contraire aux règles du présent traité, notamment à celles prévues à l'article 12 et aux articles 81 à 89 inclus.
5. Les entreprises chargées de la gestion de services d'intérêt économique général ou présentant le caractère d'un monopole fiscal sont soumises aux règles du présent traité, notamment aux règles de concurrence, dans les limites où l'application de ces règles ne fait pas échec à l'accomplissement en droit ou en fait de la mission particulière qui leur a été impartie. Le développement des échanges ne doit pas être affecté dans une mesure contraire à l'intérêt de la Communauté.
6. La Commission veille à l'application des dispositions du présent article et adresse, en tant que de besoin, les directives ou décisions appropriées aux États membres.

L'approche de l'Union européenne se caractérise premièrement par le fait d'avoir inscrit le principe de neutralité concurrentielle dans le Traité instituant la Communauté européenne il y a désormais plus de 50 ans. L'article 86 du Traité établit clairement que les entreprises publiques entrent dans le champ d'application du droit de la concurrence, et que les États membres de l'Union européenne ne sont pas habilités à prendre une quelconque disposition contraire à cette règle. Les entreprises publiques sont aussi soumises aux règles relatives à la constitution de monopoles et aux aides d'État (subventions). La deuxième caractéristique de ce système est que le Traité dote la Commission européenne des moyens nécessaires pour régler les problèmes relevant des activités économiques des entreprises du secteur public. La Commission peut exiger d'un État membre qu'il applique les règles de concurrence aux entreprises publiques. Et si une entreprise publique enfreint ces règles, la Commission peut elle-même rendre une

¹¹¹ Voir la contribution de la Commission européenne à la Table ronde de l'OCDE sur la régulation des activités marchandes exercées par le secteur public, [DAF/COMP(2004)36].

décision contre cette entreprise exigeant qu'elle mette un terme à ses agissements, et peut lui infliger des amendes. Si cette entreprise publique contrevient au droit de la concurrence avec l'aide de l'État ou sous son influence (si, par exemple, l'État donne à l'entreprise l'ordre de pratiquer des prix abusifs), la Commission peut adresser une directive ou une décision à l'État membre concerné, lui intimant l'ordre d'abandonner ces pratiques.

Outre l'article 86 du Traité, les règles européennes relatives aux aides d'État et aux subventions s'appliquent à l'ensemble des subventions et des aides d'État que les États membres ou d'autres organismes publics accordent aux entreprises, qu'elles soient publiques ou privées. Ces règles sont particulièrement importantes s'agissant des entreprises publiques, vu les relations spécifiques que les organismes publics entretiennent avec les entreprises publiques. Les aides d'État englobent non seulement les injections de capital ou les apports de capitaux, mais aussi les réductions fiscales, les exonérations fiscales temporaires, les réductions de cotisations de sécurité sociale et les cautionnements. De manière générale, les aides d'État sont interdites, bien qu'il existe des exceptions à cette règle. Les États membres ont l'obligation de notifier à la Commission leur intention d'accorder toute aide d'État à une entreprise. La Commission examine alors de près la mesure envisagée et décide de l'autoriser ou non. Un autre outil dont dispose la Commission pour veiller à la neutralité concurrentielle entre les entreprises publiques et privées est la Directive relative à la transparence¹¹², qui concerne les relations financières entre les organismes publics et les entreprises publiques. La Directive relative à la transparence impose une obligation de comptabilité séparée. Les entreprises publiques qui déploient à la fois des activités commerciales et non commerciales sont tenues de tenir des comptes séparés afin de montrer comment leur budget est divisé entre leurs activités commerciales et non commerciales. Ces outils ont été utilisés dans de nombreux secteurs, y compris dans le secteur postal, de l'énergie et des transports.

3.2.2 *Neutralité concurrentielle en Australie*¹¹³

L'Australie applique une politique spécifique en matière de neutralité concurrentielle, mais la cohérence de celle-ci avec sa politique de concurrence est moins marquée qu'en Europe. La politique de neutralité concurrentielle australienne est fondée sur le principe que les entreprises publiques exerçant leurs activités sur des marchés effectivement ou potentiellement concurrentiels ne doivent jouir d'aucun avantage concurrentiel net sur le secteur privé au simple motif qu'elles appartiennent à l'État. La Commission australienne de la concurrence et des consommateurs (Australian Competition and Consumer Commission - ACCC) ne joue pas un rôle majeur dans la mise en œuvre du principe de neutralité concurrentielle. La mise en œuvre de ce principe est confiée au Conseil national de la concurrence et à la Commission de la productivité.

L'Australie avait d'ores et déjà commencé à transformer en sociétés les entreprises de l'État lors de la publication d'un réexamen de la politique de concurrence en 1993 – le rapport Hilmer. Ce rapport avait conclu que s'il était important de soumettre les entreprises commerciales de l'État aux dispositions du droit de la concurrence, pour autant, cela ne suffirait pas à régler tous les problèmes relatifs aux avantages en matière de coûts et aux politiques de prix des entreprises publiques. Par exemple, le marché continuerait d'être faussé chaque fois que les entreprises publiques seraient exemptées de certains impôts ou qu'elles recevraient des subventions. Le même rapport a également conclu que lorsque les problèmes proviennent

¹¹² Directive de la Commission 80/723/CEE du 25 juin 1980 relative à la transparence des relations financières entre les États membres et les entreprises publiques (JO L 195, 29.7.1980, p. 35). Cette Directive a été amendée à plusieurs reprises, et dernièrement par la Directive 2005/81/CE (JO L 312, 29.11.2005, p. 47), et a été codifiée par la Directive de la Commission 2006/111/CE du 16 novembre 2006 (JO L 318, 17.11.2006, p. 17-25).

¹¹³ Voir la contribution de l'Australie à la Table ronde sur la régulation des activités marchandes exercées par le secteur public du Comité de la concurrence de l'OCDE, [DAF/COMP(2004)36].

du sein même des instances gouvernementales publiques, il convenait de les traiter en recourant à des mesures *ex ante*. C'est la raison pour laquelle l'accord gouvernemental signé en 1995 entre le gouvernement fédéral et les États australiens a instauré la politique de neutralité concurrentielle.

La charge de la mise en œuvre de cette politique est confiée à des organismes administratifs, et ce, pour plusieurs raisons. Premièrement, la neutralité concurrentielle n'est pas fondée sur le droit de la concurrence, mais a été élaborée et mise en œuvre au sein même de l'administration. À l'échelon national, cette politique relève du Trésor australien. Deuxièmement, elle vise à encourager la mise en œuvre de l'action publique. Elle suit une approche pédagogique de nature à permettre que la politique de neutralité concurrentielle et les organismes d'exécution œuvrent de concert avec les instances gouvernementales pour garantir une mise en application réussie. Elle reconnaît également que les différentes instances gouvernementales peuvent faire preuve d'une certaine souplesse, notamment lorsqu'elles sont arrivées à des stades de réforme relativement avancés, tandis que le droit de la concurrence est appliqué de manière uniforme dans toutes les juridictions. Troisièmement, des sanctions sont prévues *via* un système d'amendes et sont infligées sur recommandation d'un organe indépendant, le Conseil national de la concurrence.

Les mesures de mise en conformité à l'échelon fédéral sont cohérentes avec les dispositifs en place au niveau des États. Un Bureau des plaintes a été créé au sein de la Commission indépendante de la productivité, qui tient lieu de premier conseiller du gouvernement australien pour les questions de réformes microéconomiques. Relativement peu de plaintes ont été officiellement déposées. Ces dispositifs ne restreignent en rien le pouvoir de l'ACCC d'intenter une action en justice en vertu du droit de la concurrence.

L'objectif des autorités australiennes consiste à éliminer toute distorsion qui apparaîtrait sur un marché du fait qu'une entreprise est détenue par l'État. Ce principe s'applique : dès lors qu'il existe un marché ; aux entreprises publiques d'envergure significative (où les gains sont les plus élevés) ; à tous les niveaux d'administration ; et seulement dans les cas où les avantages l'emportent sur les coûts de mise en œuvre. Elle ne s'applique pas aux activités non marchandes et à but non lucratif. Les principes clés qui sous-tendent la neutralité concurrentielle sont :

- la neutralité fiscale, qui exige qu'aucune entreprise publique ne soit avantagée par le biais d'exemptions ou d'avantages fiscaux dont ses concurrents ne pourraient bénéficier ;
- la neutralité au regard de l'endettement, qui exige que toute entreprise publique se voie appliquer les mêmes coûts d'emprunt que ses concurrents ;
- la neutralité de la réglementation, qui exige qu'une entreprise publique ne soit pas avantagée par le fait qu'elle opère dans un environnement réglementaire différent de celui de ses concurrents ;
- le taux de rentabilité commerciale ; les entreprises sont tenues de générer un taux de rendement suffisant pour justifier le maintien d'actifs à long terme dans l'entreprise, et de verser des dividendes commerciaux ; et
- l'adéquation des prix avec les coûts, qui requiert des organismes qui mènent d'importantes activités commerciales dans le cadre de fonctions plus larges qu'ils fixent des prix reflétant l'attribution de l'intégralité des coûts encourus au titre de leurs activités commerciales, en partie afin que les fonds publics versés pour les activités non marchandes et non lucratives ne soient pas utilisés pour subventionner des activités commerciales.

L'approche australienne traite aussi les situations où les gouvernements cherchent à subventionner des obligations de service non marchand. De telles subventions peuvent conférer aux entreprises publiques un

avantage concurrentiel, par exemple en faisant bénéficier d'autres activités de subventions croisées. En Australie, les obligations de service non marchand doivent être clairement identifiées et financées de sorte que les prix reflètent l'attribution de l'intégralité des coûts. Le Conseil national de la concurrence évalue si les obligations de service marchand ont été clairement précisées et correctement financées.

La politique australienne de neutralité concurrentielle a bien fonctionné pour les raisons suivantes : (1) elle a approfondi la réforme des entreprises publiques en Australie ; (2) elle a été mise en œuvre par les grandes entreprises publiques, ce qui a permis des gains d'efficacité significatifs ; et (3) elle a substantiellement éliminé les avantages liés à la propriété de l'État.

3.3 Amélioration du gouvernement d'entreprise des entreprises publiques

Les problèmes de neutralité concurrentielle pourraient être réduits en réformant les régimes de gouvernance des entreprises publiques, de telle sorte que ces entreprises aient une optique commerciale, opèrent de manière efficace et affrontent toutes les charges d'exploitation normales. Ces réformes pourraient réduire significativement les avantages et désavantages de ces entreprises par comparaison avec leurs concurrents du secteur privé. Les caractéristiques des entreprises publiques posent des problèmes spécifiques quant à leur mode de gouvernance. Tout d'abord, les entreprises publiques sont souvent à l'abri de deux menaces majeures, essentielles à la discipline de leurs dirigeants, à savoir l'OPA et la faillite. Deuxièmement, leurs obligations en matière de responsabilité et de communication d'informations peuvent être axées sur le contrôle des dépenses publiques et, de ce fait, ne pas correspondre aux normes du secteur privé. En l'absence de régimes de gouvernance adaptés et propres à corriger les effets de ces caractéristiques, les dirigeants des entreprises publiques peuvent bénéficier d'un pouvoir discrétionnaire plus large que celui des entreprises privées, et leurs demandes de fonds publics au titre de programmes d'investissement et d'expansion peuvent s'avérer excessives.

Les gouvernements des pays de l'OCDE ont été confrontés à des problèmes complexes et ont dû adopter des compromis dans leurs travaux de réforme du gouvernement d'entreprise des entreprises publiques. Réussir à mettre en place une organisation claire et un exercice efficace de la propriété au sein de l'administration d'État nécessite une politique en matière de propriété qui soit active, sans toutefois interférer abusivement dans la gestion des affaires courantes. En outre, la chaîne des responsabilités doit permettre de veiller à ce que les conseils d'administration et les dirigeants des entreprises publiques prennent des décisions responsables, et qu'ils communiquent au public toutes les informations nécessaires. Il est pour cela important d'introduire un maximum de transparence autour des objectifs non commerciaux des entreprises publiques, y compris concernant les subventions dont elles bénéficient, le cas échéant. Il convient également de séparer clairement les rôles de l'État en qualité de propriétaire et d'instance responsable de la réglementation et de l'élaboration des politiques publiques, et de veiller à ce que des processus décisionnels efficaces soient en place.

Boîte 5. Lignes directrices de l'OCDE sur le gouvernement d'entreprise des entreprises publiques

Le rapport de l'OCDE intitulé *Gouvernance des entreprises publiques : Panorama des pays de l'OCDE*¹¹⁴ dresse un inventaire complet des pratiques actuelles et des récentes expériences en matière de réforme des régimes de gouvernance des entreprises publiques dans les pays de l'OCDE. Les réformes ont principalement porté sur un certain nombre de domaines, et notamment sur la procédure de nomination des conseils des entreprises publiques, leur composition, leurs fonctions et la manière dont ils exécutent leurs principales missions. Les règles en matière de communication d'informations imposées aux entreprises publiques elles-mêmes et aux entités actionnaires au sein de l'État ont également été réformées dans un certain nombre de pays, tout comme les dispositions visant à protéger les

¹¹⁴

Gouvernance des entreprises publiques: Panorama des pays de l'OCDE, OCDE, 2005.

actionnaires minoritaires, lorsqu'il y en a, et les relations entre les entreprises publiques et les parties prenantes.

Les mécanismes d'incitation et les modalités de nomination et de rémunération des hauts dirigeants des entreprises publiques ont également été réformés. Si elles sont correctement conçues et efficacement mises en œuvre, les réformes en matière de gouvernance peuvent améliorer l'efficacité des entreprises publiques et l'accès aux capitaux, mais aussi contribuer à une saine concurrence en harmonisant les conditions dans lesquelles opèrent les entreprises du secteur privé et du secteur public. Une meilleure gouvernance des entreprises publiques peut également renforcer la gouvernance publique dans son ensemble grâce à une plus grande transparence et améliorer la discipline budgétaire. L'expérience de l'OCDE a également montré qu'un bon gouvernement d'entreprise des entreprises publiques est une condition préalable importante à une privatisation efficace, car il rend les entreprises plus attrayantes aux yeux d'acquéreurs potentiels et renforce leur valeur marchande.

Pour aider les gouvernements à relever les défis liés à la gouvernance du secteur public, l'OCDE a publié des lignes directrices sur le gouvernement d'entreprise des entreprises publiques¹¹⁵. De manière générale, ces lignes directrices couvrent les aspects suivants : i) garantir aux entreprises publiques un cadre juridique et réglementaire efficace ; ii) l'État actionnaire ; iii) égalité de traitement entre les actionnaires ; iv) relations avec les parties prenantes ; v) transparence et diffusion de l'information ; vi) responsabilités du conseil d'administration d'une entreprise publique. Ces lignes directrices complètent les Principes de gouvernement d'entreprise de l'OCDE (révisés en 2004) et ont été largement adoptées et bien accueillies par les pays membres et non membres de l'OCDE.

3.4 *Élimination des obstacles à l'entrepreneuriat*

Historiquement, les décideurs politiques ont parfois eu de bonnes raisons économiques et sociales de limiter le nombre et la catégorie des entreprises. Particulièrement lorsque la présence de l'État actionnaire constituait un facteur déterminant, on pouvait craindre que de telles réglementations puissent avoir des conséquences négatives potentielles sur l'intensité de la concurrence dans les marchés et porter préjudice au bien-être des consommateurs. Certaines règles et réglementations peuvent avoir pour effet de limiter le nombre effectif ou les catégories de fournisseurs de biens et de services présents sur le marché. Cela sera probablement le cas si le projet de réglementation :

- accroît significativement le coût de l'entrée ou de la sortie d'un fournisseur ;
- accorde à une entreprise le droit exclusif de vendre un produit ou un service ;
- impose l'obtention d'une licence, d'un permis ou d'une autorisation pour l'exercice de l'activité ;
- limite la capacité de certaines catégories d'entreprises de participer aux marchés publics ;
- crée un obstacle géographique à la capacité des entreprises de fournir des biens ou des services, d'investir des capitaux ou de fournir de la main-d'œuvre.

De nombreux ouvrages ont été publiés sur les effets bénéfiques des réformes de la réglementation sur la concurrence, et suggèrent que des réglementations mal conçues constituent un frein non négligeable à la concurrence, l'emploi, la productivité et la croissance dans de nombreuses économies¹¹⁶. Ces études montrent que la concurrence force les entreprises à être plus efficaces et à accroître la productivité de leur main-d'œuvre ou la productivité totale des facteurs en jeu, par exemple en adoptant de nouvelles

¹¹⁵ OCDE, Lignes directrices sur le gouvernement d'entreprise des entreprises publiques, OCDE, 2005.

¹¹⁶ Pour une analyse complète, voir Wölfl, Wanner, Kozluk et Nicoletti, Ten Years of Product Market Reform in OECD Countries – Insights from a Revised PRM Indicator, Document de travail du Département des affaires économiques de l'OCDE n° 695.

technologies et en faisant preuve d'innovation. Plus précisément, Nicoletti et Scarpetta¹¹⁷ démontrent que les pays dans lesquels la propriété de l'État dans le secteur marchand est restreinte et où les barrières à l'entrée sont peu élevées réussissent mieux à améliorer la croissance de la productivité que ceux dotés d'une réglementation stricte de la concurrence. Certaines études mettent en exergue un lien positif entre la réglementation et la productivité à l'échelon des entreprises¹¹⁸, corroborant ainsi les analyses menées au niveau des secteurs d'activité. Ces études suggèrent que les réglementations accablantes diminuent la capacité de l'économie d'allouer des ressources aux entreprises les plus efficaces et freinent la croissance de la productivité dans les entreprises proches de la frontière technologique.

Le travail entrepris à l'OCDE sur la relation entre concurrence, emploi, productivité et croissance a été l'un des piliers de l'action de sensibilisation engagée par cette organisation dans le domaine de la réforme réglementaire. Les pays membres ont été vivement encouragés à lancer des programmes de réforme systématique de leur réglementation, d'envisager le recours à des analyses d'impact de la réglementation pour leurs nouveaux textes législatifs ou réglementaires et de se soumettre à l'examen par les pairs de la qualité de leur réglementation. Dans ce contexte, des outils ont été conçus pour recenser les restrictions superflues et élaborer d'autres solutions moins restrictives ne sacrifiant pas pour autant les objectifs d'action, comme le « Manuel pour l'évaluation de la concurrence » de l'OCDE¹¹⁹. Des instruments similaires ont été mis au point dans certains pays. Ces outils peuvent être utilisés de différentes manières. Ils servent le plus souvent à réaliser une évaluation globale des textes en vigueur (dans l'ensemble de l'économie ou dans certains secteurs). Mais ils peuvent aussi être utilisés pour évaluer des projets de loi ou de règlement (par exemple, dans le cadre des programmes d'analyse d'impact de la réglementation adoptés par le gouvernement).

Boîte 6. Le Manuel pour l'évaluation de la concurrence de l'OCDE

Le Manuel pour l'évaluation de la concurrence de l'OCDE a été approuvé pour publication par le Comité de la concurrence de l'OCDE en 2007. Il offre une méthodologie générale pour déceler les restrictions à la concurrence qui sont superflues et pour élaborer d'autres solutions moins restrictives ne sacrifiant pas pour autant les objectifs des pouvoirs publics. L'une des principales composantes de cet Instrument est la Liste de référence pour l'évaluation d'impact sur la concurrence qui, grâce à une série de questions simples, permet de passer au crible les lois et règlements susceptibles de restreindre inutilement la concurrence. Grâce à ce filtrage, les ressources publiques, limitées, pourront être affectées là où l'évaluation d'impact sur la concurrence est la plus utile. La Liste s'intéresse à trois sortes de restrictions des pouvoirs publics en matière de concurrence : 1) les restrictions sur les jeunes entreprises ; 2) les réglementations qui affectent la capacité des entreprises d'affronter la concurrence ; et 3) les réglementations qui influent sur le comportement des entreprises en modifiant leur motivation à agir en tant que rivaux affichés.

Le Manuel pour l'évaluation de la concurrence pourra être utilisé par les pouvoirs publics essentiellement de trois manières :

1. pour une évaluation globale des lois et règlements en vigueur (dans l'ensemble de l'économie ou dans certains secteurs) ;
2. pour l'évaluation des projets de loi ou de règlement (par exemple, dans le cadre des programmes d'analyse

¹¹⁷ Nicoletti et Scarpetta, Regulation, Productivity and Growth, Economic Policy, Vol. 18, n° 36, avril 2003.

¹¹⁸ Arnold, Nicoletti et Scarpetta, Regulation, Allocative Efficiency and Productivity in OECD Countries: Industry and Firm-level Evidence, Document de travail du département des affaires économiques, n° 616, 2008, OCDE.

¹¹⁹ Voir www.oecd.org/competition/toolkit.

d'impact de la réglementation adoptés par le gouvernement) ;

3. par les instances publiques chargées de l'élaboration et de l'examen des politiques, notamment les ministères qui élaborent les lois, ou l'autorité de la concurrence lorsqu'elle évalue l'impact concurrentiel des réglementations.

Le Manuel est destiné à une application décentralisée, aussi bien au niveau national qu'au niveau infranational. S'il est doté de cette flexibilité, c'est parce que les restrictions à la concurrence peuvent être le fait des différents niveaux d'administration et que l'évaluation d'impact sur la concurrence peut être utile pour chacun d'entre eux.

4. Conclusions

Malgré les vastes programmes de privatisation mis en œuvre dans de nombreux pays dans les années 1980 et 1990, les entreprises publiques sont toujours très nombreuses dans beaucoup de pays membres et non membres de l'OCDE. Dans une certaine mesure, la récente crise financière a contribué à consolider la présence de l'État actionnaire dans de nombreux pays, notamment dans ceux où les pouvoirs publics ont décidé de nationaliser des entreprises privées profondément touchées par la crise, à titre de mesure de sauvetage. La plupart des entreprises publiques bénéficient toujours de privilèges et d'immunités auxquels leurs concurrents privés n'ont pas accès. Ces privilèges confèrent aux entreprises publiques un avantage concurrentiel sur leurs rivales. L'octroi de ces avantages n'est pas fondé sur une plus grande performance, une efficacité supérieure, une meilleure technologie ou une gestion de meilleure qualité, mais est tout simplement laissé à la discrétion des pouvoirs publics. Ces privilèges et immunités faussent le jeu de la concurrence sur le marché entre les entreprises publiques et leurs rivales privées.

Souvent, les entreprises publiques reçoivent des pouvoirs publics l'ordre de poursuivre des objectifs autres que commerciaux et d'accomplir des missions de service public. Cela peut nécessiter l'adoption de stratégies commerciales, y compris en matière de prix, qui sont incompatibles avec la maximisation des bénéfices (par exemple, la fourniture de services universels à un prix « raisonnable » pour les consommateurs). Même si les entreprises publiques sont peut-être moins soucieuses que les entreprises privées de générer des bénéfices, elles peuvent être encore plus incitées que les entreprises privées à adopter des pratiques anticoncurrentielles. L'éventail plus large d'objectifs que poursuivent les entreprises publiques peut les amener à adopter des stratégies de prix et d'autres stratégies commerciales qui peuvent comporter des effets anticoncurrentiels. À l'inverse des entreprises privées, les entreprises publiques peuvent juger avantageux d'exclure des concurrents, d'élargir leur champ d'activité et d'accroître leurs recettes, même si de telles stratégies génèrent des pertes. Parmi ces stratégies figurent la fixation de prix inférieurs aux coûts, les subventions croisées entre des activités réservées et concurrentielles, l'augmentation des coûts d'exploitation des rivales ou encore la mise en place de barrières visant à exclure l'entrée de rivales plus efficaces sur le marché.

De manière générale, le droit de la concurrence est appliqué sans tenir compte du caractère public ou privé des entreprises. Il s'applique aux comportements des entreprises privées comme des entreprises publiques. Dans certains pays de la zone OCDE, les règles de concurrence relatives à l'abus de position dominante et à la constitution de monopole ont constitué une base sur laquelle s'appuient les enquêtes menées sur les entreprises publiques et les sanctions qui leur sont infligées. Tandis que certaines de ces activités peuvent tomber sous le coup des règles de concurrence, et notamment de celles relatives au comportement unilatéral des entreprises dominantes, certains cas peuvent bénéficier d'exemptions explicites de l'application du droit de la concurrence. Dans certains pays, les tribunaux et les administrations, par exemple, ont instauré ce que l'on appelle le « principe de l'acte de gouvernement », en vertu de laquelle certaines activités expressément imposées par les pouvoirs publics sont exclues de la surveillance des autorités de la concurrence, si certaines conditions sont réunies.

Les affaires de concurrence impliquant des entreprises publiques ont essentiellement trait à des prix abusifs et ont montré combien il est complexe d'appliquer le droit de la concurrence à ces entreprises. La difficulté de calculer correctement les coûts des entreprises publiques et de réaliser une étude comparative de ces coûts avec ceux d'entreprises privées similaires peut paraître décourageante, notamment lorsque les dispositifs de gouvernance des entreprises publiques manquent de transparence ou que leurs méthodes comptables sont inadaptées. En raison de ces difficultés et des différences entre les entreprises publiques et privées en termes d'incitation et de capacité à se livrer à des pratiques anticoncurrentielles, il y a lieu de se demander si une intervention *ex post* du droit et de la politique de la concurrence est le moyen le plus efficace de régler les problèmes de concurrence découlant de la présence d'une entreprise publique sur un marché concurrentiel.

Certaines autres mesures anticoncurrentielles qu'une intervention *ex post* peuvent être envisagées pour résoudre les problèmes posés par les entreprises publiques. Ces solutions peuvent être la privatisation et la sortie du patrimoine de l'État ; la réforme du gouvernement d'entreprise des entreprises publiques et l'adoption de cadres de neutralité concurrentielle (par exemple, en séparant les activités commerciales des entreprises publiques de leurs objectifs non commerciaux relevant de l'action publique, en améliorant les règles de transparence et de communication de l'information applicables aux entreprises publiques, en renforçant l'indépendance et la responsabilité des représentants des pouvoirs publics et en accélérant la nomination d'administrateurs indépendants et tenus de rendre des comptes, etc.) ; ou encore le recours à des réglementations autres que celles fondées sur la contrainte et l'intervention directe.

PRINCIPALES RÉFÉRENCES

- Areeda et Turner, Predatory pricing and Related Practices Under Section II of the Sherman Act, 88 Harvard Law Review 637, 1975
- Arnold, Nicoletti et Scarpetta, Regulation, Allocative Efficiency and Productivity in OECD Countries: Industry and Firm-level Evidence, Document de travail du Département des affaires économiques de l'OCDE n° 616, 2008, OCDE, Paris
- Baseman, Open Entry Costs and Cross-Subsidization in Regulated Markets, in Gary Fromm (dir. pub.), Studies in Public Regulation, Cambridge MA, The MIT Press, 1981
- Baumol, Business Behaviour, Value and Growth, 45, 1959
- Bellini, The Decline of State-Owned Enterprise and the New Foundations of the State-Industry Relationship, in The Rise and Fall of State-Owned Enterprise in the Western World, Toninelli (dir. pub.), Cambridge University Press, 2000
- Bolton, Brodley et Riordan, Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L. J., 2000
- Bös, Public Enterprise Economics: Theory and Application, Amsterdam, 1989
- Boycko, Shleifer et Vishny, A Theory of Privatization, 106 Econ. J. 309, 1996
- Brennan, Cross-Subsidization and Cost Misallocation by Regulated Monopolies, Journal of Regulatory Economics, Vol. 2, 1990, p. 37-51
- Cope, Regulating Market Activities in the Public Sector, 7 OCDE J. Comp. L. & Pol'y 32, 2005
- Crew et Kleindorfer, Privatizing the U.S. Postal Service, in Mail @ the Millenium, E.L. Hudgins (dir. pub.), Washington D.C., Cato Institute, 2000
- Cruz, The State Action Doctrine, dans Amato & Ehlermann, EC Competition Law – A Critical Assessment, 2007, Hart Publishing, pp. 551-590
- Cuervo et Villalonga, Explaining the Variance in the Performance Effects of Privatization, 25 Acad. Manag. Rev. 581 (2000)
- Delacourt et Zywicki, The FTC and State Action: Evolving Views on the Proper Role of Government, Antitrust Law Journal, Vol. 72, n° 3, 2005
- Dixit, Power of Incentives in Private versus Public Organisations, The American Economic Review, Vol 87, n° 2, 1997
- Faulhaber, Cross-subsidization: Pricing in Public Enterprises, The American Economic Review, Vol. 65, n° 5, décembre 1975

- Fox, An Anti-Monopoly Law for China - Scaling the Walls of Protectionist Government Restraints, 75 Antitrust L.J. 173, 2008
- Fox, US and European Merger Policy--fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices, 10 Geo. Mason L. Rev., 2002
- Galambos, State-Owned Enterprises in a Hostile Environment: The U.S. Experience in The Rise and Fall of State-Owned Enterprise in the Western World, Toninelli, Cambridge University Press, 2000
- Geddes, Case Studies of Anticompetitive SOE Behavior, dans Competing with the Government, Anticompetitive Behaviour and Public Enterprises, Geddes (dir. pub.) , Hoover Institution Press, 2004
- Geradin et Sidak, The Future of the Postal Monopoly: American and European Perspectives After the Presidential Commission and Flamingo Industries, World Competition: Law and Economics Review, Vol. 28, n° 2, 2005
- Goodrich, Government Promotions of American Canals and Railroads, New York, 1960
- Grout et Stevens, The Assessment: Financing and Managing Public Services, 19 Oxford Rev. Econ. Pol'y, 2003
- Irwin et Yamamoto, Some Options for Improving the Governance of State-owned Electricity Utilities, Energy and Mining Sector, Board Discussion Paper Series n° 11 de la Banque mondiale, 2004
- Jensen et Murphy, Performance Pay and Top-Management Incentives, 98 J. Pol. Econ. 225, 1990
- Kaldor, Public or Private Enterprises: The Issues to be Considered, in Baumol (dir. pub.), Public and Private Enterprises in a Mixed Economy, 1980
- Kikeri et Kolo, State Enterprises, Note 304 de la Banque mondiale, 2006
- Kikeri et Nellis, An Assessment of Privatisation, The World Bank Research Observer, Vol. 19, n° 1, 2004
- Krattenmaker et Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J., 1986
- La Porta, Lopez-de-Silanes, Shleifer et Robert Vishny, The Quality of Government, 15 J.L. Econ. & Org., 1999
- Laffont et Tirole, Privatization and Incentives, 7 J. L. Econ. & Org., 1991
- López-de-Silanes, Determinants of Privatization Prices, 112 Q. J. Econ., 1997
- Lott, Are Predatory Commitments Credible? Who Should the Court Believe?, 1999
- Lott, Predation by Public Enterprises, Journal of Public Economics 43, 1990
- Martin, Advanced Industrial Economics, 2° éd., 2002
- Megginson et Netter, From State to Market: A Survey of Empirical Studies on Privatisations, Journal of Economic Literature, Vol. 39, n° 2, 2001

Meggison, Nash et van Randenborgh, The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis, 49 J. Fin., 1994

Milgrom, Predatory Pricing, in The New Palgrave Dictionary of Economics 937, 938 in Eatwell (dir. pub.) Murray Milgate et Newman, 1987

Muris, State Intervention/State Action - A U.S. Perspective, octobre 2003, George Mason Law & Economics Research Paper n° 04-18

Nicoletti et Scarpetta, Regulation, Productivity and Growth, Economic Policy, Vol. 18, n° 36, avril 2003

North, Government and the American Economy, in American Economic Growth: An Economist's History of the U.S., Davis, Easterlin and Parker (dir. pub.), New York, 1972

OCDE, Gouvernance des entreprises publiques : Panorama des pays de l'OCDE, 2005

OCDE, Gouvernance des entreprises publiques, 2005

OCDE, Étude économique de l'OCDE : Fédération de Russie, 2009

OCDE, Lignes directrices sur le gouvernement d'entreprise des entreprises publiques, OCDE, 2005

OCDE, La privatisation au XXI^e siècle : expériences récentes des pays de l'OCDE - Rapport sur les bonnes pratiques, [DAF/CA/PRIV(2008)8/FINAL]

OCDE, Privatising State-Owned Enterprises in the OECD Area: An Overview of Policies and Practices, [DAFFE/CA/PRIV(2002)1]

OCDE, Report on Competition and Financial Markets, 2009 [DAF/COMP(2009)11]

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

OCDE, Report on Regulating Market Activities by the Public Sector, 2003 [DAF/COMP(2004)36]

OCDE, Report Promoting Competition in Postal Services, 1999 [DAFFE/CLP(99)22]

OCDE, Report, Predatory Foreclosure, 2005 [DAF/COMP(2005)14]

OCDE, Le rôle des entreprises publiques dans l'économie : Premier état des informations disponibles, 2008 [DAF/CA/PRIV(2008)9]

Phillips, Competition Policy and reform: Regulation of State Owned Enterprises, document présenté à l'occasion du Symposium international du SAIC sur la politique de concurrence et la législation, les 27 et 28 juin 2005.

Rees, A Positive theory of the Public Enterprise, in The Performance of Public Enterprises: Concepts and measurements, 179, Marchand, Pestieau et Tulkens (dir.pub.), 1984

Sappington et Sidak, Are Public Enterprises the only Credible Predators?, The University of Chicago Law Review, Vol. 67, n° 1, 2000

- Sappington et Sidak, Competition Law for State-owned Enterprises, 71 Antitrust Law Journal, n° 2, 2003
- Sappington et Sidak, Incentives for Anticompetitive Behavior by Public Enterprises, 22 Rev. Indus. Org., 2003
- Sappington et Stiglitz, Privatization, Information, and Incentives, 6 J. Policy Analysis and Manag., 1987
- Scheffman et Higgins, 20 Years of Raising Rivals' Costs: History, Assessment, and Future, 12 Geo. Mason L. Rev., 2003
- Scheiber, Ohio Canal Era: A case study of Government and the Economy, Athens, Ohio, 1969
- Scott, Strengthening the Governance and Performance of State-Owned Financial Institutions, Policy Research Working Paper n° 4321 de la Banque mondiale, 2007
- Shapiro et Willig, Economic Rationales For the Scope of Privatization, in The Political Economy of Public Sector Reform and Privatization, éd. Ezra Suleiman & John Waterbury, 1990
- Shirley et Walsh, Public vs. Private Ownership: The Current State of the Debate, Policy Research Working Paper n° 2420 de la Banque mondiale, 2001
- Shleifer, State Versus Private Ownership, 12 J. Econ Persp., 1998
- Sokol, Competition Policy and Comparative Corporate Governance of State Owned Enterprises, à paraître.
- Sprenger, The Role of State Owned Enterprises in the Russian Economy, 2008, document élaboré en vue de la Table ronde de l'OCDE sur le gouvernement d'entreprise des entreprises publiques.
- Stiglitz, The Economic Role of the State, Oxford, 1989
- Éd. Toninelli, The Rise and Fall of State-Owned Enterprise in the Western World, Cambridge University Press, 2000
- Toninelli, Nascita di una Nazione: Lo Sviluppo Economico degli Stati Uniti (1780-1924), Bologna, 1993
- Troika Dialog, Who owns Russia, Corporate Governance Annual, 2008
- Vagliasindi, Governance Arrangements for State Owned Enterprises, Policy Research Working Paper n° 4542 de la Banque mondiale, 2008
- Villalonga, Privatization and Efficiency: Differentiating Ownership Effects from Political, Organizational, and Dynamic Effects, 42 J. Econ. Behavior & Org., 2000
- Whish, Competition Law, 6^e éd., Oxford University Press, 2009
- Wintrobe, The Market for Corporate Control and the Market for Political Control, 3 J.L. Econ. & Org., 1987
- Wölfl, Wanner, Kozluk et Nicoletti, Ten Years of Product Market Reform in OECD Countries – Insights from a Revised PRM Indicator, Document de travail du Département des affaires économiques de l'OCDE n° 695

DAF/COMP(2009)37

Banque mondiale, Bureaucrats in Business: The Economics and Politics of Government Ownership, 1995

Banque mondiale, Economies in Transition: An OED Evaluation of World Bank Assistance, 2004

CANADA

1. Introduction

Historically, Crown corporations (the Canadian term for state-owned enterprises or “SOEs”)¹ have played, and continue to play, an important role in the Canadian economy. Although many Canadian SOEs have been privatized during the past 20 years,² some continue to operate in particular sectors.

SOEs are established for varying purposes, which are often a mix of commercial and policy objectives, and sometimes their mandates have the potential to conflict with the promotion of pure competition principles in the markets they affect. One example of an SOE is Canada Post, which has a statutory monopoly over the collection, transmission and delivery of letter mail within Canada. Such monopolies raise the question of the extent to which Canada’s competition law, the *Competition Act*³ (the “Act”), applies to SOEs.

The Act is a federal market framework law that governs most business conduct in Canada. To maintain and promote competition in Canadian markets, the Act contains both civil and criminal provisions aimed at preventing anti-competitive conduct. The Competition Bureau (“Bureau”), headed by the Commissioner of Competition, is responsible for the administration and enforcement of the Act.

This submission provides an overview of how the Act applies to SOEs. Specifically, the paper will briefly examine the role of SOEs in the Canadian economy, discuss the application of the Act to SOEs, including the Bureau’s approach to the Regulated Conduct Doctrine, and outline the Bureau’s enforcement experience to date regarding SOEs.

2. The role of SOEs in the Canadian economy

By definition, an SOE is a corporation that is wholly-owned, directly or indirectly, by the government.⁴ SOEs tend to operate under a private-sector model but have both commercial and public policy objectives.⁵ The public policy objectives of SOEs include: providing essential goods or services to Canadians that would otherwise be unavailable or undersupplied;⁶ controlling the price and distribution of certain products, such as alcohol;⁷ sustaining and developing certain types of industries or regions;⁸ regulating sensitive industries;⁹ and promoting national unity.¹⁰

¹ While the term Crown corporation is the more commonly used term for SOEs in Canada, the term SOE will be used in this paper to harmonize with the international vocabulary.

² Privatizations that have occurred in the past 20 years include: Air Canada in 1988-1989, Petro-Canada in 1991-1992-1995 and 2004, and Canadian National Railways in 1995. See *Federal Commercialization in Canada*, by Allison Padova, 20 December 2005, Library of Parliament.

³ R.S., 1985, c. C-34.

⁴ See subsection 83(1) of *Financial Administration Act*, R.S., 1985, c. F-11.

⁵ *Annual Report to Parliament – Crown Corporations and Other Corporate Interests of Canada 2008*, online at: <http://www.tbs-sct.gc.ca/reports-rapports/cc-se/2008/cc-se03-eng.asp#Toc220113622>

⁶ Examples include Canada Post and the Royal Canadian Mint.

⁷ Examples include Société des alcools du Québec and the Liquor Control Board of Ontario.

SOEs operate in many sectors of the Canadian economy and are located at both the federal and provincial levels of government. Federal SOEs are particularly important in industries such as transportation, infrastructure, finance, development and Canadian heritage.¹¹ Provincial SOEs are particularly important in the energy/electricity sectors, lotteries, alcohol distribution and finance industry.

SOEs that provide goods and services to the public can operate in very different competitive economic environments. SOEs may operate as statutory monopolies, such as provincial corporations supplying or distributing electricity or alcohol. Other SOEs operate in competition with private corporations, such as in the housing and broadcasting sectors.¹² Finally, some SOEs have a statutory monopoly over a certain type of product but compete with private sector companies for other products. For example, Canada Post has a statutory monopoly over the collection, transmission and delivery of letter mail within Canada¹³ but competes with the private sector with respect to its small parcel courier operations.

3. The application of the *Competition Act* to SOEs

To determine the applicability of the Act to SOEs in the Canadian context, it is first necessary to consider section 17 of the *Interpretation Act*,¹⁴ which provides that legislation, such as the Act, does not apply to the Crown other than as specified in the legislation itself. Section 2.1 of the Act indicates that it is binding on agents of Her Majesty¹⁵ in certain cases:

2.1 This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

Section 2.1 of the Act was added in 1986, in response to the decision of the Supreme Court of Canada in *R. v. Eldorado Nuclear Ltd.*,¹⁶ which also applied to *R. v. Uranium Canada Ltd.*¹⁷ In these cases, the

⁸ Examples include Telefilm Canada, the Canadian Tourism Commission, Export Development Canada, Farm Credit Canada and the Enterprise Cape Breton Corporation.

⁹ An example would be the Atomic Energy of Canada Limited.

¹⁰ An example would be the Canadian Broadcasting Corporation.

¹¹ *Annual Report to Parliament – Crown Corporations and Other Corporate Interests of Canada 2008*, Chap. 1, online at: <http://www.tbs-sct.gc.ca/reports-rapports/cc-se/2008/cc-se03-eng.asp#Toc220113622>.

¹² Examples include the Canada Mortgage and Housing Corporation and Canadian Broadcasting Corporation.

¹³ *Post Canada Corporation Act*, R.S., 1985, c.C-10, section 14.

¹⁴ R.S., 1985, c. I-21.

¹⁵ An SOE can either be an agent of the Crown or a non-agent of the Crown. An agent of the Crown can bind the Crown by its acts. An SOE becomes an agent of the Crown when one of the following conditions is met: (1) a provision in the enabling legislation declares that the SOE is an agent; (2) an Order in Council declares that the SOE is an agent; and (3) the Courts interpreting the actions of the SOE and the government control over the entity declares that the SOE is effectively an agent of the Crown. The majority of SOEs are crown agents. See *Agent Status and Crown Corporations*, available online at: <http://www.tbs-sct.gc.ca/gov-gouv/agent-mandataire/agent-mandataire-eng.asp>.

¹⁶ [1983] 2 S.C.R. 551.

¹⁷ [1983] 2 S.C.R. 551, While *R. vs. Eldorado Nuclear Ltd* and *R. vs. Uranium Canada Ltd* were two separate cases they were dealt with in a single judgment.

Supreme Court held that the *Combines Investigation Act*, the predecessor to the Act, was not binding on the Crown because it did not contain a section making it applicable to the Crown, as required by the *Interpretation Act*. The Supreme Court also held that Crown immunity extends to Crown agents acting within the purposes they were instructed to pursue. In this case, both Eldorado Nuclear and Uranium Canada were Crown agents, which had been charged under the conspiracy provision of the *Combines Investigation Act*. The Supreme Court held that the two SOEs were immune from the application of the *Combines Investigation Act* because they were acting within the purposes for which they were incorporated. Post-amendment jurisprudence has confirmed that the Act applies to agents of the Crown but not to the Crown itself.¹⁸

Section 2.1 of the Act indicates that both federal and provincial SOEs engaged in commercial activities in actual or potential competition with other businesses are subject to the same competition law regime as private sector businesses. Section 2.1 is not intended to affect either the conduct of SOEs that perform non-commercial activities or those that have a statutory monopoly over certain classes of products or activities.¹⁹

Because SOEs are subject to the same competition law regime as private sector businesses, they have access to the defences and exceptions found in the Act. The Regulated Conduct Doctrine (“RCD”), a doctrine that has been developed by jurisprudence, is of particular relevance to SOEs that are regulated by legislation.

The RCD first appeared in Canada in 1929 in the context of a criminal proceeding in which it was alleged that conduct that was regulated by provincial law was contrary to a criminal competition law provision.²⁰ In general terms, the RCD provides that conduct authorized or mandated by federal, provincial or municipal legislation cannot be contrary to the Act. The rationale underlying the RCD is that, if another valid law authorized the conduct, the conduct could not have been committed with the criminal intent required by criminal law.²¹ While this rationale seems quite straightforward, subsequent amendments to the competition law regime replacing criminal provisions with civil provisions, as well as subsequent jurisprudence involving federal law, have complicated the application of the RCD.

In light of the uncertainty surrounding the application of the RCD in a competitive context, the Bureau released its *Technical Bulletin on “Regulated” Conduct*²² (“Bulletin”). The Bulletin, which was released in 2006 after extensive consultation with interested parties, outlines the Bureau’s general approach to the enforcement of the Act with respect to conduct that is regulated by another legislative regime, and specifically addresses the Bureau’s approach to the RCD. While the Bureau acknowledges that jurisprudence on the application of the RCD is underdeveloped and that a cautious application is warranted,²³ the Bureau confirmed that, in an appropriate case, it will attempt to clarify the extent to which Parliament intended the Act to apply.

¹⁸ *Sebastian vs. Saskatchewan (Dept. of Highways & Transportation)* (1987), 61 Sask. R. 71.

¹⁹ *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, 12:00.

²⁰ *R. v. Chung Chuck*, [1929] 1 D.L.R. 756 (B.C.C.A.), aff’d [1939] 2 D.L.R. 97 (J.C.P.C.)

²¹ Janet Bolton and Lorne Salzman, *The Regulated Conduct Doctrine and the Competition Bureau’s 2006 Technical Bulletin: Retrospective and Prospective*, 2006, p.3

²² *Technical Bulletin on “Regulated” Conduct*, June 29, 2006, Online, at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02141.html>.

²³ *Ibid.* p. 1.

In determining whether it will pursue a case where conduct is regulated by another law, the Bureau will look at several factors, including: the purpose of the Act and the purpose of the other law that applies to the conduct; the specific provisions of the Act and of the other law that apply to the conduct; the interests sought to be protected by both laws; the parties involved; the impugned conduct; the general principles of statutory interpretation; and the public interest²⁴. The Bulletin indicates that the Bureau's approach could differ depending on whether the conduct is subject to a criminal provision or a civil provision of the Act, and whether the conduct is regulated by a provincial or federal law.²⁵

While the application of the RCD to civil and criminal provisions will depend on the analysis of the factors listed above, the Bulletin indicates that it is unlikely that the Bureau would pursue a case under any criminal provision(s) of the Act in respect of conduct that is authorized or required by a valid law.²⁶ Further, the March 2009 amendments²⁷ to the conspiracy provision of the Act explicitly confirm that those principles regarding regulated conduct that had been established in the jurisprudence prior to the amendments will continue to apply in respect of conduct addressed under the new criminal conspiracy provision of the Act.

4. Competition law enforcement and SOEs

The Bureau has not had any domestic enforcement cases involving an SOE since section 2.1 of the Act came into force in 1986. Therefore, the issues and challenges associated with the enforcement of competition law as it applies to SOEs, such as the difficulty of finding the appropriate measure of cost of an SOE and the comparison of these measures of costs to those of private sector firms, have not been put to the test in the domestic Canadian context.

On the international front, allegations of anti-competitive conduct by a Canadian SOE, Canada Post, were made in the case of *United Parcel Service of America v. Government of Canada* ("the UPS case"), an investor-state dispute initiated in 2000 under Chapter 11, the Investment Chapter of the *North American Free Trade Agreement* ("NAFTA"). Chapter 11 provides rights and protections for investments and investors in the NAFTA countries and allows an investor complaining of a rights violation access to a dispute settlement process before an impartial arbitration tribunal. Also relevant in this case was Chapter 15 of NAFTA on competition policy, monopolies and state enterprises. Specifically, Chapter 11 authorizes certain claims to be made concerning the activities and conduct of SOEs and monopolies.

While Canada Post is an SOE with a statutory monopoly over the collection, transmission and delivery of letters within Canada, it competes with private companies in the small parcel courier business. In the *UPS* case, *UPS* alleged, among other things²⁸, that Canada Post had engaged in anticompetitive conduct under Chapter 15 of NAFTA with respect to its small parcel courier business. Specifically, *UPS*

²⁴ *Ibid.* p. 2.

²⁵ *Ibid.* p. 2, 3.

²⁶ *Ibid.* p. 3.

²⁷ On March 12, 2009, most amendments to the *Act* came into force. However, those related to the conspiracy provision will come into force on March 12, 2010. The specific amendments are set out in Bill C-10, the *Budget Implementation Act*. Further details regarding Bill C-10 are available online at: Parliament of Canada <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5697&Session=22&List=toc>.

²⁸ *UPS* also complained about various Canadian Government policies. These complaints are beyond the scope of this paper.

alleged that Canada Post was providing its courier products (Xpresspost, Priority Courier and Purolator) with advantages that were not provided to UPS²⁹.

Following the initiation of the case in 2000, Canada challenged the claim on jurisdictional grounds arguing that competition issues were outside the scope of the arbitration tribunal. The arbitration tribunal found in its Award on Jurisdiction, rendered on November 22, 2002, that matters relating to competition law and policy were outside its jurisdiction unless, and only to the extent that, there was also a breach of an obligation under the Chapter 11. Given that no such breach was found, the claims of anti-competitive conduct were beyond the tribunal's jurisdiction. In its amended pleadings, UPS made no allegations of anticompetitive conduct within the jurisdiction of the tribunal. As a result, no Canadian SOE has yet been subject to competition law enforcement in an international forum.

5. Conclusion

The introduction of section 2.1 of the Act in 1986 has made SOEs performing commercial activities in actual or potential competition with other businesses subject to Canada's competition legislation. Since then, owing to the fact that the Bureau has not brought cases engaging section 2.1, and the more general underdevelopment of jurisprudence on the RCD have limited the scope of judicial insight regarding the application of the Act to alleged anti-competitive practices on the part of an SOE. At the same time, the only international challenge concerning the activities of a Canadian SOE has not been edifying in this regard because the NAFTA Chapter 11 tribunal was found to be without jurisdiction to decide on matters relating to competition law and policy.

²⁹

Dispute Settlement, NAFTA – Chapter 11 – Investment, UPS v. Government of Canada, available online at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel.aspx?lang=en>

CZECH REPUBLIC

1. Introduction

The growing role of the state in economies around the world is evident. This paper summarizes the experience of the Czech Office for the Protection of Competition (hereinafter referred to as “the Office”) related to the application of antitrust law to state owned enterprises (hereinafter referred to as “SOEs”) and various issues arising from the specific goals of SOEs that often go beyond principle purpose of profitability compared to the private enterprises engaged in competitive practices.

Firstly, the paper examines the definition and the importance of SOEs in the Czech Republic. Secondly, it discusses how the notion of SOEs is developed within the Czech legal framework and the Czech competition law, in particular. Thirdly, the paper describes antitrust enforcement and prospective exemptions applicable to SOEs in relation to the Office’s decision-making practice.

Finally, the paper contains a number of concluding observations and reflections, considering the Office’s experience in cases involving SOEs and its general position to the priorities in competition policy towards SOEs.

2. State-owned enterprises in the Czech Republic

In the Czech Republic no specific distinction is made between government-owned corporations, SOEs or government business enterprises. In general, these terms stand for a legal entity usually considered to be an element or part of the state, be it completely or partially state-owned in so far the state can exercise control over decisive part of an enterprise in question. The Czech legal framework defines SOEs as undertakings established to operate in commercial affairs with a distinct legal form.

While they may also have public policy objectives, SOEs should be differentiated from other forms of state-owned entities established to pursue purely non-financial objectives.

To understand the position of SOEs in the Czech Republic, it is necessary to consider the development of the market economy in the Czech Republic and its transition from the centrally-planned model of economy in the early 1990s.

In the mid-1980s, Czechoslovakia had a highly industrialized economy and as of 1980s the state-controlled market sector generated over 98 percent of the national income. In the Czechoslovak centrally-planned system, the authorities centralized all production decisions and the property rights. In general, central planning could have made it possible for producers to take advantage of economies of scale, eliminating superfluous and nonviable activities.

However, many aspects of the system inevitably interfered with its effective functioning. The major difficulty, among others, was the determination of production quotas. Moreover, the management of state-owned companies had to follow national full employment policy and the production volume was much more important than the profit maximization. In other words, the profits were created by the prices and production quotas set by the planners and had to be transferred as a whole to the supervising branch ministry. This inevitably led to fewer incentives to innovate. As a result, market production gradually declined with response to actual market needs and the whole economic system was about to collapse at the end of 1980s.

The necessity of facing the consequences of the centrally-planned economy led to inevitable restructuring of the whole economy after 1989. Transition to a market economy was launched with the process of privatization of major SOEs as well as liberalization of most of the economy sectors. A great number of private enterprises have emerged, including commercial banks and securities companies. Nevertheless, many companies remained state-owned due to various reasons.

First of all, the Czech government had a tendency to retain the state control over strategic industries. Heavy industry, energy, transportation, postal services and telecommunications were the most important part of the Czech economy and were not fully liberalized during the first wave of privatization in early 1990s.

Secondly, social and employment aspects had to be considered given that the state enterprises were very important employers and guarantees of development in many regions.

Thirdly, SOEs supplied goods and services that had few substitutes, creating potential risk of establishing private-owned monopolies in prospective markets. As for late 1990s it was obvious that further privatization of certain SOEs was necessary. As a consequence the government adopted measures to enable privatization in some parts of energy sector, heavy industry, metallurgy, extractive industry and telecommunications.

Moreover, it is difficult to generally identify sectors where SOEs compete with private enterprises as these are often dominant companies with a unique position within the market structure. In the Czech economy, the sectors where SOEs distinguishingly play important role are energy and transportation, while other formerly state-dominated sectors, such as telecommunications, have become fully privatized. In addition, there are diverse policy incentives (besides the services of general economic interest, see below) that make the position of SOEs special such as energy security, resources diversification, general supply accessibility, regional development and cohesion.

Finally, the Czech economy is relatively small and as far as it is interconnected with other economies, impact of international trade on the markets along with the membership of the Czech Republic in the EU are crucial element influencing the market competitiveness.

3. Rules applicable to SOEs

The Czech Competition Act on protection of Competition (hereinafter referred to as “the Act” or “the Competition Act”) generally applies to all subjects falling within the notion of undertaking as defined in the Act. Pursuant to Article 2(1) *undertakings shall be deemed to mean natural or legal persons, their associations, associations of such associations and other groupings, including where such associations and groupings are not legal persons, provided they take part in competition or may influence competition by their activities, although they are not entrepreneurs.*

As the Competition Act does not distinguish between private and public entities, it covers all enterprises regardless of whether they are owned or controlled by the government or other public authority.

Furthermore, in accordance with the applicable Community law, the Competition Act can not be fully applied to undertakings that are providing services of general interest.¹ This doesn't however mean that the

¹ Services of general economic interest (SGEIs) are different from “ordinary” services in so far that the public authorities consider that they need to be provided even where the market is not sufficiently profitable for the supply of such services. The concept of SGEIs is based on the principle that a quality service is ensured at an affordable price everywhere for everyone. SGEIs include for example publicly accessible supply of energy, telecommunications, postal services, transport, water and waste management

Competition Act will not be applied to such undertakings – this exclusion applies only in so far that the full application of the Act would obstruct the provision of the services in question.

In addition, the above provision is also generally applied to all undertakings, no matter whether they are state-owned or private-owned. Thus, it is only the concept of services of general interest, which comes into question.

Two conditions must be fulfilled so that an undertaking could enjoy the exemption from the Act. Firstly, an undertaking must be providing services of general interest and secondly, the full application of the Act would prevent the provision of such services. In case an undertaking provides also other services apart from those of general interest, the exemption from the Act does not apply to these unrelated activities.²

The Competition Act regulates only the conduct of undertakings, not public authorities. However, the Office retains power to influence decision making of public authorities by advocacy. Thus it is the Office's basic policy that the enforcement of competition law should be strictly neutral as to ownership of enterprises.

The Competition Act covers all relevant sectors including the energy sector. The Office has acted in several cases where undertakings (of which some are SOEs) have distorted competition. Once the law is infringed the Office is entitled to prohibit such behaviour regardless of the legal status of an undertaking or policy pursued. The energy sector, historically a strategic sector in the Czech Republic is besides the Office also closely monitored by the Czech energy regulator - the Energy Regulatory Office (hereinafter referred to as "the ERO"). The ERO and the Office cooperate within wide scope of issues, however the ERO regulates the energy market *ex ante* whereas the Office safeguards competition by *ex post* regulation.³

Moreover, cooperation between these institutions has brought very positive impacts on competition, having established pro-competitive dialogue with third parties and using the competition advocacy in preventing the energy sector from being excluded from the competitive mechanisms even though there are very few important players in the market.

4. Competition and SOEs

The Office has been examining possible distortions of competition by several SOEs during its decision practice (see below) and in all these cases the administrative proceedings were carried out in a standard manner with no exemptions for the parties to the proceedings. However, particular issues have been raised during the investigations and the cases have reflected the special position of SOEs in the Czech economy.

The Competition advocacy complements law enforcement activities. It has been repeatedly proven as a necessary tool in the Office's efforts to promote competition in less competitive markets where SOEs operate. The Competition advocacy must try to minimize unnecessary government intervention in the

services. Article 86(2) of the EC Treaty provides that services of general interest are subject "*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*".

² The abovementioned provision hasn't so far been applied in practice. However, the Supreme Administrative Court (in case 7 As 50/2006 *T-Mobile*) held that this Article should be interpreted in line with the case law of the Community courts concerning Article 86 of the EC Treaty.

³ There are no demarcation disputes between the ERO and the Office as the Supreme Administrative Court stated in its finding KOMP 3/2006-511 on 18th December 2007.

market place. Therefore, it is essential to maintain the openness and the predictability of the Office's decision. In cases where competition advocacy and other non-enforcement tools fail, appropriate enforcement and fines with sufficient deterrent effect must be ensured.

However, an argument has been raised repeatedly that SOEs should be used as a competition policy instrument to improve resource allocation in an imperfectly competitive market. It should not be anticipated, according to our view, that the creation of a SOE or even nationalization of preexisting private-owned enterprise should be used as a legitimate competition policy instrument to promote more effective competition in the market.

It may be socially desirable to create a SOE in particular market in order to establish functional alternative to inefficient or dominant private-owned companies, but the Office sees no advantages in such artificial balancing of the market. For instance, establishing a SOE providing low-cost transportation in remote regions may solve the problem in a short-time. On the other hand, at the same time it would create unfavorable conditions for undertakings willing to enter the market, by setting conditions they couldn't meet.

4.1 *Electricity industry*

Situation in the electricity sector reflect the development after the merger of former incumbent *ČEZ*⁴. Since 2003 when the Office approved the merger of *ČEZ*, Inc. and 5 regional distribution companies there have not been significant changes in the market.

According to the Office's findings the *ČEZ* company had concluded anticompetitive agreements on supplies of electric power, containing prohibited provisions forbidding the re-import the exported electricity back to the territory of the Czech Republic. This case was one of the signals that gradual liberalization in the electricity sector can only be reached through effective competition. Even though the Office faced governmental intervention in so far that the creation of the *ČEZ*'s monopoly special rules should be applied, the Office (having tried to settle the case through competition advocacy) decided that the state shareholding in *ČEZ* should not be a constituent moment for granting any exemptions. At present, the Office has established a working dialogue with *ČEZ* and its behaviour is monitored in terms of impacts on competition.

As an example of an effective cooperation between the Office and a SOE is an imposition of substantial remedies on *ČEZ* during its privatization process. *ČEZ* was obliged to separate the transmission system which is now operated by state-owned company *ČEPS*. The Office further cooperates closely with *ČEPS* namely on the preparations of new legislative drafts concerning the electricity sector, plans for sources diversification and improvement of services for the customers, with the aim to promote gradual liberalization of the energy market.

Finally, a question of more favorable approach towards SOEs was raised in 2007 during the merger of *ČEZ* and *REAS*⁵, both SOEs. The acquirer, *ČEZ*, argued that the merger in question had to be assessed under a special regime, taking into account that both companies are state-owned. Both companies argued that the concentration of two state-owned entities acting in the same economic group should not be assessed under the merger control rules because such transaction does not constitute a merger as defined by the Czech legal framework. However, the Office concluded that even though the state is the majority

⁴ *ČEZ – Český Energetický Závod* (Czech Energy Plant), now *CEZ Inc.*, member of the *ČEZ Group*.

⁵ *REAS - Severomoravské energetiky a regionální distributoři* (North-Moravian Energetics and Regional Distributors).

shareholder of both companies, both ČEZ and REAS acted as independent economic entities on a long-term basis without any significant coordination of their behaviour towards other competitors.

4.2 *Railway transport*

The case of *České dráhy, a.s.* (the Czech Railways Company) is the most distinctive example of the Office's policy towards SOEs. The Office has imposed a fine of CZK 252 million (approx. EUR 9.8 million) on the company *České dráhy, a.s.* for an abuse of its dominant position in the market for rail freight transport of large volume substrates. By its behaviour, the company violated the Czech and the EC competition rules. In particular *České dráhy, a.s.*, charged its customers dissimilar prices for provision of comparable services of rail freight transport of large volume substrates. Discriminatory price policy of *České dráhy, a.s.* also affected assertion of other rail transport providers on the market. Moreover *České dráhy, a.s.* discriminated competing customers of rail freight transport, who were excluded from setting of negotiated prices for the transport with *České dráhy, a.s.*

The Office repeatedly warned *České dráhy, a.s.* that such behaviour infringes the Czech Competition Act and will not be tolerated. No exemption was granted and *České dráhy, a.s.* was obliged to pay the fine as any other undertaking pursuant to the rules on setting fines. During the appeal procedure *České dráhy, a.s.* raised objection against the amount of the fine which, according to the opinion of the company in question, was set unreasonably high due to a fact that the money had to be collected from the state budget.

This case clearly illustrates that SOEs in the Czech Republic are treated as any private-owned undertaking. The seriousness of the appeal to a “non-sanction” solution of this particular case would be dangerous precedent for the Office's decision-making practice along with negative message for the competitors and the public. The fact that the company in question was a SOE did not outweigh that competition rules have been infringed. The fine served as a signal to undertakings that serious harm of competition rules should be penalized and that the amount of the fine is always set according to the same principles.

Moreover, as aforementioned, any action of competition authority against SOEs may be criticized by the government or consumers' organizations, depending on what kind of policy is to be implemented by the SOE. Consumer protection organizations, sometimes also oppose the Office's decisions. These organizations presume that the purpose of SOEs is the price regulation for the sake of consumer, often ignoring the harm for competition. It is then the Office's task to defend its position and be able to comprehensively present its actions to the public to avoid misinterpretations and defend the principles of competitive markets.

4.3 *Telecommunications*

Other important cases concerning SOEs involved the company *Český Telecom*⁶, a former incumbent in the telecommunications sector. In 2005 the Office imposed a fine of CZK 205 million (approx. EUR 7.8 million) on *Český Telecom* for the breach of Article 82 of the EC Treaty. Since 2002, *Český Telecom* had offered price plans intended for households and small entrepreneurs, which contained call credits or free minutes as a part of a monthly lump. By tying together services, *Český Telecom* prevented the development of competition, progress of existing alternating operators and as a consequence it limited the possibilities of consumers to obtain better services for competitive prices.

Another case involving the same company concerned the market for mediation of access to the Internet services and transmission of data by using the ADSL technology. *Český Telecom* prevented

⁶ *Český Telecom* – Czech Telecom, now private-owned company *Telefonica O2*.

the alternative operators from offering the competitive services on the retail ADSL market for appreciable period. The Office imposed a fine in total amount of CZK 90 million (approx. EUR 2.5 million) on *Český Telecom*.

Both administrative proceedings were initiated with *Český Telecom* on the grounds of the Competition Act with no exclusive or favourable treatment for the company. It is true, that the development in the telecommunications technologies and privatization of the company in question, helped to overcome the dominant position of *Český Telecom*, yet still there are competition issues derived from former state-owned monopoly. In this respect the Office has not had positive experience with SOEs in telecommunications sector.

The Office has also been active in promotion of competition in other sectors though not through the administrative proceeding. Considerable effort has been made by the Office in connection with the enforcement of competitive environment in the area of postal services which may serve as an example of the Office's approach to the SOEs.

4.4 *Postal services*

The Czech Parliament tried to extend the monopoly of *Česká pošta*⁷ for the direct mail, according to the Office contrary to the principles of competition law and the relevant EC directives.⁸ After the intervention of the Office, the proposed legislation has not been adopted. Under the current legislation, the Ministry of Trade and Industry carries out state administration functions in postal services. Within its powers, the Ministry drafts legal regulations and strategic and policy materials relating to the development of the postal sector. Under the amended Postal Services Act, the role of the postal services market regulator was transferred from the former Ministry of Informatics to an independent regulatory body, the Czech Telecommunication Office, as from 1 April 2005.

The regulator's key task is to use its regulatory powers to ensure general availability of high-quality postal services. The Ministry of Trade and Industry has retained its position as the promoter of this SOE.

Česká pošta remains the dominant provider of postal services. Based on its postal license, *Česká pošta* is also obliged to provide the universal services. The share of its competitors has so far been only marginal. Another step to foster desirable competition growth and to make business in the sector easier was to abolish the duty to obtain approval from the Ministry to provide postal services.

Pursuit of business in the postal services market became an unlicensed trade as of 1 April 2005, also due to Office's efforts and communication with other authorities. However, that applies only to services outside of the monopoly of *Česká pošta*, i.e. transport of items of correspondence weighing 50 g or more or for a price at least 18 CZK. The next liberalization steps will depend on the EU postal legislation, but it is now clear that the Office will stand for further liberalization of postal services sector.

⁷ *Česká pošta* - the Czech Post Company. State-owned enterprise providing nationwide postal, delivery and certain financial transactions services.

⁸ Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service; Directive 2002/39/EC, which amends the initial Postal Directive (97/67/EC) by defining further steps in the process of gradual and controlled market opening and further limiting the service sectors that can be reserved; Directive 2008/06/EC defining 2010, and for some Member States 2012, as a final step in the process of gradual market opening.

5. Conclusions

As noted above, the Office has some experience in application of antitrust rules to SOEs. In the Czech Republic, there is no *a priori* distinction between SOEs and private-owned enterprises, the number of SOEs is not very high and those SOEs engaged in commercial activities often represent dominant companies in the respective markets. As stated above, the Office's policy is that the enforcement of antitrust rules should apply regardless of the legal status of an undertaking. However, several recommendations may be outlined to formulate rules that all SOEs should follow in general.

SOEs should definitely be subject to the same law, taxing rules and competition rules as their private competitors. Favourable policy towards SOEs (e.g. tax benefits) would seriously harm the competition.

Moreover, SOEs should be encouraged to participate in competition advocacy projects, especially in cases where SOEs represent significant regulatory force in particular market and pursue commercial goals at the same time.

The position of SOEs must never be regarded as "definite" – once the economic situation indicate that there is a chance for another effective competitor to enter the market, entry barriers should be pulled down and the position of SOEs as a monopolist removed.

Furthermore, an introduction of new SOEs steps towards stronger regulatory framework of the economy, which should not be perceived as a positive development even in times of economic crisis. The experience so far has demonstrated that SOEs do not necessarily pursue only profit-maximizing goals as private-owned enterprises do, but much like private-owned undertakings SOEs also tend to infringe the competition rules, especially once being dominant in market.

The Office therefore stands for clear competition rules applied equally to both SOEs and private-owned enterprises, providing that the national economic policy pursues pro-competitive goals. In case when distortion of competition is implemented directly by the government, be it through SOEs or particular policy, the competition authority has the powers to intervene against the anticompetitive behaviour or against potential negative impacts on competition. Only in cases when regulatory framework of the governmental policies establishes exclusive rights for particular SOEs the Office is limited in application of antitrust rules. Such cases, however, represent very rare situations.

The Office performs its duties in protection the markets from anticompetitive behaviour and by doing so it does not distinguish between state-owned or private-owned enterprises. On contrary, aforementioned examples have demonstrated that due to their specific position SOEs are watched closely but in the same comprehensive manner as if being private-owned. Abuse of their dominant position remains the essential problem with SOEs in the Czech Republic and the Office considers strict enforcement of antitrust rules as one of the most important tools how to protect both market and consumers' welfare.

In this prospective the Office considers that no antitrust exemptions should be applicable to SOEs, once they are not excluded from the scope of the Competition Act or EU Competition law, especially in markets where non-commercial activities are interconnected with business strategies and commercial interests. It should be stressed that current approach of the Office towards SOEs will remain the same vis-à-vis possible governmental policies during the time of economic crisis and it is our belief, however, that it is highly appropriate to maintain contemporary legal regime and that neutral approach to the cases involving SOEs, which would set favourable conditions for the further development of the competition environment.

FINLAND

1. The definition and importance of state-owned enterprises (SOEs)

1.1 *Introduction*

Finland has witnessed far-reaching reforms in the public sector since the late 1980s, and major reforms continue to be underway. Marketization of the production organizations and operating environment in the public sector, and opening them up to competition, has constituted the essence of these reforms. In many cases, this has been accompanied by expansion of public sector production into areas ideal for, and already supplied by, private enterprise.

Finland has traditionally belonged to those market economies in which government on a broad scale is involved in productive activities. In order to give a valid overview of governmental involvement in productive activities in Finland, it is necessary to take a broad view as to what constitutes an SOE. In addition to the state, productive entities are owned by municipalities or their associations.¹ The economic importance of both the state-owned productive activities and the municipal activities is very substantial.

Marketization of government-owned production and opening it up to competition began in the late 1980s in the state sector as part of a general trend towards deregulation. In the municipal sector, this trend gained pace only a decade later. As regards municipal production in Finland, reforms in progress are increasingly exploiting markets and competition, and for municipalities markets and competition are means of developing the provision of welfare services and making them more efficient. Tendering for services and increased outsourcing have been features of the municipal sector in recent years, and it is possible that over the next few years vouchers will be instituted on a large scale.

In sections 1.2. – 1.8., the various forms of government-owned productive entities will be discussed, starting from state-owned companies, and proceeding to state enterprises, state agencies, municipal enterprises, municipal companies, and municipal agencies.

1.2 *State-owned companies*

There is a long tradition of state-owned companies in Finland. On Finland's independence, it was deemed acutely necessary to establish an industrial infrastructure (i.e. capital-intensive basic industries providing other industrial sectors with inputs) and ensure utilization of Finland's natural resources. Just after a devastating Civil War, it was considered unlikely that private capital would be invested in such activities, at least in a reasonable time. Thereby it was decided that the state shall establish such companies and hold them in its exclusive ownership. The intellectual foundation of the public policy to establish state-owned companies was economic nationalism, not an attempt to build a socialist-model command economy. To emphasize the latter point, the governance model of these companies allowed wide discretionary power to the company management, the state assuming a relatively retrenched ownership position. This governance principle still largely carries, although there have been more recent revisions.

¹ There are also some governmentally-owned actors that in a formal sense belong neither to the state nor to the municipal sector.

Since the late 1980s, most businesses of the state have been converted into state enterprises and then incorporated limited companies. During the past twenty years, most state-owned companies have been partly, and some fully privatized, and the stocks of state-owned companies are currently usually listed. There are now several companies in which the state currently only has a minority share holding. It is typical of state-owned companies that they operate in a regular market environment. Overall, state ownership has arguably affected the nature of these companies' business policies and the FCA has investigated into their alleged restrictive practices.²

1.3 State enterprises

In Finland, as in many other nations, the state has traditionally run natural monopoly-type activities such as railroads. In contrast to state-owned companies, these activities were, at first, organized as government agencies responsible for providing the service. A major change starting in 1989 created state enterprises out of many former government agencies. The state enterprise is a kind of hybrid model between state agency and a regular market-oriented company. It is considered that being a state enterprise is the best option for state operations that should be steered for socio-political or other reasons. The model was designed to make it simultaneously possible to give public interest-based guidelines to these actors, while also enabling them to operate in a commercial manner.

State enterprises are created by government statute and are strategically steered by the government (Parliament, Council of State, ministries). A new State Enterprise Act (1185/2002) came into force in 2003. In addition to the overall Act governing the model in general, there are specific Acts on each state enterprise. The enterprises are, however, independently and commercially managed, and usually also operate in a competitive market. The basic aim is to produce products and services on market terms, adopting business principles.

The strong public interest and/or outspoken natural monopoly feature have distinguished the state enterprise model from the state-owned company model. The former model has also been widely used as a transitional model as a government agency is transformed into a regular state-owned (or even more or less privatized) company. That is why there are currently only five state enterprises left³. In the foreseeable

² For example Rautaruukki, Outokumpu, Neste and Kemira.

³ *Finavia* offers airport and air navigation services. There are 25 airports in the network maintained by *Finavia*. In the administration of Finnish aviation, commercial activities were de-coupled from the official functions at the beginning of 2006. The Civil Aviation Administration continued to work as a commercial enterprise under the operating name of *Finavia*, and the official air transport functions are handled by the Civil Aviation Authority, a body under the Ministry of Transport and Communications.

Since the beginning of 2004, the pilotage unit of the Finnish Maritime Administration has operated independently under the name of *State Pilotage Enterprise*. The State Pilotage Enterprise provides national pilotage services and other related services that support maritime safety and operational requirements, and it is responsible for the development of these services.

Metsähallitus administers more than 12 million hectares of state-owned land and water areas. *Metsähallitus* is a state-owned enterprise that runs business activities while also fulfilling many public administration duties.

Senate Properties under the aegis of the Finnish Ministry of Finance is responsible for managing the Finnish state's property assets and for letting premises. *Senate Properties* provides services related to premises, primarily to customers which form part of the state administration. The services include leasing premises, investments, and the administration and development of the property portfolio. As a business enterprise, *Senate Properties* finances its own operations and is not dependent on the state budget. The building stock comprises university, office, research, cultural and other buildings.

future, these five state enterprises will be reorganized so as to make it possible to abandon the state enterprise model altogether.⁴

1.4 *State agencies*

The importance of the business operations of state agencies has significantly decreased as most of the state's business operations have been transferred to state enterprises or incorporated since the late 1980s. Most of the business operations on market terms have been transferred outside the scope of the state agencies. State agencies share all the shortcomings in view of competitive neutrality that state enterprises suffer from. It is, thus, obvious that government agencies can no longer be relied on to provide marketized goods and services, and that the remaining cases have to be reconsidered. Examples of major state agencies providing marketized goods and services include Statistics, Finland, and the Finnish Meteorological Institute.

1.5 *Municipal productive entities: introduction*

The building-up of the Finnish welfare state has made the Finnish municipalities large producers of welfare services (health care, social services, education, infrastructure-related technical services, and cultural services). The statutory services of the municipalities can in principle be provided in four ways: the municipality takes care of its duties within its own organization; the services are provided in cooperation with other municipalities; the municipality purchases the services from an outside provider, in other words a company or a third-sector service provider; or the municipality can issue vouchers⁵ for citizens' choices. The traditional model relied on municipal agencies that provided the service in a non-marketized environment at no fee or at low administrative fees to residents without having to compete.

Since the late 1990s, there has clearly been increasing marketization of municipal services. There are two essential trends: from monopoly-type provision to competitive provision and from non-market provision to market provision. Municipalities can establish quasi markets, for example, by instituting a procurer and provider system. They can also establish municipal enterprises which provide the goods or service to the municipalities concerned while also possibly selling these goods or services to the residents or on the outside markets. It is also possible to incorporate the productive activity as a municipal limited company which leads into more transparent mode of operation vis-à-vis other economic operators.

Thus, the productive entities within the municipality can be arranged according to the degree of autonomy of their activities into the following progression:

agency -> net budgeted cost or profit unit -> enterprise -> company.

Finstaship is a specialised shipowner, concentrating on assisting water transport. It provides private customers and the public sector with icebreaking services, offshore services by multipurpose icebreakers, buoy tender and maritime construction services, oil dispersal services, ferry services for archipelago traffic, and vessel maintenance and charterage services. Finstaship will be incorporated in early 2010. The new company will begin its work on 1 January 2010. The business structure of Finstaship will be rearranged in the incorporation process.

⁴ This is, in practice, dictated by the Commission's decision on Destia. See section 2.2.

⁵ Recently, national legislation has been amended to enable municipalities to issue vouchers for services on a far larger scale in social services and health care. According to the new legislation, citizens can use the voucher only to buy services from those private providers the municipality has found eligible for the purchase. Thus there cannot arise competition between municipally-owned and private providers, as far as the voucher regime is concerned.

1.6 *Municipal enterprise*

A municipal enterprise is a municipality's means of organizing its own operations according to commercial principles. The starting point for establishing a municipal enterprise is that it aims to be profitable in its operations through financing from sources external to the budget, mainly charges for customers. Investments should be covered from net cash flow at least over the long term. An enterprise is more flexible, faster in decision making and more independent in accounting than a municipal agency. However, an enterprise is not an independent legal entity and not independent in keeping accounts; it is a public sector unit within a municipality's organization. An enterprise is often considered a transition vehicle because, commercially, an enterprise resembles a private sector company more than a profit centre of a municipality that covers its costs.

The same restrictions on operations apply to an enterprise as to other activities of a municipality: the primary aim of an enterprise must be the statutory service and other functions within the autonomy of a municipality, not making a profit. In fact, many municipal enterprises, in energy business, in particular, are highly profitable and their profits are an important source of revenue to the respective municipalities. An enterprise could be organized to include cooperation with other municipalities. In some operations, such as water and electricity utility services, legislation requires separation of commercial activities.⁶

1.7 *Municipal limited companies*

The number of municipal limited companies is steadily increasing. A municipal limited company is a company under the authority of the municipality that does not differ as regards legislation from a private sector limited company. However, the Articles of Association of such a company often state that it is a non-profit company, so its conduct might differ from that of a private sector limited company.

Under civil law, a limited company is a legal entity separate from a municipality. It may be incorporated because the business operations are not independent enough under the municipality's administration. Incorporation can also be used to form a joint venture between municipalities.

Most of them are municipal housing corporations. Municipalities are also involved in companies promoting tourism and regional development companies. Energy and water authorities of municipalities have also been incorporated.

Operations by limited companies are considered the more suitable, the more they are subject to competition. The competitive position of municipal companies relative to private sector companies then becomes more transparent. As regards competitive neutrality, clearly as with state enterprises, a company's strategic position relative to private sector companies is strengthened when a municipality is a shareholder in the company.

1.8 *Municipal agencies*

The traditional way of providing municipal welfare services to citizens – a municipal agency – still accounts for the bulk of municipal productive activities, although the reforms outlined above have made this model constantly recede as an organizing model.

⁶ Consonantly with the state enterprise model, the municipal enterprise model will have to be reassessed. See chapter 5.

1.9 Statistical data

There are several ways of illustrating the importance of SOEs in the Finnish economy. In 2008, the net sales of state majority-owned companies amounted to EUR 39 billion, and that of state-associated companies amounted to EUR 137 billion. In 2007, the total turnover of the currently existing 5 state enterprises was EUR 1.4 billion. In 2007, the revenue collected by state agencies from the sales of marketized goods and services amounted to EUR 0.7 billion.

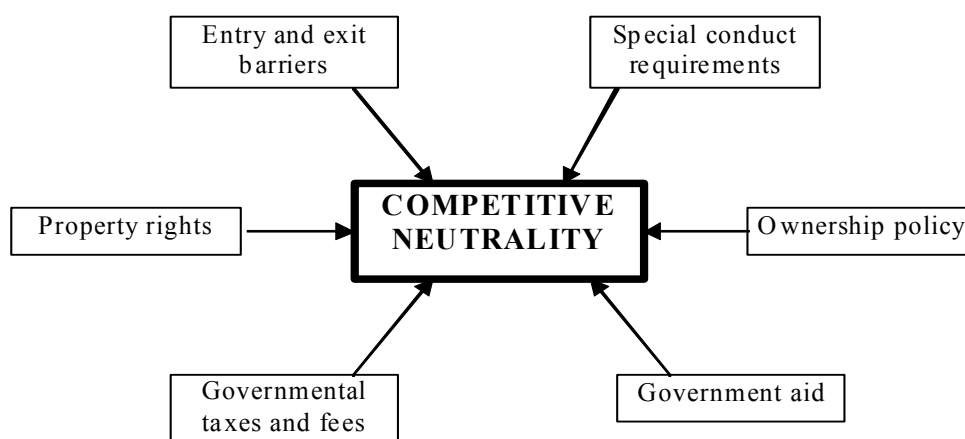
According to Statistics, Finland, the total turnover of municipal enterprises amounted to EUR 2.9 billion in 2007, but information recently published by the Federation of Finnish Enterprises suggests that the real figure may be much higher, maybe up to 4 EUR billion. The number of municipally-owned limited companies is steadily increasing, and it is difficult to give up-to date figures. But according to recent assessments, there are approximately 1500 municipal limited companies, which operate primarily in the following sectors: electricity, water maintenance, waste management and development. Because of the very nature of the productive activities of municipal agencies, which in most cases do not have any turnover in the regular sense as they do not sell goods or services on a market, only indirect ways of illustrating the extent of their operations are feasible. A rough illustration of the extent of their productive operations is gained by subtracting purchases from outside suppliers (EUR 1.64 billion) from the total municipal operating outlays on services (EUR 31.25 billion) which is approximately EUR 30 billion.

2. Rules applicable to SOEs

2.1 Outline

The institutional factors which underlie neutrality problems may originate from legislation or from established procedures which do not necessarily have a legal basis. The factors may be further classified according to the figure below.

Figure 1. Sources of competitive neutrality problems⁷



The neutrality problems examined in more detail below and having at least a partial legal basis are primarily related to state aid in its various forms (taxation, bankruptcy protection), the in-house procedure

⁷ Virtanen, M. and Valkama, P. 2009, Competitive Neutrality and Distortion of Competition - A Conceptual View. *World Competition*, Forthcoming. The sources of competitive neutrality problems are not mutually exclusive; rather, they may be connected. According to the EU state aid provisions, for example non-neutral taxation may be considered state aid.

in public procurements and the pricing of public utilities. Additionally, an example is given on regulation which impedes private sector entry. Ownership policy is examined in more detail in the memorandum related to the second part of the roundtable (ii) "Corporate governance and the principle of competitive neutrality for state-owned enterprises".

It is important to bear in mind that not all rules relevant to the competitive neutrality problems work in favor of the government-owned productive entity.⁸ However, in the following we discuss rules that do work in their favor.

2.2 *Taxation and bankruptcy protection*

The neutrality problems related to taxation and bankruptcy protection involve such situations in particular where the state or municipality conducts business in a state enterprise form.

The income tax of state-owned enterprises (6.1828% in 2007) is roughly 19% lower than the income tax of private firms engaging in similar operations (26%). If a state-owned enterprise produces services primarily for state administration, it is exempt from income tax.

The activities of municipal enterprises are taxed even more leniently than the activities of state-owned enterprises. The municipality is liable to tax as regards its business activities only and the income fetched by a property or part of a property used for a general purpose or for public good. The municipality is not liable to tax as regards the profits of its business activities or the income fetched by a property located in its own territory.

Under the Bankruptcy Act (120/2004), a debtor who is unable to pay his debts may be declared bankrupt. An enterprise owned by the state or a municipality cannot be declared bankrupt, however. State or municipal enterprises are not separate legal persons but a part of a state / municipality, so the state / municipality is responsible for their debts.

The EU Commission judged in its Finnish Road Enterprise (now Destia) decision that the benefits pertaining to taxation and bankruptcy protection described above could be considered prohibited state aid.⁹

⁸ For example state enterprises have obligations that private sector companies do not have. State enterprises have generally been defined as public procurement entities under the Public Procurement Act (1505/92), which imposes on them an obligation to put their own procurements out to tender as specified in this Act.

⁹ Commission decision C 7/2007, 11.12.2007, so-called Destia decision.

The Finnish associations Rakennusteollisuus ry and Suomen Maanrakentajien Keskusliitto ry made a complaint to the European Commission concerning the potential illegal state aid obtained by the Finnish Road Enterprise.

Until the end of 2000, the primary maintenance of the Finnish road infrastructure was done by the Finnish Road Administration which was a state-owned entity. It also managed the planning and building of new common roads. Prior to opening up the market, private consulting, planning and maintenance firms were only used when the Road Administration's own production unit could not produce the service.

The Finnish Road Administration was split into two following the buyer-producer model. The purpose of the reform was to split the activities of the customer purchasing building and maintenance services (Road Administration) and the provider of these services (a state-enterprise called Finnish Road Enterprise). The road maintenance market was gradually opened up to competition so that, after the transition period of 2001-04, the planning, building and maintenance of common roads was wholly opened up to competition by 2004.

The Commission held the bankruptcy protection and exceptional tax treatment of the state enterprise as prohibited state aid (inapplicability of bankruptcy legislation and common Community taxation). However,

As a result of the decision, a re-examination of the state enterprise model began in Finland. Cf. more closely chapter 5.

All these competitive neutrality problems also concern both state and municipal agencies. Therefore, the future reforms must also tackle the marketized output of the agencies as well.

2.3 *In-house procurements*

Particularly important for competitive neutrality is the issue concerning the terms and conditions on which the state or a municipality may purchase products or services directly from the organization it owns (in-house procurements).

The Act on Public Procurements allows the state or a municipality to make purchases without putting them out to tender (so-called direct purchase) even from agencies and enterprises which also have marketized production. If the state or a municipality buys the services from its own separate enterprise, it cannot purchase without a tender if the company simultaneously sells over 10% of its turnover out to the market. So the 10% limit does not tie e.g. state or municipal enterprises who may freely sell their services to outsiders without the threat of losing their interest unit position.

2.4 *Pricing*

It is problematic for competitive neutrality if the public actors do not consider all production costs in the pricing of their products and services. Since public production has operated in a protected environment, there has not necessarily been any need to set profitability goals or to itemize the costs of individual inputs. The cost accounting of public production units has typically been inadequate. The lack of cost awareness may have led to competitive neutrality issues, particularly as the public productive entities have begun to exploit their underused production capacity in the competitive markets in the prevailing tightened budget situation. This underpricing type of situation may hence have resulted from the strongly sheltered position of a public producer or an inadequate consideration of the relevant costs.

The Act on Criteria for Charges Payable to the State aims to prevent the potentially distorting market pricing of state agencies or enterprises, but in practice the steering impact of the Act has remained insufficient. The municipalities have no similar Act pertaining to criteria for charges.

the Commission approved the arrangements relating to the setting up of the Road Enterprise. The Commission estimated that the de facto opening up to competition of the Finnish road service market was in the common interest. Neither did the Commission approve the allegation put by the complainants according to which the Finnish Road Enterprise had exploited predatory pricing during the transition period.

The aid measures which were estimated to be prohibited were overturned regarding the Finnish Road Enterprise from 1 January 2008 when it was made an incorporated limited company (Destia). This was in accordance with a previously determined line of action.

Attempts have been made to eliminate the tax rate which is lower than that of the competitors by deciding that the public enterprises enter as income a minimum of the margin between the income tax of limited companies and the income tax paid by them. In recent years, the Ministry of Finance has set the target that the public enterprises would enter a minimum of 50% of their profit as income; in practice, this has alternated between 50 – 95%. The Commission did not approve the practice concerning the elimination of an exceptional tax treatment.

2.5 *On entry barriers – with pilotage activities as an example*

Entry or exit barriers may be regarded as an extreme form of a competitive neutrality shortcoming as institutional barriers to entry or exit may block the supply of alternative goods or services altogether.

The pilotage service is a recent case in point. The service had traditionally been provided by the state, and since 2004, the service has been provided by the State Pilotage Enterprise, a state enterprise. The first private company started pilotage activities in 2007. It met with difficulties, however, when the supervising authorities interpreted the relevant legislation to mean that pilotage was a government monopoly. The Chancellor of Justice confirmed this view, although he held that the legislation was vague. The private enterprise ceased its activities as a result of these reviews. In the midst of this process, on the FCA's initiative, the Ministry of Transport and Communications set up a working group to consider opening up pilotage activities to competition. The group proposed three different regimes: extension of the state monopoly, a model based on regional tendering and a model based on open competition. In June 2009, the Ministry of Transport and Communications decided to extend the present model based on a state monopoly, but a government proposal to this effect has not yet been issued.

3. *Antitrust enforcement and SOEs*

3.1 *Competition concerns*

During its existence, the FCA has received several complaints relating to the competitive neutrality issues between a public and a private actor. The complaints have concerned the activities of both the state and the municipalities. Typical suspicions presented are that a public unit subsidizes the products or services sold to the free market by tax revenue and commits underpricing and / or cross-subsidization and predatory pricing.

The intransparency of the relations between the governmental or other sheltered activities and market activities has often been found a problem. Some of the complaints have concerned the limited opportunities of a private enterprise to enter the market. It has also been considered a problem that a public actor has a competitive advantage due to its public law position, for example information reserves which provide it with a superior position with respect to private actors. Suspicions have been raised pertaining to the fact that a public organization has both official tasks and marketized activities, and that in the official capacity, public agencies favor their own units acting in the market.

The complaints on competitive neutrality issues have concerned several sectors of the economy. Some of the fields have included the catering and accommodation business, physical exercise services, forestry services, recycling and waste management, construction, railroad traffic, pilotage, health care and social services and the laundry business. Many private enterprises in the service sector have also suspected that the educational institutions maintained by the public sector underprice the services done as student work.

3.2 *Antitrust enforcement*

The Finnish competition legislation is based on the prohibition principle. All agreements between business undertakings which aim at restriction of competition (Articles 4 and 5) and abuse of dominant position (Article 6) uniformly with Articles 81 and 82 of the Treaty are prohibited. Intervention in restrictive measures requires a restrictive agreement between undertakings, and intervention in exclusive arrangements requires the existence of a dominant position.

Until May 2004, the Finnish competition legislation contained a provision under which intervention in harmful restraints was possible although a dominant market position or a harmful agreement could not be established. Under Article 9 of the Competition Act, a competition restriction which was not forbidden

under Articles 4-7 should be deemed to have harmful effects, if it, in a manner inappropriate for sound and effective competition, decreased or was likely to decrease efficiency within the economy, or prevented or hindered the conducting of business by another. According to the procedure then in force the FCA was compelled to make a proposal to the Market Court if the harmful effects referred to under Article 9 could not be removed through negotiations or otherwise. Even the application of the previous Article 9 remained quite rare in cases concerning competitive neutrality between a public and private actor. Nevertheless, at least in one case, the Competition Council has confirmed the harmfulness criterion's applicability to such cases.¹⁰

For the Competition Act to apply, the conduct must qualify as conducting of business. As a rule, complaints concerning neutrality problems have been related to such activities by the state or the municipality that have been estimated to qualify as conducting of business and the threshold for the application of the Competition Act has hence been exceeded.

In competitive neutrality problems, it is predominantly the abuse of dominant position which becomes applicable. However, despite the allegations presented in the complaints, the threshold for finding a dominant position has rarely been exceeded in issues involving competitive neutrality between a public and a private actor.¹¹

The provisions of the Competition Act have only a limited application to public and private competitive neutrality problems. Even if the criteria for business were to be fulfilled, it is very rarely that a public actor is estimated to have such market power which fulfils the criteria of a dominant position under the Competition Act.

3.3 *Advocacy*

The monitoring of neutrality issues and the removal thereof is not merely limited to traditional competition policy and its antitrust provisions but it is a much wider entity.

The solutions to the problems may be based on legislation or be so-called soft law instruments, and resemble recommendations and resolutions. Monitoring may focus on structures or procedures. In legislation, the state aid provisions have a major role in the maintenance of neutrality between the public and private sector activities, as shown by the Commission decision on the Finnish Road Administration. The scope of public actors in the product market may be curtailed to begin with. The pricing of public actors may be governed by instruments such as the Act on Criteria for Charges Payable to the State, and definitions may be made in public ownership policy that aim at improved neutrality.

¹⁰ For example a limited company laundry owned by the city and employing disabled was estimated to be a business to which the Competition Act could be applied (KN 6/359/98, 2.11.1998), whereas the activities of the city in leasing sports facilities were not considered professional surrender of commodities, i.e. conducting of business, and the Competition Act did not apply (KHO 1468/1/00, 11.1.2002 (copy 54)).

¹¹ The Finnish Meteorological Institute (FMI), with a monopoly on producing and distributing basic weather radar data, also runs a commercial weather service. When a commercial competitor appeared in 1999 using the radar data that FMI transmitted to its Swedish counterpart, FMI responded by degrading the quality of the data it provided internationally. The FCA sought a fine against FMI for abuse of dominance and called on the Ministry of Transport and Communications to separate and incorporate FMI's commercial functions into a company. In early 2002, the Competition Council imposed a fine of EUR 20 000. The working group examining the structural issue concluded in 2001 that the weather service should be separated, although it did not agree with the FCA that weather services for civil aviation should also be spun off into the new entity. So far, commercial weather services by the FMI have not been incorporated but the private competitor is still operating and expanding its operations to other nations as well.

Under Article 2 of the Act on the Finnish Competition Authority, the FCA's task is to take initiatives to promote competition, designed to dismantle any restrictive regulations and orders. The FCA's intervention in competitive neutrality issues between public and private actors has taken place based on this provision. Even though no violations of the Competition Act would have been detected, on many occasions, the FCA has sought to promote the amendment of e.g. procedures which have been found a competition concern. E.g. initiatives and recommendations have been used to this purpose. The initiatives have typically been addressed to the party responsible for specific regulation, most commonly the relevant Ministry.¹² Issuing recommendations together with the interest groups has been used in situations in which the FCA has received a large number of similar complaints.¹³ The objective has been to increase information on the competitive neutrality issue among the actors in the field and hence to delimit it.

4. Antitrust exemptions applicable to SOEs

Finnish competition legislation cannot be considered to contain any of the antitrust exemptions applicable to SOEs. To the extent that the SOEs are considered business undertakings referred to in the competition law, the prohibitions which are consonant with Articles 81 and 82 of the Treaty may, based on the national legislation, be applied to the operations of the SOEs. The content of the concept of a business undertaking under the Finnish Competition Act does not depend on whether a business undertaking is totally or partially owned by the state or some other public entity. The Competition Act is hence applied to all business undertakings irrespective of whether they are owned by a private or a public party.

Neither does the Competition Act include any antitrust exemptions applicable to SOEs as regards e.g. SGEI services or other common service obligations. As regards such non-commercial activities referred to in the memorandum, the provisions of the Competition Act are applied similarly to all business undertakings irrespective of which entity owns the business undertaking.

¹² In the issues of opening up the pilotage activities to competition, the FCA made an initiative to the Ministry of Transport and Communications and requested that the Ministry set up a working group to investigate how the pilotage service could be opened up to competition, the FCA's initiative diary no 820/61/07, 4.12.2007. The Ministry established a working group in December 2007, and the group submitted its final report in January 2009. The report discussed there alternative ways of arranging the supply of pilotage services.

In the issue involving the handling of corporate community waste, allegations of cross-subsidization and predatory pricing in the waste management services offered to the corporations were presented of municipal waste disposal plants. The FCA made an initiative to the Ministry of the Environment and suggested that the Ministry set up a working group to investigate the necessary limitations of liability and rules in order to improve the competitive conditions in waste management, FCA's initiative diary no 987/71/02, 7.11.2002. So-called PESÄ working group proposed in the spring of 2005 that the handling of corporate waste be opened up for competition and measures to improve the transparency of municipal waste disposal sites. The amendment of the Waste Act became effective on 1 June 2007.

¹³ It was complained that commercial vocational training schools unfairly subsidized competition from publicly funded institutes. The scope of this conflict was broad: hotel and restaurant services, computer training, driving, nature tourism, psychological testing, massage, environmental testing, flue gas measurement, building and construction, and hairdressing. The FCA recommended that the public entities set fees on a commercially viable basis for their programs that compete with private sector offerings. The Ministry of Education, which supervises the institutes, endorsed this recommendation.

A corresponding recommendation was endorsed in June 2009 pertaining to the practices promoting business in municipal sports services. The objective of the recommendation was to promote efficient competition and competitive neutrality in the field of physical education.

5. Coping with the challenges – recent measures in Finland

Improving the competitive neutrality between the public and private business has been fairly high on the political agenda in the past couple of years. The present government began its activities in the spring of 2007. The government program included the definition: “the government will ensure, by means of competition policy, the equal preconditions of private and public service production”. The Ministry of Trade and Industry (from 1 January 2008 the Ministry of Employment and the Economy) set up a working group to investigate the competitive neutrality of public business in the autumn of 2007 to implement this section of the program. The FCA had two representatives in the group.

The Ministry stated in its appointment letter that when the public and private business increasingly meet in the same market, there are bound to be problems for competitive neutrality and for market operations caused by the different preconditions and starting points for conducting the business.

The tasks of the working group were the following:

- to investigate the nature of the potential distortions of competition related to public business;
- to estimate the extent and practical meaning of the phenomenon;
- to map ways by which the implementation of competitive neutrality may be ensured; and
- to make recommendations for policy definitions or legislative reforms.

In December 2007, the EU Commission issued the decision on the Finnish Road Administration which has been described above. This had a major impact on the work of the working group and other ways of promoting competitive neutrality.

In its final report¹⁴, the working group estimated that competitive neutrality problems are primarily related to the use of the present public enterprise form while conducting business. The working group proposed a review of the Municipalities Act in that the agency or enterprise form and the corresponding cooperation forms of the municipalities could no longer be extensively used for conducting business competing with private business, notwithstanding a reasonable transition period caused by incorporation or a possible exceptional situation pertaining to a SGEI position. A public or municipal enterprise would still remain an option as an internal organization form of a municipality or association of municipalities and it could retain the present tax benefits, bankruptcy protection and special position in *in house* procurements. Marketized activities should be conducted in the common private law company forms (incorporated company, trust etc.) which would eliminate from the market the distortions emanating from the state or municipal enterprise form.

In the autumn of 2009, the Ministry of Finance has announced that it will commence a project to reform the Municipalities Act, in which the municipal enterprise model and the marketized activities of the agencies and associations of municipalities will be examined from the point of view of competitive neutrality.

The working group also issued a series of recommendations to increase transparency and to develop municipal ownership steering and good administrative procedure. In addition, the working group assessed the need to develop the monitoring of competitive neutrality. It held that the present means provided by the

¹⁴ Competitive neutrality of public business, Publications of the Ministry of Employment and the Economy 23/2009.

Municipalities Act are not valid when issues pertaining to competitive neutrality are examined. When the legislation is reassessed, monitoring measures that befit the chosen models and are in the right proportion to them should also be considered. The working group held that in the competition law assessment the FCA is best placed.

In March 2008, the Ministry of Finance set up a project with the task of assessing the compatibility of the state-owned enterprise with the common market. It was estimated in state administration that even though the Commission's decision on Finland only concerned the Finnish Road Enterprise, it has an indirect impact on the entire public enterprise system and the present state-owned companies (Finavia, Finnpiilot, Metsähallitus, Senate Properties and Finstaship).

By the end of 2009, the project will have

- charted the applicability of the state-enterprise model to the common market,
- made state-enterprise specific proposals for further measures together with the steering ministries, competition authorities and ownership steering department of the State Council and
- made proposals for potential new organization and steering models.

The Cabinet Committee on Economic Policy discussed an interim report of the project in March 2009 and held that state-enterprise model cannot be considered compatible with the common market and decided that the state business is hereinafter conducted primarily in an incorporated company form. State-enterprise type of business which takes place in a workable market in open competition will be incorporated. It was also found that, in the state's marketized paid service production, there are similar obstacles to activities in the common market as there are in the state enterprise model.

It has been decided that the State Enterprise Act will be amended to the effect that a state enterprise could only operate in an *in house* capacity in the future and hence produce services specifically for state agencies and enterprises. A decision was also made to prepare government proposals on the incorporation of Finavia, Finnpiilot and Finstaship. It was also decided that the examination of the different forms of organizing Metsähallitus and the Senate Properties and the development of these organizations would be continued. The first incorporations can be implemented from the beginning of 2010. Attention shall be paid to the preconditions for operating in the common market when the paid service production of the government agencies is arranged.

6. Discussion

In order to safeguard the steady development of the Finnish economy, it is essential to remove at least the most serious shortcomings of competitive neutrality between SOE's and private enterprise. The successful removal of these shortcomings requires that competitive neutrality be precisely understood. In Finland, the FCA has consistently maintained that a shortcoming of competitive neutrality is considered to exist if and only if an outside institutional factor affects the ranking of and choice between competing products made by an economic agent. It is clear that there are many other related problems of market performance such as poor market information negatively affecting transactions which, however, are out of the sphere of competitive neutrality. This approach was adopted by the working group that investigated into the competitive neutrality of public business.

The importance of the competitive neutrality problem between SOE's and private operators is a consequence of the Finnish policy to reform government-owned production rather than close it down or privatize it. Although no explicit policy strategy has, as far as the FCA is aware, ever been promulgated,

what is in horizon is a modern competitive welfare state in which private and government-owned producers, and charities all have a chance to compete on an equal footing for publicly and privately financed transactions throughout the economy. In such an economy, the rationale for governmentally-owned productive activities is considered in the same vein as other owners consider their activities.

Consonantly, the FCA has always taken a neutral position to the ownership of productive activities. It has not been considered to be the function of the FCA to decide what kind of actors are entitled to carry on production in whatever market as that would be tantamount to acting like a central planning authority. In contrast, the FCA must act to safeguard workable and undistorted competition between market participants whatever their ownership pattern. In addition, the FCA acts to consult policy makers as to the likely effects of marketizing government-owned production and opening them up to competition.

According to the FCA's experience, the current antitrust rules are a relatively ineffective way of tackling competitive neutrality problems between SOE's and private enterprise. Over the next few years, progress is, thus, likely to be made in tackling the competitive problems caused by SOE's. Provisions realizing these goals could be placed in competition law, municipal law or in a special statute on competitive neutrality between SOE's and private operators. Under each of these optional legislative avenues, powers could be granted to the FCA, some other Agency or courts to take decisions and to apply possible remedies and sanctions.

New legislation will most likely ban the use of both the state and the municipal enterprise model in competitive environments, save under transitional periods or under a special SGEI regime. In order to make sure that operating models inconsistent with competitive neutrality requirements are not used, legislation must provide for powers to order unlawful structures to be abolished. It is also possible that the conduct of SOE's, protected by government ownership, is anti-competitive (predatory-type pricing, in particular) although the criteria of dominant market position – and, thus, its abuse – are not fulfilled. In such cases which cannot be outlined in detail in legislation, there must be powers to apply a conduct remedy. In principle, there are several options as to the legislative set-up to realize such goals.

The FCA regards it as important that the new legislative responses are flexible enough to enable and even facilitate the reforms of the system of welfare service provision so critically important for competition, and do not block or even reverse reforms. If that happened, the competitive neutrality problem might, in the end, be solved at the cost of another, immensely bigger problem, that is obstructing the very reforms of government-owned production aiming at increasing the efficiency of these activities.

Endeavors to put in place satisfactory legislation to deal with the competitive neutrality problems are currently hampered by the economic crisis as far as the implementation would call for additional administrative or judicial resources. The economic crisis may, thus, postpone the implementation of the legislative response.

The discussion above might not exhaust the overall question of the role of the SOEs in the context of competition policy.¹⁵ Some of the theoretical work concerning antitrust and state-owned enterprises has concentrated on behavior or incentives of SOEs to engage in predatory pricing or exclusionary practices.¹⁶ Although many of these characteristics are present in the list of antitrust cases involving public entities,

¹⁵ It is not entirely clear that an incorporation of a SOE is always a sufficient solution to competitive neutrality problems.

¹⁶ Cf. Sappington, David, E.M. & J. Gregory Sidak (2003) Incentives for Anticompetitive Behavior by Public Enterprises. *Review of Industrial Organization* 22, 183–206 and Sappington, David, E.M. & J. Gregory Sidak (2003) Competition Law for State Owned Enterprises. *Antitrust Law Journal* 71, 479–523.

many of these problematic areas are now in fact addressed by principles of corporate governance of SOEs including local government-owned enterprises, which we discuss in our parallel paper.¹⁷

Whereas the incentives and the ability of SOEs to behave anticompetitively have gained increasing attention, the questions regarding the role of SOEs may involve other fields of antitrust work as well. For example, theoretical developments in mixed oligopoly models may influence the assessment of mergers in markets where state ownership is pronounced. This could, for example, refer to government-owned actors that do not operate on market terms, but have special assignments or operate in the interface between competitive market and in-house production. In their assessment of the effects, these contributions focus on the changes in surplus, i.e. in the utility of end users and/or producers instead of narrowing the view to the competitive process alone. This may call for a broader assessment of effects in mergers.¹⁸

¹⁷ For details, see the Chapter on Corporate Governance.

¹⁸ Regarding public utilities, the theoretical model of Björkroth, Grönblom and Willner (2006) suggests that a combination of privatization and liberalization can improve welfare, provided that costs are reduced (often dramatically) and there are no other disadvantages. Björkroth, T., Grönblom, S. and Willner, J. (2006) "Liberalization and regulation of public utility sectors: theories and practice". In Bianchi, P. & Labory, S. (ed.) *International Handbook of Industrial Policy*, Edward Elgar.

FRANCE

1. Introduction

Nonobstant leurs spécificités, les entreprises publiques sont avant tout des « entreprises » et, comme telles, soumises au droit de la concurrence national et communautaire.

Les particularités du statut des entreprises publiques tiennent à la part prise par les personnes publiques dans leur fonctionnement.

Aux termes de l'article 1er de l'ordonnance du 7 juin 2004 portant transposition de la directive 80/723/CEE relative à la transparence des relations financières entre les Etats membres et les entreprises publiques, « *on entend par entreprise publique tout organisme qui exerce des activités de production ou de commercialisation de biens ou de services marchands et sur lequel une ou des personnes publiques exercent, directement ou indirectement, une influence dominante en raison de la propriété, de la participation financière ou des règles qui la régissent. L'influence des personnes publiques est réputée dominante lorsque celles-ci, directement ou indirectement, détiennent la majorité du capital, disposent de la majorité des droits de vote ou peuvent désigner plus de la moitié des membres de l'organe d'administration, de direction ou de surveillance* ».

La jurisprudence considère aussi que constituent des « entreprises publiques » les sociétés dans lesquelles des personnes morales de droit public détiennent ensemble ou séparément plus de la moitié du capital social, et qui se trouvent pour cette raison sous l'influence dominante de leur propriétaire public¹.

Ce terme « d'entreprise » renvoie à l'exercice d'une activité économique exercée sur un marché et implique l'application des règles de concurrence qui ont vocation à régir tout offreur sur un marché, quelle que soit sa forme juridique. En droit communautaire comme en droit national, l'entreprise comprend en effet « *toute entité exerçant une activité économique* », « *indépendamment de son statut juridique et de son mode de financement* »².

L'ordonnance du 1^{er} décembre 1986 relative à la liberté des prix et de la concurrence prévoyait déjà dans son article 53 que les « *règles définies au présent livre s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de conventions de délégation de service public* »³. Pour marquer l'importance de cette règle, il a été choisi de l'inscrire dans le premier article du livre IV du code de commerce lors de sa codification par ordonnance du 18 septembre 2000⁴.

Ainsi, la dénomination d'entreprise publique renvoie, d'une part, à l'influence dominante d'une personne publique, et d'autre part, à l'exercice d'une activité sur un marché. Or, si l'on considère que le

¹ CE, Ass., 24 novembre 1978, Syndicat national du personnel de l'énergie atomique ; Cons.constit., 16 janvier 1982, décision 81-132 loi de nationalisation ; Cass.com., 12 janvier 1988, n°87-90288.

² CJCE, du 23 avril 1991, Höfner et Esler, préc.

³ Pour une application de cette règle dans la jurisprudence française : voir Cass.com., 12 décembre 1995, Direction météorologique nationale (DMN).

⁴ Ordonnance no 2000-912 du 18 septembre 2000 relative à la partie Législative du code de commerce.

marché est le lieu d'expression des intérêts individuels, et qu'une personne publique a en charge la satisfaction de l'intérêt général, cette notion renferme un paradoxe⁵.

Ce paradoxe était reflété par la réticence de la jurisprudence à l'égard de l'intervention de l'Etat et des personnes publiques dans la fourniture de produits ou services en concurrence⁶.

Aujourd'hui que l'intervention des entreprises publiques sur les marchés s'est développée, celle-ci revêt certaines caractéristiques (1.1) qui pourraient être de nature à perturber l'exigence d'égalité concurrentielle entre opérateurs publics et opérateurs privés (1.2).

1.1 L'action des entreprises publiques sur des marchés concurrentiels va de pair avec l'ouverture à la concurrence des secteurs anciennement détenus par des monopoles publics, et la diversification des activités de ces monopoles

Depuis la fin des années 80, on assiste à l'ouverture à la concurrence des marchés des télécommunications, de l'électricité, du gaz, des services postaux, ou des transports aérien ou ferroviaire initiée par la Commission européenne. Ces politiques d'ouverture ne remettent pas totalement en cause le monopole qui était confié à l'opérateur public, mais consistent plutôt à séparer les branches d'activités concurrentielles de celles liées au monopole naturel : « *la plupart des activités en réseau* », a-t-on ainsi remarqué, « *peuvent être découpées en infrastructures et services, les premières étant plus efficacement servies par un monopole, et les secondes par un marché concurrentiel* »⁷. La plupart des entreprises publiques, et, notamment celles chargées de ces anciens monopoles, continue donc à se voir assigner certaines missions de service public, qui correspondent à un service universel ne pouvant être rendu par le marché à un prix abordable pour l'ensemble de la population et répondant à certains critères qualitatifs. Cette carence justifie fréquemment le recours à un financement public, normalement prohibé pour les entreprises opérant sur les marchés concurrentiels⁸.

Pour les économistes, cette dualité d'action de l'entreprise publique, qui concerne tant le marché que l'accomplissement de certaines missions de service public, fait que ses objectifs ne peuvent être considérés comme similaires à ceux d'une entreprise privée dont l'activité serait exclusivement concurrentielle⁹ : « *au premier chef* », constate le Conseil de la concurrence (« le Conseil ») dans son rapport annuel pour l'année 2003, « *ces entreprises doivent assurer leurs missions de service public. Elles se voient ainsi fréquemment assigner des objectifs distincts de la maximisation de profit de court terme, objectifs qui peuvent même être complètement incompatibles avec cette dernière* »¹⁰. Dans son avis 94-A-15 relatif à la diversification des activités d'EDF et de GDF, le Conseil souligne ainsi qu'en tant qu'entreprise publique, « *certaines contraintes imposées à EDF ou GDF relèvent de décisions ministérielles qui peuvent être, le cas échéant, tout à fait étrangères à la logique d'entreprise* ».

⁵ Moavero Lilanesi (E), « Les services d'intérêt économique général, les entreprises publiques, et les privatisations », rev. du droit de l'union européenne, 2000.117.

⁶ Conseil d'Etat, 30 mai 1930, Chambre syndicale du commerce de détail de Nevers

⁷ A.Perrot, « L'économie de la régulation », Les cahiers français, n°313, p.52.

⁸ Dans l'avis que le Conseil a rendu sur le projet de loi transposant la directive 97/67/CE concernant les règles communes de développement du marché intérieur des services postaux (03-A-06), l'enjeu financier de ces services est relevé. Au moment où l'avis a été rendu, 211M€ annuels restaient à la charge de La Poste au titre de la politique d'aménagement du territoire et 482M€ au titre de l'activité distribution de presse (§20).

⁹ De Donder (P), « L'entreprise publique en concurrence : les oligopoles mixtes », rev.française d'économie, 2005, vol.20, p.11.

¹⁰ La Documentation française, p.81 et s. V.également, avis 94-A-15, p.11 et s. : - 97-A-07, p.16 et s..

Cette différence relative aux objectifs poursuivis par l'entreprise publique peut avoir une incidence sur la formation du prix. Lorsque l'entreprise publique poursuit principalement la maximisation du bien-être social, et que son action pallie les imperfections du marché, elle n'aura pas d'intérêts à fixer un prix de vente lui permettant de dégager d'importants bénéfices, contrairement à la firme privée, qui recherche la maximisation de son profit¹¹.

Les obligations de service public confiées aux entreprises publiques sont donc à l'origine de certaines caractéristiques de l'action de ces entreprises sur le marché. Il faut néanmoins préciser que la notion française de service public, comme celle communautaire de service d'intérêt général, a un contenu matériel et non organique. Elle renvoie à une activité, et non à une structure. Les missions correspondantes, de « service universel », ou « d'obligations de service public », peuvent être confiées à des entreprises privées aussi bien que publiques. Le Conseil de la concurrence a eu l'occasion de rappeler ce fait, dans le cadre d'une procédure de mesures conservatoires mettant en cause l'entreprise TéléDiffusion de France (TDF): *« les obligations du service universel ne nécessitent pas, par nature, que l'opérateur qui en est chargé se trouve en situation de monopole public mais peuvent être dévolues à plusieurs opérateurs publics ou privés »*¹².

D'autres considérations, rappelées dans le rapport précité du Conseil, sont donc à prendre en compte pour définir les particularités de l'action des entreprises publiques sur un marché :

- leur action coexiste souvent avec une activité monopolistique ou une activité qui s'inscrit dans un domaine réservé, répondant aux situations de « monopole naturel » qui couvrent des infrastructures essentielles (par exemple l'infrastructure ferroviaire ou le réseau de transport de l'électricité) ;
- ces entreprises sont généralement présentes sur tout le territoire, et sont souvent considérées par les particuliers et les entreprises comme des interlocuteurs de référence ;
- elles bénéficient de moyens de financement plus aisés ;
- l'absence d'actionnaires privés, ou le caractère minoritaire de leur présence, peut conduire à assouplir les contraintes de rentabilité.

En outre, lorsqu'indépendamment de la diversification de ses activités, l'entreprise publique demeure une personne publique, ses conditions d'exploitation sont particulières.

La diversification des activités des entreprises publiques s'accompagnent, certes, le plus souvent d'une transformation des établissements publics industriels et commerciaux (EPIC) en sociétés commerciales : EDF, GDF, France Télécom, Aéroports de Paris, Air France. Cette transformation statutaire n'est cependant pas systématique : La Poste, la SNCF, ou la RATP, par exemple, demeurent des personnes publiques ayant le statut d'EPIC.

Or, lorsque l'opérateur historique conserve son statut d'établissement public et n'est pas transformé en société commerciale, la diversification de ses activités est encadrée par le principe de spécialité, qui signifie que la personne morale, dont la création a été justifiée par la mission qui lui a été confiée, n'a pas de compétence générale au delà de cette mission. L'intervention des personnes publiques dans le secteur

¹¹ De Donder, art.préc.

¹² 03-MC-03, §35. V. également le rapport annuel précité : *« (...) allouer les obligations de service universel à l'opérateur historique ou, plus généralement, à une entreprise publique, n'est pas une nécessité. Les financer au moyen d'un domaine réservé non plus »*.

concurrentiel doit donc être considérée comme illégale si elle a « *pour seul objet de faire concurrence au secteur privé ou d'éliminer des commerçants sans aucune justification d'intérêt général* »¹³. Ce principe n'interdit pas aux personnes publiques de se livrer à d'autres activités économiques, de nature concurrentielle. Mais il faut alors que ces nouvelles activités soient annexées à leur mission statutaire : les activités concurrentielles ne sont pas interdites à la double condition, précisée par le Conseil d'Etat, que ces activités « *soient techniquement et commercialement le complément normal de sa mission statutaire principale, (...) et que ces activités soient à la fois d'intérêt général et directement utiles à l'établissement public notamment par (...) tous moyens mis au service de son objet principal* ».

Il est intéressant que noter que, pour le Conseil d'Etat, le principe de spécialité s'applique quel que soit le moyen retenu d'intervention sur un marché, même lorsque la personne publique agit par le truchement d'une filiale dont elle détient, majoritairement ou non, les parts : « *ces critères valent, pour la spécialité, quelque soit la méthode de diversification retenue : par l'établissement lui même, par une filiale à contrôle majoritaire de l'établissement ou par une participation minoritaire* »¹⁴. Ces principes ont été rappelés dans un arrêt récent¹⁵.

Cette limitation du champ d'activité des personnes publiques, a priori éloignée du respect de la libre initiative des opérateurs dans une économie de marché, s'accompagne d'une réglementation différente de celle appliquée aux entreprises privées : une personne publique est protégée par le principe d'insaisissabilité de ses biens¹⁶, et ne peut être soumise aux procédures collectives de redressement et de liquidation judiciaires¹⁷.

En définitive, « l'activité économique publique » est particulière en raison des objectifs qu'elle poursuit (empreints de considérations propres à l'intérêt général), des modalités d'exploitation dont elle bénéficie (en terme de réseau et d'accès au financement notamment), et, éventuellement, de sa spécialité.

1.2 Particulière dans son principe, cette activité l'est également dans ses modalités d'exercice : dès lors qu'une personne publique se déploie sur un marché, il lui est tout particulièrement imposé d'exercer une concurrence à armes égales avec les acteurs économiques privés

En effet, le processus concurrentiel exige dans son principe que chaque opérateur bénéficie peu ou prou des mêmes chances de départ : sans un minimum d'égalité, aucune entreprise ne se lancerait dans la compétition. Ainsi que l'a souligné le Conseil de la concurrence dans son avis 95-A-18 (Sernam), « *l'entreprise publique sous réserve de ses obligation de service public doit pouvoir saisir les mêmes chances et assumer les mêmes risques qu'une société commerciale quelconque* ». Or, l'entreprise publique peut bénéficier d'une position privilégiée sur un marché, généralement héritée de son ancien monopole, position pouvant être à l'origine d'une rupture d'égalité. Ce risque a rapidement été perçu par les juges. Dès 1936, la Cour de cassation estime ainsi que « *l'on ne saurait interdire au concessionnaire d'un service public une activité industrielle et commerciale étrangère à l'objet même de sa concession qu'autant qu'il est établi que les avantages que sa concession lui procure ont pour effet de rompre en sa faveur, dans l'exercice de son industrie, l'égalité qui doit présider au libre jeu de la concurrence* »¹⁸.

¹³ Conclusions du commissaire du Gouvernement Braibant, sous CE, 29 avril 19702, Unipain.

¹⁴ CE, Sect., 7 juillet 1994, avis relatif à la diversification des activités d'EDF-GDF.

¹⁵ CE, Ass., 31 mai 2006, Ordre des avocats du barreau de Paris.

¹⁶ Cass.civ.2^e, 21 décembre 1987, Bull.civ., n°348.

¹⁷ Paris, 15 février 1991, D.1991.IR.104.

¹⁸ Cass.civ., 15 janvier 1936, Cie des omnibus et tramways de Lyon.

La seule considération de conditions différentes d'exploitation entre entreprises privées et entreprises publiques ne peut cependant suffire à caractériser une atteinte à l'égalité des chances¹⁹. En effet, ainsi que l'a rappelé le Conseil dans un avis 96-A-12 du 17 septembre 1996, « *le bon fonctionnement de la concurrence sur un marché n'implique pas nécessairement que tous les opérateurs se trouvent dans des conditions d'exploitation identiques. Il suppose toutefois qu'aucun opérateur ne bénéficie pour son développement de facilités que les autres ne pourraient obtenir et d'une ampleur telle qu'elles leur permettent de fausser le jeu de la concurrence sauf à ce qu'elles soient justifiées par des considérations d'intérêt général* ».

Il importe surtout qu'existe, au sein de l'entreprise publique, une séparation claire entre les activités exercées en monopole et celles, concurrentielles, résultant de la diversification. La structure des entreprises publiques doit donc être adaptée aux mécanismes du marché (3), afin d'éviter certains comportements anticoncurrentiels (2).

2. Le contrôle du comportement des entreprises publiques

Le contrôle du comportement d'une entreprise prend un tour particulier lorsque l'entreprise exerce concomitamment des activités concurrentielles et des activités exercées en monopole. Il importe en effet de délimiter une ligne de partage entre ces deux types d'activités, alors même qu'elles peuvent être connexes. Une confusion des deux secteurs d'activités pouvant être de nature à fausser le jeu de la concurrence, l'Autorité de la concurrence examinera le respect du périmètre de chacun, d'un point de vue financier ou commercial.

2.1 *Le respect du partage financier entre les activités concurrentielles et celles répondant aux missions de service public de l'entreprise publique*

2.1.1 *Les subventions croisées*

L'entreprise publique exerçant à la fois des activités concurrentielles et monopolistiques peut être tentée de faire supporter le maximum de charges aux activités exercées sous monopole légal, c'est-à-dire un monopole dont l'acquisition n'a supposé aucune dépense et est insusceptible d'être contesté, au bénéfice des activités exercées en concurrence. La subvention croisée est caractérisée lorsque le fait, pour une entreprise, de diversifier son activité, conduit, pour le bien ou le service initialement fourni, à un prix plus élevé que son coût de fourniture isolé (le coût supporté lorsque le bien en question est produit seul). Dans la décision *Deutsche Post*, la Commission européenne a ainsi précisé que « *du point de vue économique, les « subventions croisées » supposent, d'une part, que les produits d'un service donné ne permettent pas de couvrir les coûts incrémentaux propres à ce service et, d'autre part, qu'il existe ou un service ou tout un domaine d'activité de l'entreprise dont les produits dépassent les « coûts de fourniture isolée »*. L'excédent de couverture des « coûts de fourniture isolés » indique la source des subventions croisées et le déficit de couverture des coûts incrémentaux la destination »²⁰.

¹⁹ Voir par ex. décision 00-D-47 : « (...) il est licite, pour une entreprise publique qui dispose d'une position dominante sur un marché en vertu d'un monopole légal, d'entrer sur un ou des marchés relevant de secteurs concurrentiels, à condition qu'elle n'abuse pas de sa position dominante pour restreindre ou tenter de restreindre l'accès au marché pour ses concurrents en recourant à des moyens autres que ceux qui relèvent d'une concurrence par les mérites ». Plus récemment : décision 08-D-11, §29.

²⁰ Décision 2001/354/CE du 20 mars 2001.

Lorsque qu'il n'existe pas d'excédents de ressources dégagés par l'activité exercée en monopole, on ne peut caractériser de subventions croisées²¹.

Lorsqu'elles sont identifiées, les subventions croisées ne sont pas illicites *per se*. En revanche, si l'entreprise publique utilise les ressources de son activité monopolistique pour financer des prix prédateurs sur le marché concurrentiel ou, si, de façon générale, les subventions ou une pratique commerciale qui en est issue perturbent durablement le marché, celles-ci sont anticoncurrentielles.

Le Conseil de la concurrence a, ainsi eu à se prononcer sur le soutien apporté par les centres EDF-GDF Services à sa filiale Citélum sur le marché de l'éclairage²². La constatation que la part de marché de la filiale était limitée à 1 %, que les subventions en nature avaient eu une durée limitée au démarrage de l'activité de Citélum et étaient restées d'une ampleur relativement modeste, a conduit le Conseil à estimer que le soutien d'EDF à sa filiale n'avait pas pu fausser le jeu de la concurrence sur le marché. Dans une autre décision relative au soutien d'EDF aux sociétés Industelec, le Conseil a, de même, estimé que ce soutien n'avait pas eu d'effet sur le marché de l'ingénierie : « (...) *Il n'a pas davantage été observé de perturbation de concurrence résultant des avantages octroyés par EDF, telles que des disparitions d'entreprise ou des succès commerciaux spectaculaires qu'auraient remportés les Industelec et qui auraient été de nature à orienter durablement l'évolution future du marché* »²³.

A l'inverse, le Conseil a sanctionné la Française des jeux pour avoir consenti à sa filiale une subvention permettant à cette dernière de pratiquer des prix inférieurs à ses coûts variables²⁴. La Française des jeux bénéficie, en effet, d'un monopole d'exploitation des jeux de hasard. Il était reproché à cette entreprise d'avoir fait exécuter par sa filiale des prestations de maintenance à des prix inférieurs aux coûts variables de ces prestations pour obtenir des marchés de maintenance informatique à l'extérieur du groupe. Tout en écartant la qualification de prix prédateurs, dans la mesure où l'existence d'une stratégie prédatrice n'était pas crédible au regard du contexte économique, le Conseil a considéré que les subventions croisées attribuées par la Française des jeux à sa filiale avaient permis à cette dernière de pratiquer des prix inférieurs à ses coûts variables et avaient provoqué une perturbation durable du marché : « (...) *est susceptible de constituer un abus le fait, pour une entreprise disposant d'un monopole légal, c'est-à-dire un monopole dont l'acquisition n'a supposé aucune dépense et est insusceptible d'être contesté, d'utiliser tout ou partie de l'excédent des ressources que lui procure son activité sous monopole pour subventionner une offre présentée sur un marché concurrentiel, lorsque la subvention est utilisée pour pratiquer des prix prédateurs ou lorsqu'elle a conditionné une pratique commerciale qui, sans être prédatrice, a entraîné une perturbation durable du marché qui n'aurait pas eu lieu sans elle ; Considérant qu'en l'espèce, la Française des Jeux, utilisant les ressources tirées du monopole des jeux, a consenti à sa filiale une subvention, qui a permis à cette dernière de pratiquer, sur le marché concurrentiel de la maintenance informatique, des prix inférieurs à ses coûts variables, pratique qui a eu pour effet de lui permettre de remporter dix-sept contrats de maintenance que des concurrents auraient remportés si cette pratique de prix n'avait pas eu lieu (...)* ».

²¹ Un tel cas a été rencontré par le Conseil de la concurrence à propos de l'affaire Giat (avis 03-A-12).

²² Décision 00-D-47.

²³ Décision 02-D-34. V. également, décision 03-D-44 dans laquelle le Conseil a estimé que les transferts de ressources de GDF vers sa filiale n'avaient pu fausser le jeu de la concurrence sur le marché.

²⁴ Décision 00-D-50, confirmée par CA Paris, 20 novembre 2001 (pourvoi en cassation rejeté par arrêt du 10 décembre 2003, pourvoi n°1814).

2.1.2 La prédation

Dans cette dernière affaire, la qualification de la prédation n'a pas été retenue, en raison de l'absence d'une stratégie prédatrice de la part de La Française des jeux : sa faible part détenue sur le marché de la maintenance informatique (entre 0,5 et 0,7 %), combinée à la modestie des barrières à l'entrée, rendait improbable le succès d'une stratégie prédatrice qui aurait consisté à éliminer les concurrents afin de pouvoir, ensuite, relever les prix.

De façon générale, lorsqu'elle doit être imputée à une entreprise publique, la pratique de prédation est rarement retenue par l'Autorité de la concurrence, pour deux raisons principales.

En premier lieu, l'entreprise publique n'a pas toujours ni l'intérêt, ni la capacité, à commettre une pratique de prédation. Il a été indiqué plus haut que les objectifs de cette forme d'entreprise pouvaient être éloignés de ceux liés à la recherche du profit. L'intérêt public peut primer et le fait de subir des pertes, même pendant une longue période, ne révèle pas nécessairement d'objet anticoncurrentiel : *« elles peuvent refléter la forme particulière des objectifs de l'entreprise publique, qui valoriserait le niveau de sa production, davantage que l'ampleur de ses coûts ou de ses pertes »*²⁵. De façon générale, l'absence d'actionnaires privés, ou le caractère minoritaire de leur présence, peut conduire à assouplir les contraintes de rentabilité.

Dans un avis portant sur l'intervention des collectivités locales dans le domaine des salles de cinéma, le Conseil constate ainsi qu'une *« stratégie de prédation du cinéma public demanderait que la collectivité, ou le tiers exploitant le cinéma pour son compte, accepte d'augmenter le prix des places à terme. Or, la finalité même de l'intervention communale ou départementale est de proposer aux habitants des tarifs inférieurs à ceux du marché. Ce faisant, l'intérêt public légitime l'intervention de la collectivité disparaîtrait »*²⁶. Dans cette situation où l'objet anticoncurrentiel est difficile à prouver, la pratique de prédation peut être démontrée dans sa potentialité d'effet : *« dans ce cas la pratique serait anticoncurrentielle non pas dans son objet (on ne peut être sûr que l'objet poursuivi par l'opérateur dominant est anticoncurrentiel), mais dans sa potentialité d'effet (si la pratique de l'opérateur public peut éliminer du marché des concurrents aussi efficaces que lui) »*²⁷.

L'entreprise publique peut ainsi ne pas avoir intérêt à mener une stratégie prédatrice. Mais elle peut aussi ne pas en avoir la capacité. Elle est, en effet, parfois amenée à appliquer des tarifs réglementés, par exemple dans le secteur de l'énergie.

Or, la prédation ne se comprend que par l'effet d'éviction qui en est escompté : *« l'effet d'éviction est central dans l'examen de la pratique : le sacrifice consenti n'a, en effet, de sens que si l'entreprise prédatrice considère qu'il est possible pour elle de récupérer à plus long terme (...) les pertes ou les moindres profits subis »*²⁸.

Lorsque l'entreprise publique applique des tarifs réglementés, elle n'a pas les moyens de récupérer les pertes subies par l'augmentation de ses prix. Le Conseil a ainsi constaté, s'agissant du prix de vente du gaz aux tarifs réglementés que *« GDF n'a pas la capacité (...) à conduire une politique de prix prédateurs, qui se résumerait pour elle à accroître ses pertes, sans espoir d'en retirer un bénéfice ultérieur sous forme de consolidation de sa part de marché après élimination de ses concurrents. La stratégie de prédation n'est*

²⁵ Rapport annuel précité, p.88.

²⁶ Avis 08-A-13, §49.

²⁷ Avis 96-A-10, p.21.

²⁸ Décision 07-D-09, §166.

donc pas possible. Le prix de vente du gaz en distribution publique inférieur aux coûts totaux ne peut donc pas constituer, en l'espèce, une pratique de prix prédateur »²⁹.

En second lieu, la comparaison des coûts variables de l'entreprise publique aux prix qu'elle pratique, nécessaire à la caractérisation d'une pratique de prédation conformément à la jurisprudence Akzo³⁰, peut être particulièrement difficile à opérer lorsque les activités concurrentielles et les activités en monopole de celle-ci sont connexes, et qu'elles comportent des coûts en commun.

D'une part, le test de coûts de la jurisprudence Akzo est difficilement transposable aux opérateurs publics. A technique de production identique à celle des entreprises privées, les coûts moyens des opérateurs publics peuvent être plus élevés. *« Les prémisses sur lesquelles est fondé l'arrêt AKZO précédemment cité peuvent n'être qu'imparfaitement satisfaites dans les cas où se trouvent confrontés sur un même marché des opérateurs privés et un opérateur public disposant, « par ailleurs » d'une position de monopole associée à l'exercice d'une mission de service public », constate ainsi le Conseil : « De par sa nature de monopole public, l'opérateur en position dominante peut être confronté à des conditions d'exploitation radicalement différentes de celles auxquelles sont confrontés les opérateurs privés avec lesquels il est en concurrence, que ce soit au regard du statut des personnels qu'il emploie ou des conditions de son financement ou encore d'autres considérations. Dès lors qu'il serait, par exemple, établi que, compte tenu de son statut public ou du fait qu'il doit assurer une mission de service public, l'opérateur dominant encourt nécessairement, à technique identique de production et de commercialisation, des coûts moyens plus élevés que ses concurrents pour la partie concurrencée de son activité, le fait qu'il enregistre une perte (sur coût moyen) dans cette activité n'indiquerait pas nécessairement que ses concurrents sont en raison de sa politique de prix, susceptibles d'être confrontés à des difficultés financières difficilement surmontables »³¹.*

D'autre part, il convient de faire le partage entre les coûts inhérents à l'activité exercée en monopole, et les coûts inhérents à l'activité concurrentielle de l'entreprise.

La Commission européenne³² a retenu que, dans le cas d'un opérateur détenant un monopole lié à une mission de service public et diversifiant ses activités, le caractère prédateur des prix pratiqués sur le marché doit être évalué en prenant comme référence les seuls coûts incrémentaux liés à l'activité concurrentielle, c'est-à-dire ceux qui ne seraient pas engagés par l'entreprise si elle n'exerçait pas cette activité.

Le Conseil s'est fondé sur cette décision dans l'affaire des vedettes vendéennes³³. L'espèce concernait les liaisons maritimes entre le continent et l'île d'Yeu assurées par une régie départementale. Un opérateur privé, qui exploitait pendant la saison estivale un service de vedette rapide entre deux ports de Vendée et l'île d'Yeu, accusait la régie d'avoir fixé le prix des passages sur sa vedette (« L'Amporelle ») à des niveaux très bas, inférieurs à ses coûts de revient réels.

Si la régie était, en effet, la seule à exploiter des ferries sur la liaison Île d'Yeu-continent, et donc à offrir le transport des véhicules et des marchandises encombrantes, ou des voyageurs pendant la période hivernale, conformément à la mission de service public dont elle était chargée, elle se trouvait en

²⁹ Avis 07-A-08, §167.

³⁰ CJCE, 3 juillet 1991.

³¹ Avis 96-A-10, précité.

³² Décision Deutsche Post du 20 mars 2001, COMP/35.141.

³³ Décision 04-D-79.

concurrence avec plusieurs autres compagnies qui offraient des services de transport de voyageurs en vedette rapide en période estivale.

La difficulté de l'espèce consistait à délimiter ce qui devait faire partie des coûts incrémentaux pour caractériser l'existence d'une éventuelle prédation. Pour le Conseil et la Cour d'appel de Paris (dans son arrêt du 28 juin 2005), seuls les coûts liés à l'exploitation de l'Amporelle pendant la période estivale (durant laquelle la Régie exerce une activité concurrentielle) étaient concernés. En revanche, les coûts fixes liés à l'achat de la vedette et auxquels la Régie était obligée de faire face pour assurer sa mission de service public, devaient être exclus. D'après le calcul qui en résultait, aucune pratique prédatrice n'était démontrée³⁴.

L'analyse de certaines pratiques, telles que les subventions croisées perturbant le libre jeu de la concurrence ou les pratiques de prédation, impose donc à l'Autorité de la concurrence de déterminer quel est le partage financier entre les activités concurrentielles et celles répondant à la mission de service public.

D'autres pratiques montrent aussi qu'une confusion commerciale peut exister entre les types d'activités.

2.2 *Le respect du partage commercial entre les activités concurrentielles et celles répondant aux missions de service public de l'entreprise publique*

Les espèces soumises à l'Autorité de la concurrence montrent que deux cas de figure peuvent se présenter. Soit l'entreprise publique tente d'exploiter sa position ultra-dominante d'opérateur historique sur un marché en cours de libéralisation pour écarter la concurrence naissante. Soit l'entreprise publique fait profiter l'une de ses filiales, créée dans le cadre de la diversification de ses activités, d'avantages normalement liés à son activité exercée en monopole.

2.2.1 *Les pratiques commises lors de l'ouverture des marchés*

La fragilité de l'état concurrentiel des marchés en cours de libéralisation a été relevée par le Conseil dans son étude thématique relative aux mesures d'urgence. Il est notamment constaté que libéraliser les grands secteurs de réseau autrefois organisés en monopoles légaux « *n'a généralement pas suffi à transformer d'emblée ces anciens marchés monopolistiques en marchés concurrentiels. En effet, d'une part, ces marchés présentent souvent de fortes barrières à l'entrée qui empêchent ou freinent l'arrivée de nouvelles entreprises. D'autre part, sur ces marchés, l'opérateur historique conserve, au moins dans un premier temps (...) un monopole de fait, qu'il peut être tenté d'utiliser pour écarter la concurrence naissante. Saisi de tels comportements qui menacent l'arrivée ou la survie de nouveaux entrants, souvent fragiles et vulnérables, le Conseil de la concurrence reconnaît généralement que l'urgence qui lui permet d'adopter des mesures conservatoires est caractérisée* »³⁵.

Le Conseil a ainsi eu, notamment, à intervenir lors de la libéralisation du secteur des télécommunications et de l'énergie.

³⁴ La Cour de cassation a considéré que, pour parvenir à une telle conclusion, encore fallait-il s'assurer que le coût de la mise en service de l'Amporelle était indispensable à la Régie pour assurer la mission de service public de continuité territoriale confiée à elle toute l'année : Cass.com., 17 juin 2008. V.également l'arrêt rendu sur renvoi : CA Paris, 9 juin 2009 (rejet du recours).

³⁵ Rapport annuel pour l'année 2007, la Documentation française, p.51.

Il a tout d'abord eu l'occasion de préciser, dans un avis sur les offres tarifaires de France Telecom, que des remises sur le segment d'activité en monopole ne devaient pas être liées à des engagements sur les segments en concurrence par offre de couplage³⁶.

Le couplage tarifaire peut constituer une atteinte à la concurrence, sans qu'il soit nécessaire qu'une remise soit appliquée, lorsque l'offre résulte d'une situation de quasi-monopole et qu'elle induit nécessairement une captation de clientèle³⁷. Les nouveaux entrants sur le marché se trouvent, en effet, dans l'impossibilité de proposer des offres équivalentes, tandis que l'offre de l'opérateur historique, même si elle n'est pas financièrement attractive, peut attirer les consommateurs en raison de son apparente simplicité.

Dans deux décisions, le Conseil a ainsi enjoint à France Telecom de suspendre des offres tarifaires couplant, à la veille de l'ouverture à la concurrence du marché des communications locales, des prestations en concurrence avec des prestations exercées en monopole³⁸.

D'autres types de pratiques ont donné lieu à des mesures conservatoires dans le secteur de l'énergie. Le processus de libéralisation du marché de l'électricité en France s'est achevé en juillet 2007. Au cours de cette année, le Conseil a dû prendre des mesures d'urgence à l'encontre d'EDF, afin d'assurer les conditions favorables au développement de la concurrence dans ce secteur.

Dans une première affaire, le Conseil a considéré qu'EDF était susceptible d'abuser de sa position dominante sur le marché libre de la fourniture d'électricité, en concluant avec les clients éligibles (catégorie alors uniquement composée de consommateurs professionnels) des contrats manquant de transparence quant à leurs conditions de résiliation anticipée³⁹. Cette opacité, combinée à l'ambiguïté de certaines clauses, pouvait, en effet, dissuader le client de profiter des opportunités du marché.

La décision du Conseil tient compte de la situation particulière de l'opérateur historique lors de l'ouverture à la concurrence de marchés anciennement monopolistiques. L'appréciation des contrats conclus avec les clients éligibles est en effet rapprochée de l'échéance du 1^{er} juillet 2007 : à cette date, l'ensemble des consommateurs d'électricité (y compris les consommateurs résidentiels) allait pouvoir se fournir sur le marché libre. Il est donc enjoint à EDF de définir, dans ses conditions générales de vente, les règles applicables en cas de résiliation anticipée, pour les contrats de fourniture d'électricité aux clients finals ayant exercé leur éligibilité.

La seconde affaire concerne des pratiques de ciseaux tarifaires, pouvant en principe être caractérisées indépendamment du statut de l'entreprise à qui elles sont imputées. Cependant, elles sont là encore replacées dans le contexte particulier de la pleine libéralisation du secteur de l'électricité au 1^{er} juillet 2007. La saisine du Conseil provenait d'une plainte d'un fournisseur d'électricité ne disposant pas de moyens de production propre. EDF était accusé de lui vendre de l'électricité en gros à un prix l'empêchant d'intervenir de manière viable sur le marché de détail. Le Conseil a considéré qu'EDF était susceptible d'abuser de sa position dominante en vendant à Direct Énergie de l'électricité à un prix de gros ne permettant pas à un rival aussi efficace qu'EDF de le concurrencer sur le marché de détail sans subir des pertes. Une pénurie d'offres d'approvisionnement en électricité de base sur le marché de gros, de nature à gêner l'activité des nouveaux fournisseurs sur le marché de détail, a également été constatée. Pour remédier à l'atteinte au secteur, le Conseil a donc ordonné à EDF de formuler une proposition de fourniture

³⁶ Avis 97-A-05.

³⁷ Avis 00-A-26.

³⁸ Décisions 00-MC-19 et 00-MC-06 (confirmée par CA Paris, 30 mars 2000).

³⁹ Décision 07-MC-01, confirmée par CA Paris, 26 juin 2007.

d'électricité en gros ou toute autre solution techniquement ou économiquement équivalente permettant aux autres fournisseurs de concurrencer les offres de détail faites par EDF sur le marché libre sans subir de ciseau tarifaire⁴⁰.

Ces différentes espèces illustrent les comportements qui peuvent être commis par l'opérateur public lors de l'ouverture à la concurrence de marchés anciennement monopolistiques, tendant à conserver les avantages liés à ce monopole.

D'autres comportements, davantage liés à la structure de l'entreprise publique qu'à la libéralisation conjoncturelle d'un secteur, ont également été relevés par l'Autorité de la concurrence.

2.2.2 Les pratiques liées à la diversification des activités des entreprises publiques

Par différents biais, l'entreprise publique peut être tentée d'utiliser les avantages liés à son monopole légal au profit de ses activités concurrentielles.

Elle peut, tout d'abord, octroyer à sa filiale, qui exerce une activité commerciale, des avantages normalement strictement liés à l'activité monopolistique. Dans son avis relatif à la diversification des activités d'EDF-GDF, le Conseil de la concurrence, auquel a succédé l'Autorité de la concurrence depuis le 2 mars 2009, souligne ainsi que « *les marchés 'captifs' qui résultent du statut des établissements publics, caractérisés par des monopoles légaux et l'exercice de missions de service public, leur permettent de dégager des moyens hors du commun pour développer d'autres activités. Notamment, leur situation particulière pour obtenir de manière privilégiée des moyens de financement, l'accès au consommateur final favorisé par l'existence d'un réseau couvrant l'intégralité du territoire national ou l'image d'intérêt général du service public apparaissent comme des avantages facilitant l'implantation sur des marchés ne relevant pas du monopole légal* »⁴¹.

Tel est le cas lorsque l'entreprise publique fait bénéficier ses filiales de la notoriété et du réseau dont elle bénéficie en tant qu'entreprise chargée d'une mission de service public.

Dans l'avis précité, le Conseil relève que « peuvent être soulignés, parmi d'autres, deux avantages potentiels tirés de la mission de service public détenue de longue date ; il s'agit, d'une part, de la taille (effet de réseau), d'autre part, de l'image. En effet, la taille du réseau (...) facilite l'accès au consommateur final et permet plus aisément d'adapter l'offre à la demande ; mais elle peut aussi être perçue, par le client, comme un élément rassurant. De plus, il est plus commode pour les collectivités locales d'avoir un interlocuteur unique pour traiter les différents contrats de leur ressort. De son côté, l'image [est] un avantage immatériel important (...) puisque souvent cette bonne notoriété repose sur des appréciations de sérieux, de fiabilité ou de sécurité avec des garanties d'universalité et de continuité ».

Tel est également le cas lorsque l'entreprise publique utilise les informations privilégiées auxquelles elle a accès en raison de ses missions de service public, au profit de ses activités concurrentielles. Dans le secteur des télécommunications, le Conseil a par exemple considéré que France Telecom devait s'interdire d'utiliser les informations contenues par les fichiers de raccordement téléphonique dans le cadre de ses activités commerciales annexes, notamment à des fins de démarchage⁴². De même, le Conseil a estimé que l'utilisation, par France Telecom, des données stratégiques issues de son activité d'exploitation de la boucle locale afin de favoriser la commercialisation des services d'accès à Internet Wanadoo, a octroyé à

⁴⁰ Décision 07-MC-04.

⁴¹ Avis 94-A-15, p.10.

⁴² Avis 04-A-21.

sa filiale un avantage exclusif qui a perturbé le jeu de la concurrence sur les marchés des fournisseurs d'accès à Internet⁴³.

Deux espèces récentes illustrent ces différents cas de confusion commerciale entre les activités concurrentielles et celles monopolistiques de l'entreprise publique.

Dans la première espèce⁴⁴, concernant des pratiques mises en œuvre par la SNCF, le Conseil considère que le partenariat de cette entreprise publique avec une agence de voyage, permettant à leur filiale commune, agence de voyage, d'être hébergée sur le site Web de la SNCF, canal de distribution de billets de train sur Internet, est anticoncurrentiel. Le partenariat permet, en effet, à la SNCF d'orienter les acheteurs de ses billets en ligne vers les prestations de l'agence de voyages, alors que ces derniers croient acheter des produits de la SNCF. La filiale tire ainsi profit « *de la publicité, de l'efficacité commerciale, et de la réputation de qualité de la SNCF (...). Un tel accord, consistant à prendre appui sur un monopole légal pour développer une activité sur un marché concurrentiel connexe, est anticoncurrentiel dans la mesure où il a pour objet de réserver un avantage déterminant à la filiale commune et ainsi de fausser la concurrence par les mérites* »⁴⁵. Cette pratique d'entente s'accompagne, en outre, d'abus de position dominante consistant notamment à mettre à la disposition de la filiale de la SNCF certaines fonctionnalités favorisant l'achat de billet en ligne, alors que les autres agences de voyage en étaient dépourvues⁴⁶.

La seconde espèce concerne des pratiques mises en œuvre par EDF⁴⁷. L'Autorité de la concurrence estime que l'utilisation des moyens de communication d'EDF (une lettre d'information et une plateforme téléphonique), orientant l'ensemble de ses abonnés vers les activités de sa filiale sur le marché de la production d'électricité photovoltaïque, entretient une confusion entre le rôle d'EDF en tant que fournisseur d'électricité aux tarifs réglementés et l'activité concurrentielle de sa filiale. Par ces pratiques, la filiale d'EDF profite de l'image de l'opérateur historique et utilise la base de données détenue par sa société-mère sur les clients régulés, avantages dont ne bénéficient pas ses concurrents.

Tous ces exemples illustrent des comportements qui favorisent de façon illicite une filiale de l'entreprise publique au détriment de ses concurrents.

Mais l'égalité concurrentielle peut également être rompue par des pratiques qui tirent profit du monopole légal pour désavantager les concurrents de la filiale de l'entreprise publique sur le marché. Dans ce cas, les agissements de l'entreprise publique n'ont pas pour objet de bénéficier directement à sa filiale, mais de nuire à ses concurrents.

L'entreprise publique peut ainsi ériger des barrières artificielles à l'entrée du marché sur lequel sa filiale exerce des activités concurrentielles.

Elle peut, par exemple, imposer aux concurrents de sa filiale des conditions restrictives injustifiées d'accès à des infrastructures qu'elle détient grâce à son monopole, essentielles pour l'exercice des activités concurrentielles⁴⁸. Dans la décision précédemment citée, le Conseil a considéré que la SNCF avait commis

⁴³ Décision 07-D-33, §86.

⁴⁴ Décision 09-D-06.

⁴⁵ Décision 09-D-06 préc., §181.

⁴⁶ Décision 09-D-06 préc., §260.

⁴⁷ Décision 09-MC-01.

⁴⁸ Dans son arrêt du 12 juillet 2005, NMPP, la Cour de cassation a précisé que pour qualifier une facilité d'essentielle, il faut établir, d'une part, que les entreprises qui en demandent l'accès ne peuvent mettre en

un abus en imposant, à un coût particulièrement élevé, aux agences de voyages concurrentes de sa filiale l'utilisation d'une licence pour l'accès à certaines informations de la SNCF indispensables à l'activité de ces agences, relatives aux horaires, aux places disponibles, et aux tarifs généralement appliqués⁴⁹.

D'autres manœuvres défavorisant les concurrents de l'entreprise publique sur un marché consistent à mener des pratiques discriminatoires ou dénigrantes. Les espèces soumises au Conseil concernent principalement le secteur des télécommunications ou encore de l'électricité.

C'est ainsi que le Conseil de la concurrence a reproché à France Télécom d'appliquer une tarification discriminatoire pour le service de désignation du point d'adduction (lieu où l'installation téléphonique construit par le promoteur du lotissement ou de l'immeuble se raccorde au réseau public) : alors même que cette entreprise ne facturait pas cette prestation à ses propres clients et que cette tarification n'était pas appliquée sur le reste du territoire national, l'unité régionale de Bretagne de France Telecom appliquait à son concurrent un niveau élevé de tarification pour la désignation de ces points⁵⁰.

Dans une autre espèce, France Télécom a également été sanctionnée pour avoir mené des pratiques de discriminations à l'encontre des concurrents de la filiale Wanadoo sur le marché de la fourniture d'accès à Internet, en mettant à la disposition des FAI alternatifs des informations relatives à l'éligibilité des lignes à l'ADSL moins actualisées et moins précises que celles dont disposaient les agents commerciaux de France Télécom pour la commercialisation des packs Wanadoo⁵¹.

Cette dernière espèce montre que l'opérateur téléphonique a également mené des pratiques de dénigrement à l'encontre des concurrents de sa filiale. Il est intéressant de noter que ces pratiques ont été considérées par le Conseil comme anticoncurrentielles en raison de la position particulière de l'opérateur historique sur le marché. La décision reconnaît tout d'abord que « *la concurrence suppose un certain degré de rivalité et de compétition entre les acteurs d'un marché* ». Le fait de chercher « *à bénéficier d'un avantage concurrentiel en jetant le discrédit sur son concurrent ou sur les produits de ce dernier* » peut cependant être abusif. En l'espèce, le Conseil souligne la « portée singulière » des agissements de France Telecom, opérateur historique des télécommunications en France : « *France Télécom demeurerait la référence en matière de télécommunications, notamment du point de vue technique mais aussi de la crédibilité. Par ailleurs, France Télécom était l'acteur principal et incontournable du monde de l'accès à Internet haut débit, notamment en raison du fait qu'il était propriétaire de la quasi-totalité des boucles locales et de son avantage historique en terme de capillarité des réseaux de transport des données* »⁵².

L'analyse concurrentielle de l'Autorité de la concurrence porte, ainsi, sur les comportements des entreprises publiques : il s'agit de vérifier si l'entreprise publique respecte une ligne de partage, financière ou commerciale, entre les activités qu'elle exerce en monopole et celles qu'elle exerce, directement ou par l'intermédiaire d'une filiale, sur un marché.

Mais le contrôle de l'autorité peut également porter sur l'organisation et la structure des entreprises publiques.

oeuvre aucune solution alternative économiquement raisonnable et, d'autre part, que l'accès à la facilité est indispensable à l'exercice de leur activité.

⁴⁹ Décision 09-D-06 préc., §235 et s.

⁵⁰ Décision 07-MC-03.

⁵¹ Décision 07-D-33.

⁵² Décision 07-D-33 préc., §79.

3. Le contrôle de l'organisation des entreprises publiques

L'Autorité de la concurrence a préconisé à maintes reprises, notamment dans ses fonctions consultatives, la nécessité, pour les entreprises publiques, d'identifier clairement ce qui ressort de leurs activités concurrentielles de ce qui ressort de leurs activités exercées en monopole. Il apparaît tout d'abord nécessaire d'établir une séparation entre les deux types d'activités, quelle soit comptable ou juridique. En outre, les missions de service public de l'entreprise publique doivent être clairement identifiées.

3.1 *La séparation comptable et juridique des activités exercées en monopole et des activités concurrentielles*

Dans le sens des positions adoptées par la Commission européenne, le Conseil de la concurrence a plusieurs fois recommandé aux entreprises publiques la séparation comptable⁵³, consistant notamment à instaurer une comptabilité analytique, qui permet, par une imputation exacte des ressources et des charges, la distinction des activités de monopole de celles concurrentielles.

Pour l'Autorité de la concurrence, cette individualisation comptable répond à une triple finalité⁵⁴ :

- celle, tout d'abord, de disposer d'informations sur les coûts, en vue d'une fixation éventuelle de tarifs par les pouvoirs publics. Il importe, en effet, afin d'éviter toute distorsion de concurrence, que ces tarifs correspondent aux coûts totaux de l'entreprise. Cette règle a récemment été rappelée par l'Autorité de la concurrence, saisie d'un projet de décret concernant les tarifs réglementés de vente de l'électricité⁵⁵. Sur le marché de la fourniture d'électricité au consommateur final, la plupart des consommateurs ont choisi de ne pas se fournir sur le marché libre, et de rester aux tarifs réglementés. Dans ce contexte, l'Autorité a rappelé que « *l'objectif d'un texte portant sur les modalités de fixation des tarifs réglementés est d'éviter toute distorsion de fonctionnement du marché libre, du fait de tarifs réglementés qui ne correspondraient pas aux coûts totaux supportés par le fournisseur. A défaut, le fonctionnement d'un marché désormais complètement ouvert à la concurrence serait faussé en créant une barrière à l'entrée de nouveaux opérateurs* »⁵⁶.
- celle, ensuite, d'assurer, à tous les opérateurs sur le marché concurrentiel, des conditions équitables d'exercice de leur activité en prévenant d'éventuelles subventions croisées ;
- celle, enfin, d'apporter aux autorités de concurrence les informations et les moyens leur permettant de contrôler l'absence de pratiques abusives. La dissociation comptable permet en ce sens « *de s'assurer qu'il n'existe pas de transfert de charges et de ressources entre les diverses activités du groupe, et [est] de nature à réduire les éventuelles distorsions de concurrence, compte tenu des risques spécifiques d'atteinte à la concurrence liés à la situation de l'opérateur historique* »⁵⁷.

Généralement exigée dans les directives sectorielles de libéralisation, cette condition de séparation comptable a également été consacrée par l'ordonnance du 7 juin 2004, portant transposition de la directive

⁵³ Avis 95-A-18 ; - 97-A-07 ; - 96-A-10 ; - 00-A-29 ; - 04-A-21.

⁵⁴ Avis 05-A-14.

⁵⁵ Avis 09-A-43.

⁵⁶ Avis 09-A-43 préc., § 70.

⁵⁷ Avis 97-A-07 préc.

80/723 relative à la transparence financière entre les Etats membres et les entreprises publiques⁵⁸. Le rôle l'Autorité de la concurrence peut ainsi dépasser celui, initial, de recommandation, pour porter sur le contrôle de l'établissement de ces comptes par les entreprises⁵⁹.

Mais la séparation préconisée entre activités exercées en monopole et activités concurrentielles peut aller au-delà de la séparation comptable et concerner la structure de l'entreprise publique.

Une séparation fonctionnelle, par laquelle les services affectés aux activités concurrentielles dispose d'une autonomie de gestion mais continuent d'appartenir à la même société, peut être recommandée. Le Conseil de la concurrence a en ce sens préconisé à EDF une répartition autonome des moyens matériels et humains nécessaires au fonctionnement du réseau public de transport (RTE), afin de permettre à ce service, interne à EDF, d'exercer son autonomie de gestion⁶⁰.

Lorsque c'est possible, notamment au regard du personnel de la future filiale⁶¹, l'Autorité de la concurrence peut aussi recommander l'affectation des services concernés à des entités juridiquement distinctes. La « filialisation » qui en résulte suppose la constitution de sociétés commerciales régies par le code de commerce. Par rapport à la séparation comptable ou fonctionnelle, cette séparation juridique permet de « rapprocher les conditions de fonctionnement des filiales concernées de celles d'une entreprise privée »⁶² : les filiales peuvent se voir appliquer des procédures collectives, ou être financées aux conditions du marché⁶³.

3.2 *L'identification claire des obligations de service universel*

L'Autorité de la concurrence a également insisté, dans le cadre de son rôle consultatif, sur la nécessité d'une définition explicite et précise des obligations de service universel : « *Il convient que soient précisément identifiés les services d'intérêt économique général dévolus aux opérateurs publics (EDF, distributeurs non nationalisés). (...) La définition de ces missions particulières dévolues aux opérateurs publics est d'autant plus importante que les droits exclusifs dont ils peuvent bénéficier sont justifiés par l'existence de ces missions* »⁶⁴. Le champ du domaine réservé ne doit pas, en effet, excéder ce qui est nécessaire à la réalisation des objectifs de service public. Dans le rapport annuel pour l'année 2003, le Conseil de la concurrence rappelle à ce sujet que lorsque « *des domaines réservés ont été institués, ils doivent être limités à ce qui est strictement nécessaire pour assurer l'équilibre économique de l'opérateur* ».

⁵⁸ Article 2 de l'ordonnance.

⁵⁹ Avis 05-A-14 (préc.); - 05-A-19 ; - 06-A-12 (saisine du Conseil de la concurrence par la CRE sur la mise en œuvre de la séparation des comptes dans le secteur de l'énergie).

⁶⁰ Avis 00-A-29. V. également Avis 04-A-21, par lequel le Conseil de la concurrence a indiqué qu'outre la tenue d'une comptabilité analytique, France Telecom devait veiller à ce que ses activités concurrentielles s'exercent hors de tout accès au fichier de raccordement, regroupant les informations des opérateurs télécom transmises à France Telecom dans le cadre de leurs demandes de raccordement.

⁶¹ Dans son avis 96-A-10 relatif au fonctionnement des services financiers de la Poste, le Conseil de la concurrence reconnaît ainsi que la filialisation entraînerait la fin de la polyvalence des agents, et poserait un problème de partition du personnel.

⁶² Rapport annuel préc., p.108.

⁶³ Avis 94-A-15.

⁶⁴ Avis 98-A-05.

en charge des [obligations de service universel] »⁶⁵. Ces missions doivent aussi être évaluées afin que leurs coûts soient compensés. Toute « surcompensation » relèverait du contrôle des aides d'Etat.

4. Conclusion

L'action des entreprises publiques sur les marchés présente un enjeu particulier en raison de leur qualité fréquente d'opérateurs historiques sur ces marchés, de gestionnaires de facilités essentielles, dont l'accès est indispensable à leurs concurrents, de prestataires de service public, et enfin, de bénéficiaires de l'image de marque et du réseau associés à ce service public.

La concurrence avec des entreprises privées qui n'ont ni l'histoire ni la position de l'entreprise publique sur le marché peut résulter d'un équilibre fragile. Son émergence (lors de la libéralisation des marchés monopolistiques), et son maintien nécessitent fréquemment l'intervention de l'Autorité de la concurrence.

A cette fin, les moyens à la disposition de l'autorité sont utilisés de façon étendue. *Ex ante*, l'autorité intervient avant toute infraction, par voie de recommandation permettant à l'entreprise publique d'adapter son organisation aux mécanismes du marché. *Ex post*, lorsqu'un comportement s'avère contraire aux règles de concurrence, ou est susceptible de l'être, les remèdes appliqués prennent en compte les particularités liées à la situation de l'entreprise publique à laquelle le comportement est imputé. Le Conseil de la concurrence a, en effet, constaté que les sanctions pécuniaires infligées aux entreprises publiques « *peuvent ne pas suffire à dissuader ce type de comportement, notamment s'il se trouve que l'entreprise n'est pas très sensible à ses coûts, ou si elle peut simplement transférer l'amende aux contribuables* »⁶⁶. Le maintien d'une concurrence non faussée, c'est-à-dire, dans le cas d'agissements d'une entreprise publique bénéficiant de sa situation d'opérateur historique, d'une concurrence à armes égales, peut donc être assuré par d'autres remèdes. L'Autorité de la concurrence peut prononcer des injonctions dans le cadre de mesures conservatoires, mettant fin aux pratiques visant à retarder l'entrée des concurrents sur un marché en cours de libéralisation⁶⁷, ou accepter les engagements de l'entreprise publique lorsqu'ils lui apparaissent suffisants⁶⁸. Elle peut également aménager la sanction pécuniaire éventuellement encourue lorsque l'entreprise ne conteste pas les griefs et prend des engagements mettant fin à ses agissements⁶⁹.

L'action de l'Autorité de la concurrence peut, en outre, être complétée par celle du juge administratif. Ce dernier peut, en effet, annuler ou résilier les contrats administratifs passés en méconnaissance du droit de la concurrence⁷⁰, ou accorder des dommages et intérêts aux victimes de pratiques anticoncurrentielles⁷¹.

Ces différents instruments permettent au marché de fonctionner de façon saine, mais n'interdisent jamais aux entreprises publiques d'exercer une activité concurrentielle, car en définitive, la concurrence, lieu d'égalité, est aussi le lieu de la diversité.

⁶⁵ Rapport annuel préc., p.111.

⁶⁶ Rapport annuel préc., p.111.

⁶⁷ V. développements ci-dessus, p.13 et s.

⁶⁸ Par ex. : décision 07-D-43.

⁶⁹ Par ex. : décision 09-D-06, préc.

⁷⁰ CE, Ass., 16 juillet 2007, Tropic travaux Signalisation.

⁷¹ Voir, pour la première condamnation : TA Bastia, 6 février 2003, Autocars Mariani.

ANNEXE

LES PRINCIPAUX AVIS ET DECISIONS DU CONSEIL ET DE L'AUTORITE DE LA CONCURRENCE EN MATIERE D'APPLICATION DU DROIT DE LA CONCURRENCE AUX ENTREPRISES PUBLIQUES

- Avis 94-A-15 du 10 mai 1994 relatif à une demande d'avis sur les problèmes soulevés par la diversification des activités d'E.D.F et de G.D.F. au regard de la concurrence
- Avis 95-A-18 du 17 octobre 1995 relatif à une demande d'avis sur les problèmes soulevés par les activités de messagerie de la Société nationale des chemins de fer français (S.N.C.F.) au regard de la concurrence
- Avis 96-A-10 du 25 juin 1996 relatif à une demande d'avis de l'Association française des banques concernant le fonctionnement des services financiers de La Poste au regard du droit de la concurrence
- Avis 97-A-05 du 22 janvier 1997 portant sur les propositions tarifaires Modulance Partenaires de France Télécom
- Avis 97-A-07 du 27 mai 1997 relatif à une demande d'avis de l'Association française des opérateurs privés de télécommunications sur les questions soulevées au regard du droit de la concurrence par la coexistence à France Télécom, au sein d'une même structure juridique et commerciale, d'activités de télécommunications exercées en situation concurrentielle et sous monopole
- Avis 97-A-20 du 4 novembre 1997, Urbiel
- Avis 98-A-15 du 28 avril 1998 relatif à une demande d'avis sur les principes à respecter ou les dispositions à prévoir pour assurer le fonctionnement concurrentiel du marché électrique dans le cadre tracé par la directive européenne 96/92/CE
- Décision 00-MC-19 du 5 décembre 2000 relative à une demande de mesures conservatoires présentée par l'Autorité de régulation des télécommunications
- Avis 00-A-26 du 15 février 2001 relatif à une demande d'avis du Gouvernement sur deux décisions tarifaires de France Télécom visant à créer des forfaits de communications incluant l'abonnement à la ligne téléphonique
- Avis 00-A-29 du 30 novembre 2000 relatif à la séparation comptable entre les activités de production, transport et distribution d'électricité

- Décision 00-D-47 du 22 novembre 2000 relative aux pratiques mises en œuvre par EDF et sa filiale Citélum sur le marché de l'éclairage public
- Décision 00-D-50 du 5 mars 2001 relative à des pratiques mises en œuvre par la société Française des Jeux dans les secteurs de la maintenance informatique et du mobilier de comptoir
- Décision 00-D-54 du 28 novembre 2000 relative au comportement de l'Institut national de la consommation (INC)
- Décision 00-D-57 du 6 décembre 2000 relative à des pratiques mises en œuvre par la SEM Gaz et Electricité de Grenoble et les sociétés GESTE et GEG Achats sur le marché des prestations de services dans le domaine de l'énergie et du bâtiment
- Décision 02-D-34 du 11 juin 2002 relative à des pratiques d'Electricité de France dans les secteurs de l'énergie et de l'ingénierie relative à l'utilisation des énergies
- Décision 03-MC-03 du 1er décembre 2003 relative à une demande de mesures conservatoires présentée par la société Towercast à l'encontre de pratiques mises en œuvre par la société TéléDiffusion de France (TDF)
- Décision n° 03-D-62 du 18 décembre 2003 relative à des pratiques relevées lors de l'attribution d'un marché d'étude par l'agglomération dijonnaise
- Avis 03-A-06 du 16 mai 2003 relatif au projet de loi sur la transposition de la directive 97/67/CE concernant les règles communes de développement du marché intérieur des services postaux de la communauté et l'amélioration de la qualité de service, modifiée par la directive 2002/39/CE du 10 juin 2002, modifiant le code des postes et télécommunications et portant création d'une autorité de régulation pour le secteur postal
- Avis 04-A-21 du 28 octobre 2004 relatif à une demande d'avis de la Fédération Interprofessionnelle de la Communication d'Entreprise (FICOME) ayant trait aux conditions d'exercice par France Télécom, des activités d'opérateur d'accès d'une part, et d'installation-maintenance de systèmes de télécommunications d'autre part
- Décision 04-D-79 du 23 décembre 2004 relative à des pratiques mises en œuvre par la Régie départementale des passages d'eau de la Vendée (RDPEV)
- Avis 05-A-14 du 6 juillet 2005 relatif à l'établissement d'une comptabilité séparée par activité pour les distributeurs locaux de gaz naturel
- Avis 05-A-19 du 20 octobre 2005 relatif aux principes à respecter pour l'établissement par EDF d'une comptabilité séparée pour les clientèles éligibles et non éligibles
- Avis 06-A-12 du 30 juin 2006 relatif à l'établissement par GDF d'une comptabilité séparée pour la clientèle éligible et la clientèle non-éligible
- Décision 07-MC-01 du 25 avril 2007 relative à une demande de mesures conservatoires de la société KalibraXE
- Décision 07-MC-03 du 7 juin 2007 relative à une demande de mesures conservatoires présentée par la société Solutel

- Décision 07-MC-04 du 28 juin 2007 relative à une demande de mesures conservatoires de la société Direct Energie
- Avis 07-A-08 du 27 juillet 2007 relatif à une demande du Conseil d'Etat à propos des tarifs de vente du gaz naturel en distribution publique de Gaz de France
- Décision 07-D-33 du 15 octobre 2007 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l'accès à Internet à haut débit
- Avis 08-A-13 du 10 juillet 2008 relatif à une saisine du syndicat professionnel UniCiné portant sur l'intervention des collectivités locales dans le domaine des salles de cinéma
- Décision 09-D-06 du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne
- Décision 09-MC-01 du 8 avril 2009 relative à la saisine au fond et à la demande de mesures conservatoires présentée par la société Solaire Direct
- Avis 09-A-43 du 27 juillet 2009 relatif à un projet de décret concernant les tarifs réglementés de vente de l'électricité

GERMANY

1. General remarks

When the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter: ARC) was enacted more than fifty years ago, state ownership played an important role in a number of sectors of the German economy. The importance of state ownership has declined continuously since then. The withdrawal of the state from economic activity has accelerated even more since the 1990s with deregulation of key network industries.

Recently, the financial and economic crisis has brought a recalibration internationally and domestically, although even in this extraordinary situation Germany has largely – though not entirely – avoided direct governmental ownership in ailing firms.

The ARC generally applies to enterprises without regard to their ownership structure. Thus, competition law is generally applicable to the commercial activities of state-owned enterprises; only in cases defined by statutory exemption state-owned enterprises are not subject to competition law. The provisions aim to ensure that the state does not exempt itself from the competition rules at its own discretion.

Although, historically, there have been exemptions of companies – or rather sectors of the economy – from competition law, in the last decade or so the German legislator has largely eliminated these exemptions.

2. Statutory basis and intention of the legislator

The ARC states explicitly that it applies also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities.¹

The German law follows a functional approach when determining which entities are covered by the ARC. This functional approach leads to a broad application of the act according to which the commercial activities of the state and of its organisation are also subject to the rules of the ARC. This approach is fully consistent with European competition law.

The functional approach reflects the intention of the legislator that the state and its enterprises shall not be able to avoid the application of competition law, when participating in the market, e.g. because they are acting with regard to a service of general interest (*Daseinsvorsorge*) or because there are safety or health considerations.² Thus, the rules of the ARC are applicable where a state-owned enterprise is

¹ Section 130 (1) ARC. Furthermore the provision provides for an exception from this general rule. It provides that the provisions of the Parts I to III of the Act (provisions *inter alia* on the ban of cartels, abusive practices and merger control) shall not be applicable to the German Central Bank (*Deutsche Bundesbank*) and to the Reconstruction Loan Corporation (*Kreditanstalt für Wiederaufbau*). An English version of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

² Cf. for example Federal Court of Justice (*BGH*) WuW/ E BGH 1661- *Berliner Musikschule* (1979); Bundeskartellamt (BKartA) WuW/E BKartA 2150- *Tarifreue* (2001).

commercially active and where no mandatory explicit justifying exemption regulated by public law exists. Hence, the application does not depend on the form of organization of the enterprise, the seat or the provenance of the enterprise, the level of participation or the share of the state-owned enterprise or on the intention of the state-owned enterprise to realize or maximize profits.³ Activities of state-owned enterprises in commerce which aim at the exchange of products or commercial services are subject to the application of competition law⁴.

It is not decisive whether the relationship between the state-owned enterprise and the other party is governed by civil law or public law. This aims at ensuring that the state-owned enterprise may not exempt itself by choosing public law as the legal basis for a certain activity. The application of competition law solely depends on the question whether the state actually or potentially offers or demands its services parallel to other market participants in the market⁵. The general applicability of the ARC is not ruled out, *a priori*, by sector-specific regulation or by the providing of services of general interest.⁶

3. Exemptions

Historically and until the 1990s, activities in the postal services, telecommunications and rail sector were conducted by the state – though not so much through state-owned enterprises, but rather by public administrations. However, since the 1980s more and more sectors have been privatized and the state's activities have decreased.

Even before the move to deregulation and privatization, market activities of state administrations were subject to competition law oversight. Therefore, when for example the Deutsche Bundesbahn – the German railway operator – was managed as a public administration, the Bundeskartellamt took up complaints, e.g. concerning issues of buyer power.⁷

However, historically the ARC provided for a number of sectors, which were exempted from the application important aspects of the ARC, among them public transport, banks, insurances and public utility companies.⁸ These exemptions have largely been repealed.

In the context of this discussion some of these sectors are of particular interest because companies in these sectors tend to have strong ties with municipal or state entities. To give some examples, exclusive concessional contracts (*ausschließliche Konzessionsverträge*) with regard to the supply of electricity and gas were originally exempted *inter alia* from the application of Section 1 ARC (Prohibition of Agreements restricting competition). In connection with the new Energy Act of 1998, the former broad exemptions for agreements for the supply of electricity or gas (Section 103 ARC old version) were abolished.

Furthermore, the ARC contained a broad exemption for agreements, decisions and recommendations in the public transport sector in the beginning. Subsequently this blanket exemption was repealed in favour

³ Cf. for example BGH NJW 1962, p. 196- *Gummistrümpfe*; BGH WuW/E BGH 1474- *Architektenkammer* (1977).

⁴ BGH WuW/E DE-R 289, 291- *Lottospielgemeinschaft* (1999).

⁵ Cf. BGH NJW 2000, 866- *Kartenlesegerät*; BGH WuW/E BGH 1469- *Autoanalyzer* (1976); BGH WuW/E BGH 2399- *Krankentransport* (1987); Higher Regional Court of Dusseldorf (*OLG Düsseldorf*) WuW/E OLG 4998 – *Landesapothekerkammer* (1992).

⁶ Cf. BGH WuW/E DE-R 1396- *DB/üstra* (2006).

⁷ BKartA: Tätigkeitsbericht 1979/1980, p. 38.

⁸ Sections 99-104a ARC old version.

of a narrower provision with regard to undertakings in the public transports sector. In the course of the 6th amendment of the ARC the provision was removed from the ARC altogether and was incorporated into the Passenger Transportation Act (*Personenbeförderungsgesetz*; hereinafter: PBefG).

Finally Section 69 Book V of the German Social Welfare Code (SGB V) provides for an exemption for the legal relations between compulsory health insurance funds and doctors, pharmacies etc.⁹ This exemplifies that German law does not allow for a general exception for state-owned enterprises, such as a general “state action doctrine”.

4. The economic crisis: Financial Market Stabilisation Act

Due to the economic crisis the economy has to face new challenges. To address the extraordinarily difficult situation and restore confidence in the financial markets, the German parliament has enacted the Financial Market Stabilisation Act that came into effect in October 2008.¹⁰ The Act comprises a package of measures aimed at stabilising the financial markets. The primary objectives of the act are (i) to secure the liquidity of financial institutions that have their seat in Germany and (ii) to prevent a general credit crunch. The concern was that systematically indispensable banks could fail with consequences which were unpredictable for the wider economy in Germany and beyond. The core of the package is a rescue fund which may (*inter alia* and under certain conditions) acquire (or otherwise secure) loans, securities, derivative financial instruments and other risk positions, acquire equity in the recapitalisation process and thus strengthen the core capital ratio of the undertakings or also acquire a participation, in particular, shares in firms.

According to Article 2 Section 17 of the Act, Parts I-III of the ARC¹¹ are not applicable. This means that the acquisition of interests by the fund in financial institutions is not subject to German merger control law.¹² This does not imply, however, that the acquisition of these interests from the fund by third parties in the future would also escape merger control law.

5. Enforcement practice

The debate on the reach of competition law in industries governed by sector specific rules – and which, incidentally, also have a strong nexus to the state – can be illustrated by important precedent cases in these sectors.

5.1 Public transport sector

In its decision *DB Region / üstra* the German Federal Court of Justice dealt with a decision of the Bundeskartellamt in a merger case, which involved the Deutsche Bahn – the German railway operator that is 100% owned by the Federal state – and regional/ municipal companies.¹³ The case concerned the

⁹ According to this provision these legal relationships are not subject to Section 1 ARC (Prohibition of agreements restricting competition). However, the legal relations mentioned in Section 69 SGB V are not exempted from the application of the rules on merger control. Therefore, the Bundeskartellamt applies the relevant provisions of the ARC to assess mergers of hospitals.

¹⁰ An English version of the Act is available at http://www.bundesfinanzministerium.de/nr_82/DE/BMF_Startseite/Aktuelles/Aktuelle_Gesetze/Gesetze_Verordnungen/Finanzmarktstabi_engl_anl.templateId=raw.property=publicationFile.pdf.

¹¹ These are provisions *inter alia* on the ban of cartels, abusive practices and merger control.

¹² This regulation applies only to the rescue fund established under the Financial Market Stabilisation Act.

¹³ BGH WuW/E DE-R 1681-1693 –*DB Region/ üstra* (2006).

markets for regional rail transport and was only cleared subject to conditions. In the course of the proceedings the Federal Court of Justice took the opportunity to clarify the application of competition law to the markets for regional rail transport. The Court reiterated once more that this sector is not generally exempted from the application of competition law. The involved parties had tried to argue that the legal relations between the regulatory authority and the transport enterprise were governed by public law and should ensure services of general interest. Thus, the argument continued, merger control should not be applicable to these cases as the providers of these services did not have any freedom of behaviour with regard to the relevant competitive behaviour. The court turned down this argument, stating that agreements between transport enterprises and for decisions and recommendations of such enterprises are only exempted from the application of Section 1 (Prohibition of Agreements restricting competition) and Section 22 (prohibition of recommendations) of the ARC old version.¹⁴ Thus, under the current version of the ARC such agreements and decisions or recommendations are only exempted from the application of Section 1 ARC, as such cooperations may be necessary to ensure the functioning of public transport.¹⁵ However, the relevant provision explicitly does not exclude the public transport sector from the application of other provision of competition law, in particular merger control.

This interpretation has become well-established case-law, so that there is no room for doubt with regard to the applicability of the ARC to the public transport sector.¹⁶

5.2 *Postal sector and telecommunications sector*

Also in other privatized sectors – such as the postal sector and the telecommunications sector – the applicability as well as the practical application of competition law is well-established.¹⁷ Whereas the competences of the sector regulator Federal Network Agency (*Bundesnetzagentur*) are concentrated, largely, on issues of network access, general competition law covers all other relevant aspects in these sectors. In applying the ARC the Bundeskartellamt has taken important action in these sectors.¹⁸

5.3 *Hospital sector*

Competition law, and in particular merger control, is also applicable to the health and hospital sector, notwithstanding the fact that the hospital market is a highly regulated market and that many hospitals and health operators are state-owned entities. However, merger control in the health and hospital sectors – especially with regard to state owned entities – remains a controversial issue in Germany.

The German courts have only recently affirmed that merger control applies to these sectors.¹⁹ Merger control aims at maintaining competitive framework conditions in this economically highly significant and socially sensitive area where planning requirements and market-economy control mechanisms exist alongside one another. Enforcing competition as a controlling mechanism does not jeopardise the provision of health care services to the population – which generally is one of the main arguments of critics- but ensures a long-term offer of choices for patients in the interest of high-quality care. Furthermore, the

¹⁴ This exemption is laid down in Section 8 (3) sentence 7 PBefG.

¹⁵ BGH WuW/E DE-R 1681-1693 –*DB Regio/ üstra* (2006), para. 20.

¹⁶ Cf. BGH WuW/E DE-R 1797-1802- *Deutsche Bahn/ KVS Saarlouis* (2006); for older cases see BGH NJW 1995, 2168 – *Wandelhalle*; BKartA WuW/E DE-V 603 – *ÖPNV Göttingen* (2002).

¹⁷ Cf. BKartA, Tätigkeitsbericht 1993/94, p. 25, p.133 ff; BKartA, Tätigkeitsbericht 1995/96, p. 24, p. 139 ff.

¹⁸ See landmark decision OLG Düsseldorf, WuW/E DE-R 1473 – *Konsolidierer* (2005); BKartA WuW/E DE-V 1023- *Konsolidierer* (2005).

¹⁹ Cf. for example BGH WuW/E DE-R 2327- *Kreiskrankenhaus Bad Neustadt* (2008).

decisive factor is the relationship between patients and hospitals. The patients are direct consumers of hospital services. They decide independently whether to go into a hospital, and if so, which hospital to choose.²⁰

The Federal Court of Justice consequently clarified that the exception in Section 69 SGB V does not exempt mergers between hospitals from the merger control under the ARC.²¹ There is no indication in the wording or in the purpose or objective that the legislator tried to exempt mergers of hospitals from the ARC. The exemption shall only help the compulsory health insurance funds to fulfil their obligations with regard to ensuring the public health care mandate (*öffentlich-rechtlicher Versorgungsauftrag*). A hospital merger is generally not related to this mandate. This decision shows once more that the German Courts interpret the exceptions very narrowly and that as soon as the state engages in commercial activities in parallel with other market participants, the state is also subject to the ARC.²²

6. Conclusion

In their decisions, the Bundeskartellamt and the courts in Germany have been restrictive in making exemptions from the applicability of competition law to state-owned enterprises. German law does not contain a general exception for state-owned enterprises, such as a general “state action doctrine”. Thus, only in the cases where the statutory provisions exist and only where the state-owned enterprises do not compete, actually or potentially, with other market participants by offering or demanding services parallel to them in the market, an exception can be made. The current crisis should not be used to introduce more exemptions into national legislation; rather, governments should be committed to further reduce the scope of existing exemptions.

²⁰ Cf. OECD DAF/COMP(2006)20.

²¹ See Footnote 9. For details of the argumentation see BGH WuW/E DE-R 2327- *Kreiskrankenhaus Bad Neustadt* (2008).

²² See also *Monopolkommission*, Sondergutachten 45, Zusammenschlussvorhaben der Rhön-Klinikum AG mit dem Landkreis Rhön-Grabfeld, 2006, p.22 ff, with the same result and further arguments. The Monopolies Commission is an independent evaluative and advisory body assessing the development of competition law in Germany (see <http://www.monopolkommission.de/>).

GREECE

1. Introduction

Private and state-owned enterprises are treated equally under Greek competition law in accordance with the EU law principle of competitive neutrality.

Law 703/1977 “On control of monopolies and oligopolies and protection of free competition”¹ clearly stipulates in Article 6 that “the provisions of the present law are also applicable to public undertakings or common utility undertakings”. Article 6 of Law 703/77, as in force, also provides that the Ministers of Finance and Development may, by joint decision, which is issued following the opinion of the Hellenic Competition Commission, exempt specific public undertakings or categories thereof from the application of national competition legislation, provided that these are of general importance to the national economy. Nevertheless, this provision has never been applied so far.

The Hellenic Competition Commission (hereinafter the “HCC”) has examined the competitive behaviour of public undertakings in several cases and in various sectors of the economy, such as in the field of energy (electricity and oil industry), water management, port services, air transport and telecommunications. The relevant cases concerned the engagement of public undertakings in prohibited agreements or practices in co-operation with private undertakings and the examination of possible abuses of dominant position.

2. Oil industry

Up to year 2008, Hellenic Petroleum S.A. (ELPE) was a state controlled enterprise. The HCC has examined the competitive behaviour of ELPE in the following cases.

In the year 2003,² the HCC investigated a decision of the Board of Directors (“BoD”) of ELPE, which brought about amendments to the contracts concluded between ELPE and oil trading companies, so that the latter would benefit from a more favourable rebate policy to be applied by ELPE for gasoline and diesel. The condition for this favourable treatment was that the validity of the contracts in question would extend to a three year period and the contracting parties would not fall in arrears throughout the period, during which they would remain in effect. The HCC’s investigation indicated that ELPE was not in a position to act independently of its competitors, customers, suppliers and consumers, as it faced strong competition by MOTOR OIL and PETROLA, -its competitors at the time, while its key accounts included -among others- the very powerful oil trading companies BP and Shell. Thus, ELPE was not found to have a dominant position in the relevant markets during the period under investigation. Furthermore ELPE was not found to have infringed article 1 of Law 703/1977³, as the rebates in question did not operate as exclusive supply agreements and were not in a position to affect the market structure.

¹ Law 703/1977 is the Greek Competition Act.

² HCC Decision 242/III/2003.

³ Article 1 of Law 703/1977 provides for the prohibition of agreements, decisions or concerted practices, which restrict or distort competition.

Upon request of the Minister of Development on 02.08.2006 the HCC initiated a sector inquiry⁴ in the individual markets for oil products (refinement, wholesale and retail trade) identifying the possible problems, which may jeopardize effective competition, and submitted its views for the purposes of a public consultation according to the procedure specified by Article 5 of Law 703/1977.

Taking into account the conclusions reached during the public consultation⁵, in 2007 the HCC issued a decision⁶ that describes the main problems that led to the distortion of competition in the three oil market segments. In the refinery segment, there were only two companies, namely the state company ELPE and MOTOR OIL (HELLAS) that covered 90% of oil demand in Greece, while the rest was imported by wholesale companies. The major problem here was connected to the existing compulsory oil reserves system. Due to this and other restrictions (i.e. lack of storage) a marketer (oil company, large end-consumer etc) could not easily import oil products. In the wholesale segment, the existing legal framework considerably impeded the replacement of Private Use Tanks with new ones of modern specifications. In addition, the minimum tariffs for transportation of liquid fuel by Public Use Tanks were by the legislation in force, which is explained by social policy but certainly raises questions of compatibility with competition law. In the retail segment, although competition was relatively strong, some problems did exist due to the existing legal framework (i.e. high fees for license contracts of fuel stations on national roads, fixed trading hours for liquid fuel service stations, zoning restrictions hindering the sale of fuel by supermarkets etc).

In this context the HCC ordered the domestic refinery companies ELPE and MOTOR OIL to price oil products destined for the domestic market at a price made known on the date of placement of the order and to notify the present HCC decision to the trading companies, with which each collaborated.

In order to assess the extent, to which the conditions of effective competition had been restored or to which it was necessary to modify the remedies imposed and to take more lenient or stricter measures, the HCC re-initiated an inquiry into the oil industry. The HCC re-submitted its views for public consultation⁷ and issued a second decision⁸ which imposed the following remedies on refineries: (a) refineries were obliged to notify the Ministry of Development and the oil trading companies of the cost of compulsory oil reserves for the oil products traded in the domestic (gasoline, diesel, heating oil) and international markets (aviation and shipping fuel); (b) refineries, which supply fuel to non-branded petrol stations that meet the conditions for direct access to the refineries, were obliged to price in a manner consistent with the legal provisions on direct access by the stations in question to the refineries.

In both decisions the above measures were to be implemented within 30 days from the publication of the present HCC decision, while in addition a pecuniary sanction of €10,000 per day of non-compliance was threatened.

⁴ Article 5 of the Competition Act provides for an exceptional tool whereby the HCC, acting *ex officio* or upon request of the Minister of Development, may conduct inquiries into a particular sector of the national economy. If the HCC finds that there is no effective competition in that sector, and that its ordinary powers under the antitrust and merger control rules are not sufficient, it can even take “regulatory measures of a behavioural or structural nature” to restore competition in the market. Such measures include the imposition of generalized duties of “transparency and non-discrimination” and the obligation that “pricing must reflect costs”. Non-compliant companies will be exposed to decisions imposing high fines ranging from €15,000 to 15% of the undertaking’s annual turnover.

⁵ The Public Consultation took place from 02.10.2006 through 03.11.2006.

⁶ HCC Decision 334/V/2007.

⁷ The Public Consultation took place from 27.05.2008 through 27.06.2008.

⁸ HCC Decision 418/V/2008.

In the year 2007, the HCC examined the market for air fuel in Greece⁹, which consists of two distinct stages: (a) the wholesale market (from refineries to oil companies) and (b) the retail market (from oil companies to airports). The HCC investigated the joint adoption by the aforementioned domestic refineries of the decision to switch to the new aviation fuel price quotation indicator in the process of meeting the oil reserves obligation provided for by the legislative framework that resulted in a significant rise in the price of aviation fuel at the wholesale level. The HCC concluded that the simultaneous switch to the new indicator by the local refineries could not be justified by the particular market structure (oligopoly) and was thus not attributed to innocuous parallel behaviour. The refineries applied a common policy and there was mutual communication. The infringement in question was considered particularly serious by the HCC, which held that it concerned horizontal collusion (price-fixing), extending to the whole of the Greek territory. In this context the HCC imposed a €7,344,421 fine on ELPE and a €1,591,219 fine on MOTOR OIL. Moreover, the HCC ordered ELPE and MOTOR OIL (a) to calculate the cost of maintaining aircraft fuel security stock, (b) to maintain accounting data of the said cost and (c) to notify all trading undertakings, with which they concluded transactions on the Greek market, of the present decision within specific time-limits set.

3. Airline industry

In the year 2002, three Greek Travel Agents' Associations filed a complaint against OLYMPIC AIRWAYS -which was until very recently a state owned company- and AEGEAN/CRONUS, accusing them of a concerted practice and abuse of collective dominance¹⁰. According to the plaintiffs, the abovementioned companies jointly proceeded to a) the reduction of the commission payable to travel agents on issuance of air tickets to all domestic destinations and b) the abolition of all categories of reduced fares. The HCC ascertained that the airlines in question engaged in concerted practice thus infringing Article 1 of Law 703/1977 by jointly and simultaneously imposing the abovementioned measures on travel agents, which resulted in the considerable reduction of their profits¹¹ and in the increase of air ticket prices to the detriment of consumers. The HCC imposed fines on the airlines and its decision¹² was upheld by the Athens Administrative Court of Appeals.

4. Port services

The HCC examined the complaint filed against "PIRAEUS PORT AUTHORITY SA", i.e. "ORGANISMOS LIMENOS PEIRAIOS S.A." (hereinafter "OLP SA"), and "MEDITERRANEAN SHIPPING COMPANY S.A." (hereinafter "MSC"), a shipping line engaged in worldwide container transport, by "SARLIS CONTAINER SERVICES S.A.", a company operating in the market for containers' maritime transport (liner)¹³.

The complainants alleged that OLP SA abused its dominant position in the market for the provision of port services to undertakings operating in the containers' maritime transport business inter alia by a) imposing unfair prices and trading conditions regarding the quality and timely provision of its services, b)

⁹ HCC Decision 327/V/2007 – *International Air Transport Association (IATA) v. ELPE and MOTOR OIL*.

¹⁰ The examination of allegations of collective dominance (article 2 of Law 703/1977) was considered unnecessary by the HCC, due to the fact that concerted practice was established (article 1 of Law 703/1977).

¹¹ There existed no alternative solution for the travel agents, as the combined market share of the two airlines in question for domestic flights ranged from 85% to 94% in the years 2000, 2001 and the first half of 2002, while it reached 99% in the second half of 2002, when the competitor airline Axon ceased its operation.

¹² HCC Decision 249/III/2003.

¹³ HCC Decision 428/V/2009 – *Piraeus Port Authority S.A.*

applying dissimilar terms for equivalent services to other trading parties - users of the Container Terminal in comparison with the terms granted to MSC, c) refusing to enter into similar agreements with the rest of the users, who were thus disadvantaged, d) limiting the shipment of containers, in cases where Piraeus was used as destination or point of departure, e) failure to improve and modernise the Container Terminal facilities.

The complainants also alleged that the said agreement between OLP SA and MSC was prohibited by Article 1 of Law 703/1977 and Article 81 EC, to the extent that it constrained the ability of OLP SA to freely conclude similar agreements providing benefits to undertakings competing with MSC and that it contained performance standards hindering regular and efficient servicing of the rest of the users.

OLP SA is an undertaking controlled by the Greek State, which owns at least 51% of its shares. By way of its legal status OLP SA is a public undertaking under the supervision of the Minister of Mercantile Marine, whose objective is the service of public interest and which operates within the rules of private economy and enjoys administrative and financial autonomy. OLP SA has been granted the right of exclusive exploitation of the installations of Piraeus Port (including the Container Terminal) and for the construction and maintenance of the port facilities. It is therefore the sole provider of stevedoring and storage services (port services) of freight transported by sea in the area of Piraeus.

The tariffs and other terms and conditions for the provision of its services are determined by virtue of decisions of OLP SA's BoD and ratified by Ministerial decision. In this context its codified "Regulation and Tariffs of Stevedoring and Transportation Services" (hereinafter the "Regulation") has been issued and approved by the Minister of Mercantile Marine. The Regulation constitutes a state measure according to Article 86(1) EC. According to the Regulation, as a rule, priority is given to the servicing of a ship upon the order of arrival (namely on a first-come, first-served basis). However, it also provides for a number of exceptions, in which cases OLP SA may deviate from this rule.

OLP entered into an agreement with the liner company MSC (agreement No. 59/2002, hereinafter the "Agreement"). On the basis of this Agreement, MSC undertook the obligation to use the port of Piraeus as a hub port for transshipment and transit of cargo, while it enjoyed privileged treatment and priority in the provision of services by OLP¹⁴.

The HCC, in accordance with the relevant EC case law¹⁵ held that the provision of port services relating to container stevedoring does not correspond to a general economic interest of particular characteristics, which distinguish it from other economic activities. Thus the provision of port services is not exempt from the scope of rules governing the protection of free competition.

The relevant services market was defined as: a) the market for the provision of port services (stevedoring) and container storage services to containers in transit, and b) the market for the provision of port services (stevedoring) and container storage services to domestic (imported/exported) containers.

¹⁴ This agreement (59/2002) provided, *inter alia*, that:

a. [MFN:] In case more advantageous terms are granted to any other users, OLP SA shall grant the same to MSC. If in the broader area of OLP SA's jurisdiction, OLP SA or any third party offers similar services at better prices, OLP SA shall adapt its tariffs to the same levels with regard to MSC.

b. OLP SA undertakes the "moral obligation" [*sic*] not to grant privileges (including with regard to tariffs) to other shipping companies, if the return in exchange for granting such privileges is disproportionate in comparison to the provisions of the agreement between OLP SA and MSC.

¹⁵ Case C-179/90, *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA*, [1991] ECR I-5889.

The relevant geographic market was defined as: a) the Mediterranean with regard to the provision of port and storage services to containers in transit, b) the ports located in Central and South Greece (ports of Piraeus and of Volos) with regard to the provision of port and storage services to domestic (imported/exported) containers.

As to the assessment of possible infringement of articles 1 of Law 703/1977 and 81 EC, the Agreement in question was vertical; therefore emphasis was given on its effect on the market. The HCC unanimously reached the conclusion that the parties to the agreement did not intend to conclude an agreement having as its object the restriction of competition. However, the agreement had as its effect the prevention, restriction and distortion of competition¹⁶.

More precisely, certain contractual clauses¹⁷ were contrary to article 1 of Law 703/1977 and article 81 EC, to the extent that they materially reduced the capacity of servicing of other users leading to the application of unequal terms to equivalent transactions. The obligations OLP SA had undertaken towards MSC SA, namely the volume of cargo serviced, the priority given and the performance specifications resulted in insufficient, suboptimal servicing of the rest of the users. During the period in question the demand for stevedoring and storage services exceeded the capacity of OLP SA to fully and sufficiently provide these to all the users requesting them. A minimum level of services was not guaranteed towards the latter. This constituted an infringement of article 1 of Law 703/1977 and article 81 EC, resulting in a competitive disadvantage for the trading parties (i.a. increased delays during the stevedoring procedure leading to a decrease in the commercial value of the activity and in profit margins, damage to the company's profile and payment of storage charges for an increased duration) and, possibly, in cost increases for the consumers. Evidence showed an increase of MSC's market-share in both markets for containers in transit and domestic containers. The attraction of in-transit cargo could have been achieved by virtue of less onerous means, e.g. by increased capacity and efficiency on behalf of OLP SA.

Furthermore, the majority of the members of the HCC concluded that there was no proof of abuse of dominant position, i.e. infringement of articles 2 of Law 703/1977 and 82 EC, in the market for domestic cargo¹⁸.

¹⁶ With regard to the application of Commission Reg. (EC) No 2790/1999, OLP SA is a monopolistic provider of port services to cargo shipped via Piraeus and of access to the installations of the port, and is super dominant with regard to the product market of port services provided regarding domestic cargo from Central and Southern Greece (a market to which Agreement 59/2002 applied directly or indirectly). Thus the vertical agreement under examination was not presumed to be lawful on the basis of the Block Exemption Regulation and required individual examination. The clauses of the Agreement providing for privileged servicing of MSC's ships and performance specifications for OLP SA constituted an imposition of terms on the supplier, as to the quantities of the services provided. This situation verged on exclusive supply obligations regarding MSC, for which the exemption provided for in Article 2 of Reg. 2790/99 would have applied, on condition that the market share held by the buyer (MSC) did not exceed 30% of the relevant market, where it purchased the contracted goods or services. This was not the case here, as MSC holds the second position in the ranking of shipping lines engaged in worldwide container transport and is apparently dominant in the downstream market for domestic cargo. Even if Reg. 2790/99 would apply with regard to article 81 EC Treaty, the HCC withdrew the benefit of the Regulation in question in respect of Central and Southern Greece, as the Agreement brought about effects incompatible with Article 81(3) EC Treaty in the aforementioned part of the Greek territory, which has all the characteristics of a distinct geographic market (Council Regulation (EC) No 1/2003, article 29.2 and Commission Regulation (EC) 2790/99, article 7).

¹⁷ See footnote 14 above.

¹⁸ Piraeus, as opposed to other ports, is a destination with significant volumes of domestic cargo. Due to the fact that the markets for the provision of stevedoring services to domestic and in transit cargo are

In conclusion OLP SA was ordered to cease and desist from infringing articles 1 of Law 703/1977 and 81 EC and adopt all measures necessary for achieving the equitable and proportional treatment and efficient servicing of all port users. MSC was also ordered to cease and desist from infringing articles 1 of Law 703/1977 and 81 EC. OLP SA and MSC SA were ordered to inform the HCC within 60 days from notification of the decision in question of all measures adopted, which shall be subject to the HCC's approval. The HCC imposed a fine of €1,280,197.43 on OLP and of €1,283,871.27 on MSC and threatened the imposition of a penalty of €5,000 Euros per day in case of non-compliance.

5. Water management

In 2002 three companies¹⁹ filed a complaint against the “THESSALONIKI WATER SUPPLY AND SEWERAGE COMPANY S.A.”, (i.e. “ETAIRIA YDREYSEOS & APOXETEYSEOS THESSALONIKIS” (hereinafter “E.Y.A.TH.”). The complainants alleged that in 2001 E.Y.A.TH. abused its dominant position (article 2 of Law 703/1977) in the Thessaloniki market for water supply and sewerage services by excessively increasing its water supply pricing for industrial-manufacturing use, thus disadvantaging local industrial and manufacturing firms in comparison with competing firms operating outside the prefecture of Thessaloniki.

E.Y.A.TH. is a state owned undertaking²⁰ under the supervision of the Minister of Economy and Finance and the Minister of Macedonia-Thrace, listed on the Athens Stock Exchange.

E.Y.A.TH.'s pricing strategy is determined by joint ministerial decree of the Minister of Economy and Finance and the Minister of Macedonia-Thrace every five years in order to ensure the satisfactory performance of investments, which have been carried out.

The HCC held²¹ that E.Y.A.TH. constitutes an undertaking in the sense of article 2 of Law 703/1977, since it exercises a financial activity by providing water supply and sewerage services and assumes the economic and financial risk associated therein. It was also noted that the provisions of Law 703/1977 are also applicable in the case of undertakings such as E.Y.A.TH., which “operate for public interest purposes, are public utility enterprises and are governed by the rules of private economy”. National legislation has granted E.Y.A.TH. an exclusive right to provide water supply and sewerage services within the geographical regions, where its activity extends. E.Y.A.TH. therefore occupies a dominant position in the water supply market of Thessaloniki. However the HCC held that E.Y.A.TH.'s increase in pricing reflected significant investments it had undertaken, in order to modernise and develop its water supply and sewerage

interconnected and cannot be separated (apart from the pricing of the services), the way OLP SA treats a client operating mainly in the market for cargo in-transit cannot be completely separated from the effects this treatment may have in the market for domestic cargo. Given the above, OLP SA holds a dominant position in the market for stevedoring and storage services of domestic cargo. In examining the possibility of *cross-subsidization*, the HCC made reference to the test adopted by the European Commission in its *Deutsche Post* decision (COMP/35.141) and found that in the case at hand the condition is not met that the profits by the non-monopolistic, competitive sector (in this case: services regarding transit cargo) exceeded the stand-alone cost; therefore OLP has not abused its dominant position.

¹⁹ The companies in question are “VAFIA FINISTIRIA THESSALONIKIS S.A.”, “VOGIATZIS S.A.” and “APOLLON A.E.V.E.”.

²⁰ According to data as on 30.09.2005, which was taken into account by the HCC, the Greek Government participated in E.Y.A.TH.'s share capital at 74%, while natural and legal entities participated at 16.1% and 9.9% respectively.

²¹ HCC Decision 350/V/2007 – *Thessaloniki Water Supply and Sewerage Company S.A.*

network, and served as an incentive for further investment²². Furthermore the economic value of the services provided by E.Y.A.TH. could not be held as disproportionate to the fee it charges. In conclusion the HCC concluded that the unilateral increase by E.Y.A.TH. of the pricing of its services did not constitute an abuse of its dominant position according to article 2 of Law 703/1977.

6. Electronic communications

OTE, i.e. the Hellenic Telecommunications Organization, is the incumbent telecommunications provider in Greece, which was controlled by the Greek State until 2008²³.

In 2000, the HCC delivered an opinion concerning an auction of special fixed wireless access licenses²⁴. The question was whether competition law allows both state-owned enterprises, i.e. the Hellenic Telecommunications Organization (OTE) and the Public Power Corporation (PPC), to acquire special fixed wireless access licenses. The HCC noted that according to the principle of non-discrimination between the public and private sector, public undertakings are not exempt from the application of national competition law. Furthermore, not in all cases may public undertakings be considered as members of the same group of companies (here, of the State) acting in coordination instead of competing against each other, since this is not the case, where they have independent power of decision, irrespective of the way, in which their capital is held, or of the rules of administrative supervision applicable to them. Public undertakings may compete with each other and their competitive behaviour shall be evaluated by the HCC according to the same criteria applicable to the behaviour of private undertakings. In the abovementioned case OTE, which is the incumbent telecoms provider, had already acquired two licenses for the development of fixed wireless access services. The HCC concluded that the participation of PPC in the auction enhanced the competitive procedure: PPC had the intention to dynamically enter the market for fixed wireless access services making use of its own competitive advantages, i.e. its own wire network, in direct competition with the existing incumbent provider OTE.

In the year 2007, the Hellenic Telecommunications and Post Commission (EETT), following consumers' complaints regarding OTE's practices and invoicing policy in the broadband services market, ascertained that OTE had infringed national competition law by abusing its dominant position in the broadband market, in the form of a margin squeeze and imposed on OTE a fine of €20,000,000. More precisely, OTE retained a small margin between the wholesale price (the one used to sell ADSL broadband connections to the alternative operators) and the retail price (the one used to sell the same service to its subscribers) that it impeded alternative operators to cover their costs, in order to provide retail broadband services competitive to those of OTE. The above practices resulted either in the forced exit of the alternative operators from the market or in their incurring significant losses, given that the operators were compelled to sell their services at the same retail price as OTE. Such practices were found to hinder the business development of the operators, as well as their financial viability. In the long run, competition

²² It was held that the pricing of an undertaking's services within a particular market may be considered excessive, if it allows the undertaking in question to achieve higher profits than the profits it would achieve within a competitive market (extraordinary profits). The maintenance of the undertaking's profit at a higher level than the cost of its capital for an extended period of time constitutes an indicator of the practice in question.

²³ Following an agreement between the Greek Government and Deutsche Telekom, on 5 November 2008, each held 25% plus one share in OTE's share capital. Since 31 July 2009, following the sale of a further 5% of OTE's share capital by the Greek State to Deutsche Telekom, the Greek State now holds 20% and Deutsche Telekom 30%.

²⁴ HCC Opinion No. 3/III/2000.

would be damaged, which would result in high retail prices and -to a further extent- in restraining innovation and the offer of new services²⁵.

7. Energy

On 28.03.2003 the Board of Directors of PPC²⁶ issued a decision (effective as of 01.02.2003) regarding the amendment of the contractual terms for electric power supply concluded between PPC and its Eligible High Voltage Customers. The said decision raised concerns of an abuse of dominance by PPC²⁷.

The decision of PPC's BoD provided for the possibility to redefine the contractual maximum and minimum power within medium or minimum load zones when this is made possible by the technical supply boundaries of each client and the technical and operating potential of the system, under the condition that PPC remain the exclusive provider of the service in question.

The customers/end-consumers of electric power comprise of Eligible and Non-Eligible Customers. Articles 2 and 25 of Law 2773/1999 grant Eligible Customers²⁸ the right to choose an electricity provider in light of the gradual liberalisation of the Hellenic electricity supply market²⁹. However, evidence³⁰ indicated that whenever PPC became informed that Eligible Customers wished to use a different provider, it would state its will to proceed to the amendment of the terms of supply contracts concerning the calculation of the power consumed. This practice cancelled the unimpeded enjoyment of the right to choose a supplier, a fundamental element of the liberalisation of the market for electric power.

As PPC is the sole provider of electricity to Eligible High Voltage Customers in the Greek market with a market share of almost 100%³¹, it holds a monopoly position, which constitutes a sufficient

²⁵ EETT (Hellenic Telecommunications and Post Commission) Annual report 2007, chapter 3.3.6.

²⁶ PPC SA was established as a Société Anonyme following the conversion of the pre-existing Public Undertaking "PUBLIC POWER CORPORATION" and as general successor thereof, according to article 43 of Law 2773/1999 and Presidential Decree 333/2000, which constitutes its charter of incorporation. It now operates according to the above Presidential Decree and Law 2190/1920 on Sociétés Anonymes. The Greek Government participates in the share capital of PPC SA at a majority percentage not lower than 51%. According to Article 3 of its charter of incorporation the company's purpose is to exercise commercial and industrial activity in the field of energy in Greece and abroad.

²⁷ The HCC examined the case in question following its referral by the Regulatory Authority on Energy (hereinafter "RAE"), in order for the HCC to exercise its competence according to Law 703/1977, in case an infringement were ascertained.

²⁸ According to article 25 of Law 2773/1999 as of 01.07.2007, all consumers with the exception of those connected to isolated minor networks are Eligible Customers. Prior to this date the term "Eligible Customers" included all consumers with the exception of those connected to isolated minor networks and those purchasing electricity solely for their own household consumption (household customers).

²⁹ The electricity market in Greece was liberalized by way of Law 2773/1999 (as amended by Laws 2873/2000, 2941/2001 and 3175/2003). In this way the Greek legislative framework transposed Directive 96/92/EC and Directive 2003/54/EC concerning common rules for the internal market in electricity, which repealed Directive 96/92/EC.

³⁰ Letter No. O-5-403/20.01.2004 by RAE to the HCC and oral complaints by High Voltage Customers.

³¹ Eligible customers operating within the Greek territory are entitled to electricity supply from any provider established within an EU Member State, if it meets the conditions specified by Law 2773/1999. However the limited capacity of Interconnectors for Importing Electricity operates as an actual barrier, which leaves PPC -the sole electricity production company established on Greek territory- unaffected from competition deriving from companies established outside Greece.

indication of dominance³². The HCC held³³ that PPC abused its dominant position, thus infringing Article 2(a) of Law 703/1977 and Article 82(a) EC. However, the effective co-operation of PPC with the HCC's Directorate General for Competition during the investigation, as well as the fact that the PPC committed the infringement in question only for a very short period of time, i.e. 3 months, and ended it prior to the handling of the case by the HCC, thus not significantly affecting the business choices within the market in question, constituted mitigating circumstances³⁴ according to the HCC, which held that imposition of a fine was not justified. It therefore ordered PPC to cease and desist from committing the above infringement in the future. In case of recurrence of the infringement the current decision will constitute an aggravating circumstance with a view to possible determination of a fine.

Another interesting development is the European Commission's Decision of 5 March 2008³⁵ which found that Greece had infringed Article 86(1) in conjunction with Article 82 EC, by maintaining rights giving the state-owned electricity incumbent PPC privileged access to lignite. Greece had thereby allowed PPC to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering competitors from entering the market³⁶. The March 2008 decision called upon Greece to propose measures to correct the anti-competitive effects of that infringement.

Greece proposed a list of measures that it intends to adopt with a view to ensuring access to lignite and to lignite-fired electricity generation. Greece proposes to grant exploitation rights on the lignite deposits of Drama, Elassona, Vevi and Vegora through tender procedures to entities other than PPC. Greece has also agreed to ensure that the companies winning the tenders will not sell the lignite extracted from these deposits to PPC. On the basis of Greece's proposals, competitors of PPC will potentially access about 40% of all exploitable Greek lignite deposits³⁷. The European Commission is satisfied that the

³² Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, [1979] ECR 461; Case C-53/92P, *Hilti AG v. Commission*, [1994] ECR I-667.

³³ HCC Decision 389/V/2008 – *Public Power Corporation S.A.*

³⁴ The HCC has issued "Guidelines on the Calculation of Fines" (HCC Notice of 12.05.2006), where mitigating circumstances are outlined.

³⁵ See European Commission Press Release IP/08/386 of 05.03.2008.

³⁶ Virtually all lignite deposits in Greece are owned by the state, which grants exploration and exploitation rights to undertakings. PPC has obtained 91% (in terms of volume of deposits) of the current exploitation rights. PPC has also obtained exploration rights for two of the three deposits, for which exploitation rights are still to be allocated. It was Greece's policy to continue to grant lignite exploitation rights for electricity generation and it had indicated its intention to grant new exploitation rights for the three remaining deposits in the near future.

In Greece, virtually all lignite is used as a fuel for electricity generation in power plants situated close to the mines. Lignite is abundant in Greece, and is the cheapest available fuel in Greece. Indeed, lignite-fired electricity generation currently represents more than 60% of total generation and lignite-fired plants are by far the most extensively used power plants in Greece.

Competitors of PPC in the electricity market cannot currently compete efficiently with PPC in the Greek market, because they are denied access to sufficient quantities of lignite. The very limited additional generation capacity that competitors have built since the liberalisation of the market in 2001 is based on comparatively expensive energy sources. As a result, PPC continues to produce more than 85% of the electricity consumed in Greece. By maintaining quasi exclusive access to lignite in favour of PPC, Greece has allowed PPC to maintain its dominant position in the electricity wholesale market.

³⁷ The decision in question requires the tender procedures for the exploitation of the lignite mines of Drama, Elassona and Vegora to be launched at the latest within six months from the notification of the decision and requires that the allocation rights be effectively granted to the successful bidders at the latest within 12

implementation of the proposed measures would remove the anticompetitive problems identified in its March 5th 2008 decision and has therefore accepted the aforementioned commitments made by Greece to ensure fair access to Greek lignite deposits³⁸.

8. Application of merger control provisions to privatisation procedures

By way of a recent Notice³⁹, the HCC expressly stated that mergers, which take place on the basis of national legislation on privatisations (Law 3049/2002), are not exempt from the application of national merger control provisions. The said Notice therefore adheres to the principle of non-discrimination between public and private sector undertakings in the context of national and EC competition law.

9. Conclusions

The examples outlined above illustrate that the Greek competition law framework does in general provide the basis for a level playing field regarding competition between public and private sector entities, in the sense that its enforcement is neutral as to the ownership of companies, thus focusing mainly on the conduct of the undertakings in question.

However, it is important to remain vigilant, in order to identify policies, which may interfere with competitive neutrality by favouring SOEs over private companies, such as taxation regimes, financial market provisions, bankruptcy regimes, as well as the general regulatory environment. It is important for such distortions to be mitigated, as they may ultimately reflect on the competitive environment between SOEs and private undertakings.

Within this context, the HCC may *ex officio* issue an opinion⁴⁰ assessing the impact on competition and proposing the amendment or even the elimination of such policies favourable to SOEs.

months of the decision. It also clarifies that the EU and national policies on environmental and health protection in particular relating to lignite-fired generation are unaffected by the present decision.

³⁸ See European Commission Press Release IP/09/1226 of 06.08.2009.

³⁹ Notice of 03.06.2009 on “the application of articles 4 ff. of Law 703/77 on merger control in privatization cases according to Law 3049/2002”.

⁴⁰ The Greek Competition Act (Law 703/1977), as recently amended on 07.08.2009 by Law 3784/2009 (Official Journal Issue A' 137/07.08.2009), has reinstated the *ex officio* advisory capacity of the Hellenic Competition Commission. Article 8e § 1 of Law 703/1977, as in force, provides that the HCC may administer its opinion on matters of its competence either *ex officio* or upon request of the Minister of Development or another competent Minister or by chamber unions or associations of commercial or industrial unions.

KOREA

1. Definition and classification

Korea enforces the *Act on the Management of Public Institutions (hereinafter “the Act”)* to regulate general matters concerning public institutions including companies part of whose stakes are owned by the government. The Act regulates public institutions’ makeup of the board of directors, their qualifications, appointment & dismissal, terms of office, remuneration, accounting, and management assessment & supervision, etc. In order to be subject to the Act, the following 6 requirements should be met.

Public institutions under the Act on the Management of Public Institutions refer to

- An institution established by direct operation of another Act with an investment by the Government;
- An organization to whom the amount of the Government grants (including the revenue from its commissioned affairs or monopoly, if it is an institution to whom some affairs of the State are commissioned or a monopoly is granted by direct operation of a statute; the same shall apply hereinafter) exceeds one-half of the amount of its total revenue;
- An institution which the Government holds at least fifty percent of the outstanding shares in or secures practical control over in making decisions on its policies through the exercise of the power to appoint executives with at least thirty percent of such outstanding shares or otherwise;
- An institution which the Government together with an institution falling under one of subparagraphs 1 through 3 holds at least fifty percent of the outstanding shares in or secures practical control over in making decisions on its policies through the exercise of the power to appoint executives with at least thirty percent of such outstanding shares or otherwise;
- An institution which a single institution or two or more institutions falling under one of subparagraphs 1 through 4 hold at least fifty percent of the outstanding shares in or secure practical control over in making decisions on its policies through the exercise of the power to appoint executives with at least thirty percent of such outstanding shares or otherwise; or
- An institution established by an institution falling under one of subparagraph 1 through 4 with an investment by the State or the establishing institution.

The act classifies public institutions into public corporations and quasi-governmental institutions. Public corporations refer to firms whose self-generating revenue takes up a half or more of the total revenue, and they are again classified into market-based public corporations whose asset size reaches 2 trillion won or more and self-generating revenue accounts for 85% of the total revenue and quasi-market-based public corporations that are not market-based ones. Quasi-governmental institutions refer to public institutions other than public corporations. Quasi-governmental institutions generally conduct services commissioned by government rather than run business in the market.

Among various types of public institutions, public corporations are the ones that are significant in terms of antitrust law. Currently, there are 24 public corporations in Korea, with 6 market-based ones and

18 quasi-market-based ones. Examples of market-based public corporations are Korea Gas Corporation, Korea Electric Power Corporation, Incheon International Airport Corporation, Korea Airports Corporation, Pusan Port Authority, and Incheon Port Authority, while quasi-market-based ones include Korea Highway Corporation, Korea Tourism Organization, and Korea Railroad Corporation.

2. Application of antitrust law to public corporations

2.1 Application standards

Basically, any commercial activity that any public institutions, be it a public corporation or a quasi-governmental institution, conduct as an enterprise in the market are subject to the *Monopoly Regulation and Fair Trade Act (hereinafter "MRFTA")*. That is to say, both the MRFTA and the Act do not grant any exceptions to public institutions in application of the MRFTA.

But there are cases where some other laws guarantee public corporations monopoly rights or directly regulate acts of public corporations. For instance, regarding introduction of natural gas and its wholesale business, the Urban Gas Business Act grants Korea Gas Corporation a monopoly. It is not that the law explicitly stipulated the monopoly, but required approval by the Minister of Knowledge Economy(MKE) for introduction of natural gas and entering natural gas wholesale business. And in fact only Korea Gas Corporation got the approval, virtually ensured as a monopoly. The government concerned that hasty introduction of competition to this industry might bring about adverse effects like unnecessary redundant investment considering that introduction of urban gas and wholesaling it needs a large-scale storage facility and transport system¹. In another case, the Electric Utility Act grants Korea Electric Power Corporation a monopoly in power transmission, distribution and sales. Of course, the concerned law also does not stipulate the monopoly in the law, but the monopoly is ensured through approval by the MKE.

2.2 Application cases

2.2.1 Cases related exclusionary or exploitative abuses

As Korea's public corporations in most cases are guaranteed a monopoly by legal provisions or *de facto* monopoly, they have not been sanctioned by the MRFTA for their act with an aim to exclude their rivals. In other words, with the given monopoly, there is no need for them to act unfairly in order to exclude other enterprise.

Moreover, the government controls prices and output of public corporations given a monopoly in most cases, so there are little chances of them engaging in exploitive abuses such as price abuses. Because their prices are controlled by the government, calling for high prices is not easy for them. And even if they do so, it would be hard to be ruled as an abuse under the MRFTA, since the prices are likely to be set pursuant to the government regulation. Therefore, there are only few cases of exclusionary or price abuses by public corporations.

Yet there is one case of exclusionary abuses by National Agricultural Cooperatives Federation (NACF), which is not a public corporation in legal terms but virtually considered so. In addition, there are a number of exploitative abuse cases concerning public corporations' abusing superior trading position²

¹ As for now, as part of the Plan for Advancing Public Corporations, Korea is considering introducing competition to natural gas introduction and wholesale sector.

² They refer to acts of using one's superior bargaining position to exploit its transaction partners that are defined as abuse of trading position under the MRFTA.

and giving disadvantages to their trading partners, although they are not typical antitrust issues such as exclusionary abuses.

NACF's abuse of market dominance (2006)

The NACF enjoys a dominant status in the Korean chemical fertilizer distribution market. Whereas some 20 firms are competing in the chemical fertilizer manufacturing market, in its distribution market, the NACF is a foremost dominant firm³. Among chemical fertilizers, fertilizers applied to food grain are all distributed through the NACF and 47% of fertilizers for gardening go through the NACF.

Abusing this dominance in the distribution market, the NACF restrained other fertilizer manufacturers from entering the food grain fertilizer distribution market. Through the purchase contracts with food grain fertilizer manufacturers, it forced them to not to sell fertilizers directly via agencies or dealers but supply only to it. It terminated the contract with manufacturers who were found to break the terms, and even when it had to allow some manufacturers to sell directly, it unilaterally set the prices they sell to their agencies.

As a result, the NACF effectively restrained its rivals from entering the food grain fertilizer distribution market, maintaining its 100% market share. It can be compared to the gardening fertilizer distribution market where NACF's market share was stuck in the 40% range, and thus substantial competition was well maintained. This case shows how difficult it could be to introduce effective competition to the sector where the monopoly has been guaranteed. Reform of the system alone is not enough for meaningful competition, but thorough supervision of the existing dominant public corporations should be accompanied. The Korea Fair Trade Commission(KFTC) applied the provision of the MRFTA concerning excluding rivals⁴ as one type of abuse of market dominance to NACF's act, imposing corrective orders and a surcharge of some 1.5 million dollars. The NACF filed a lawsuit against KFTC's decision, but the High Court and the Supreme Court were consistent in upholding KFTC's decision on NACF's illegal act and subsequent remedies.

Local public corporations' acts of abusing superior trading positions (2009)

The KFTC had investigated into alleged abuses of trading positions by public corporations imposing various disadvantages on their transaction partners from the late 1990s to 2005. Enjoying monopolistic statuses in the relevant markets, public corporations tend to gain monopsony power in many cases. And abusing such power, they are likely to impose various disadvantages on transaction partners who provide them goods or services. Considering this, the KFTC launched investigations annually until 2005 into public corporations. The KFTC applied Article 23 of the MRFTA, a provision concerning abuse of trading position as a type of unfair trade practice. This provision aims to restrain any coercive acts of using trading position to impose disadvantages on or ask for providing benefits from transaction partners. Under the provision, proving unfairness in transaction process alone is enough to be illegal even without strong evidence of anti-competitive effects.

³ NACF's dominant status in the fertilizer distribution market has to do with the fact that until 1987, the government ran the fertilizer business for itself and the NACF bought the entire domestically produced fertilizers on behalf of the government to supply them to farming households. In 1987, this system came to an end when the fertilizer sales became open to other channels like agencies or dealerships of fertilizer manufacturers. But still until today, by practice, the NACF enjoys a superior status in the fertilizer distribution market.

⁴ An act of dealing to unfairly exclude competitors or act with the possibility of considerably undermining consumer interests (Item 5, Clause (1), Article 3-2 of the MRFTA).

Practices of public corporations had greatly improved after a series of the KFTC's investigations and sanctions, the KFTC viewed. However starting from 2008, voices were raised calling for supervision over public corporations and accordingly, from early 2009, the KFTC resumed probes into public corporations. This time around, the main objects of the probes were local public corporations owned by local governments, which have been rarely subject to investigations so far. KFTC probes revealed that 16 local public corporations abused their trading position in placing projects or commissioning services and gave various disadvantages to their transaction partners, and the KFTC imposed corrective orders and warnings.

Their major illegal acts include failure to pay for the cost accrued from additional project or service commissioned, failure to pay the interests for delayed payment, etc. These acts might not have been possible at all or might be brought before court if the public corporations had had an equal bargaining position with their partners. Yet, their transaction partners, most of them small in size, were forced to tolerate such acts. Filing a suit might earn them some compensation right away, but that would end the transaction for good, a bigger loss. As a matter of fact, many of the local public corporations are the only procurer of certain goods or services in the local areas, and thus they often enjoy superior bargaining position in most of the transactions.

Major Illegal Acts since 2000

Year	Major acts	No. of companies subject to remedies	Remedies
2001	Delayed payment, etc.	24 (local public corporations)	Corrective order, surcharge (632 million won)
2002	Unfair rents increase, etc.	2	Corrective order,
2004	Failure to pay compensation for delay, etc.	5	Corrective order, surcharge (20 million won)
2005	Failure to pay for the interests for delayed payment, etc.	5	Corrective order, surcharge (332 million won)
A	Failure to pay compensation for delay, etc	7	Warning, corrective order

2.2.2 Undue assistance cases

Article 23 of the MRFTA prohibits the act of unfairly providing benefits or substantially favorable conditions in dealing with affiliated firms as a type of unfair trade practices, and requires "large-scale internal transactions" over a certain scale to be publically disclosed after the resolution by the board of directors.

As the MRFTA is applied to any acts of public corporations, where they unfairly give favorable terms or benefits to their subsidiaries, the KFTC handles it as an undue internal assistance. In fact, between 1999 and 2003, the KFTC conducted wide-ranged probes into public corporations three times and revealed several internal assistances and impose remedies⁵. They supported their affiliates by concluding no-bid

⁵ The first probe in 1999 disclosed 11 public corporations on undue internal assistance and imposed surcharge of total 43.9 billion won; 5 public corporations with 39.5 billion won in 2000; and 7 public corporations with 3.7 billion won in 2003.

contracts at unfairly high prices, offering their real estate as security so that their affiliates get lower - interest loans, or putting off collecting rents in order to support their affiliates.

3. Conclusion

Currently, the Korean government is aggressively pursuing public corporation reforms, with MOSF leading the initiative. The gist of the current reforms is to make their management more efficient through restructuring or to privatize parts of them that can be better run by the private sector. The KFTC's stance is that as for sectors that are little to do with public good or natural monopoly, privatization of public corporations should be pursued in a more aggressive and fast manner, and the KFTC is continuously promoting this within the government.

Moreover, the KFTC will continue to monitor potential abuses of market dominance by public corporations and make more vigorous efforts to promote competition in the post-privatization market. That's because most public corporations are vested with superior position thanks to monopoly in the past, and thus hold power to exclude their rivals. And also for institutional reforms such as privatization to have a substantial effect, competition authority's close supervision should be ensued as well.

NETHERLANDS

1. Introduction

This paper, concerning ‘the application of antitrust law to state-owned enterprises,’ will give a general outline of the Dutch Bill ‘Markets and Governments’ (*Markt en Overheid*)¹, currently being debated in the Dutch Upper House of Representatives. This Bill amends the Dutch Competition Act² by introducing rules regarding the conduct of government organizations.³ The Bill will affect government organizations that either engage in economic activities themselves or via a government undertaking⁴ whose strategy may be set by those government organizations. The fundamental aim of this bill is to level out the playing field between private undertakings and governments that engage in economic activities. In light of this round-table discussion’s topic, it is interesting to note that, as already reflected by the title of the Bill, the Netherlands has chosen to tackle the problem directly by addressing the government organizations (rather than the undertakings through which they have acquired a seat in the free-market game of supply and demand). As a result of this Bill the NMa will be able to take measures against unfair competition⁵ by government organizations. However, enforcement action by the NMa is not possible in cases where the government in question has previously decided that certain economic activities concern a public interest. In order to define the provision of a particular good or service as a public interest, such a decision must be made by a democratically elected body such as a provincial council, local council, or regional water authority.

2. History

In the 1980s, the Dutch government faced soaring budget deficits. In an attempt to address these deficits, it reorganized government finance sustainability by diminishing the budget allocated to leading government organizations.⁶ In response, many of these organizations began to expand their activities in the free market in an effort to compensate for the loss in income. However, when government organizations initially entered commercial markets, insufficient consideration was given to the possibility these government organizations would have an unfair competitive advantage over private undertakings on the

¹ Wetsvoorstel aanpassing Mededingingswet ter invoering van gedragsregels voor de overheid (Kamerstukken I 2008- 2009, 31 354, A) Bill amending the Dutch Competition Act by introducing rules of conduct for the government (the Bill).

² De Nederlandse Mededingingswet (Act of 22 May 1997, Providing New Rules for Economic Competition) (Dutch Competition Act).

³ In this paper, the term government organization as referred to in the Bill, includes local councils, provinces, regional water authorities and quasi-autonomous administrative authorities.

⁴ A government undertaking is defined as a private undertaking which is controlled by (has its strategy set by) the government.

⁵ In this paper the term unfair competition is used as a translation of the Dutch term *oneigenlijk* and refers to improper behaviour, this term does not necessarily confer any illegal status to the behaviour.

⁶ Brief over Nader rapport inzake wetsvoorstel aanpassing Mededingingswet ter invoering van gedragsregels voor de overheid. <http://www.ez.nl/dsresource?objectid=156104&type=PDF>.

free market, thereby potentially causing in market disruptions and an uneven playing field.⁷ As the government's presence on the free market increased, so did the resistance regarding these inequalities.⁸

3. Analysis of the problem

Governments have traditionally been the supplier of so-called collective goods, which are goods and services that regular market parties do not, or cannot, supply due to the lack of a commercial market. Examples include national defence or the construction and maintenance of dikes. As an expansion of their activities, governments started to supply goods and services that private undertakings already offered, or could offer, on the free market. Examples include offering fire-safety trainings or providing passenger transport services. In principle, in the Netherlands, government organizations may act legally as a private undertaking. In such cases, the government organization becomes a direct competitor of private undertakings. Whether in a concrete case it is advisable for the government to act as a private undertaking depends on the political and administrative assessment of the government organization in question and to what degree such role-switching will actually help in attaining the government's objectives. One point to consider is that having the government act as a private undertaking does have its drawbacks, since competition may be disrupted if the government organization/undertaking makes use of unfair competitive advantages.

Unfair competition may arise when a government organization, offering goods and services on a market, uses competitive advantages it possesses by virtue of its public duties. For example, a government organization may have an unfair competitive advantage when it cross-subsidizes the goods and services it supplies to third parties as a private undertaking, with the public funds it receives as part of its execution of its public duties, thereby enabling it to off-set its losses.⁹ Another potentially unfair competitive advantage is the fact that in reality a government never goes bankrupt; this fact may lead to competitive advantages (e.g. a government undertaking will have an advantage over other private undertakings as it may be considered to be more reliable).¹⁰ Furthermore, a government organization may provide a government undertaking with information that the government organization has collected in the course of carrying out its public duties. A case can be made that, if the government uses these unfair advantages, markets will be disrupted. Existing sector specific legislation as well as European rules on State Aid only go so far in alleviating these problems.¹¹ In light of the above, the Dutch government has come to the conclusion that a new legal framework is needed in order to prevent unfair competition from occurring when governments act as private undertakings. This Bill is currently being debated in the Upper House of Parliament.

4. The Bill's proposals

The Bill's objective is to create as level a playing field as possible for government organizations whilst concurrently taking into account the government's specific public duties. Certain rules regarding the

⁷ Chapter 1.2 and 1.4.2 Voorstel van wet tot wijziging van de Mededingingswet ter invoering van regels inzake ondernemingen die deel uitmaken van een publiekrechtelijke rechtspersoon of die hiermee zijn verbonden (aanpassing Mededingingswet ter invoering van gedragsregels voor de overheid) Memorie van toelichting (15 februari 2008) (Tweede Kamer Vergaderjaar 2007-2008, 31 354, nr.3) (Explanatory Memorandum).

⁸ "Onderzoek naar de problematiek Markt en Overheid" PricewaterhouseCoopers, Den Haag, April 2005. (Investigation into the issue Markets and the Government).

⁹ Section 25i of the Bill.

¹⁰ Chapter 1.3 Explanatory Memorandum.

¹¹ See OECD-document Roundtable on regulating market activities by the Public Sector, background note by the Secretariat (Daffe/COMP (2004) 18, Paris, 17 May 2004, p.19).

conduct of government organizations and have therefore been incorporated into the Bill relating to the earlier mentioned risks to a disruption of competition.¹²

These rules cover the financing of economic activities, the sharing information that has been collected whilst carrying out public duties, and the separation of government and business roles. Given that these rules relate to competition, they will be included in the Dutch Competition Act, and will be enforced by the Netherlands Competition Authority (NMa). In principle, the Bill covers all industries where the government acts as supplier of goods and services. However, as a result of political choices and other regulatory measures, some industries do not fall under the Bill's scope, these include public education and research, public broadcasting, and, to a certain degree, sheltered workshops.¹³ In addition, this Bill does not apply to situations where European regulations on State Aid are applicable.

The proposed rules will be briefly discussed under the following headings.

4.1 *Obligation to include all costs*

Government organizations are required to set the prices for their goods or services at such a level that they will at least cover the costs per good or service.¹⁴ The obligation to include all costs means that both direct and indirect costs must be included in the product's price. The rationale for the mandatory calculation of the integral cost price *per economic activity* is that a private undertaking usually faces competition from the government on a specific product or service only – for example, the government may not face any competition on the market for the provision of access to public swimming pools, while it may face competition on the separate economic activity of providing tanning booths which it offers concurrently with the swimming pool facilities.¹⁵

In general, when considering whether products or services may be classed as separate economic activities, the question one is in fact asking is whether the goods or services provided are part of the same relevant market as the other goods and services offered by the government organization. Although the government organization may be offering the tanning studios in conjunction with public swimming pool amenities, these activities form two distinct markets. The costs for each good/service must therefore be calculated independently of each other. It is for this reason that the government organization must include all the costs of running the tanning studio (exclusive the swimming pool profits) when determining the price to charge the consumer for the tanning studio facilities. All direct and indirect costs are to be included: for example, costs for making financial resources available, costs of utilizing means of production, labour costs and other personnel costs. It is only by including all associated costs that private undertakings offering tanning studio enterprises may be enabled to compete on a level playing field with government organization active in the same market. The notion of cost coverage means that a number of choices must be made regarding the nature of the costs that are to be incorporated into the price (as well as to the economic method to be used in determining these costs).

When determining which aspects of a government organization ought to be considered when accounting for its costs, one must determine which parts of the government organization are operating in commercial markets and which are purely providing a social necessity. In the above example the market

¹² Chapter 6 Explanatory Memorandum.

¹³ Section 25h of the Bill. There are some exceptions to this rule, see Chapter 4 Explanatory Memorandum.

¹⁴ Section 25i of the Bill. For the sake of clarity it is important to note that although the bill only directly regulates the behaviour of government organizations, that through such regulation, it also exerts an indirect affect on government undertakings.

¹⁵ Chapter 4.3 Explanatory Memorandum.

for the provision of swimming pool facilities might be classed as a social necessity, while the market for tanning studios would be considered a commercial market.

The Bill stipulates that a set of more detailed rules, regarding the obligation of government organizations to include all costs,¹⁶ will also be drawn up by a ‘general administrative regulation’ (*Algemene maatregel van bestuur*). These detailed rules are currently being drafted and will be published concurrently with the ratification of the Bill. The detailed rules regarding the cost stipulation will be similar to those which regulate State Aid.¹⁷ This complementary set of rules will thus serve as a benchmark for government organizations active on the free market, as well as for private undertakings and the NMa.

4.2 *Inequality of access to information*

For most market participants it is invaluable to gain access to information not commonly available. There is no objection to access to/the sharing of information, where such information is obtained and shared under a normally functioning free market. However, the situation is different when information is used that the government has obtained whilst carrying out its public duties using public funds. In this way government organizations have an unfair competitive advantage which may affect the level of the playing field.¹⁸

A further competitive disruption is the fact that the costs of gathering such competitively advantageous information are much lower for a government organization, as such bodies generally have free access to such information in their role as a public administrative body. The costs that a private undertaking would incur in order to obtain such information are generally calculated in the price to the consumer, with the result that the price of the product or service is much higher and can therefore not compete with similar products offered by government organizations. Government organizations may also collect certain data whilst carrying out their public duties that is not (and should not) be made available to third parties. The Bill therefore makes clear that information that has been collected within the context of a public duty may only be used for commercial purposes if that same information is also made available to third parties, under the same conditions as those that apply to the government organization.¹⁹

4.3 *Necessity to maintain a distinction between public duties and operating a government-run economic business*

The Bill refers to the necessity of ensuring that duties and responsibilities regarding economic activities on the one hand, and the carrying out of administrative duties that are somehow related to those economic activities on the other hand, are not carried out by one and the same person. The fact that a government organization is engaged in economic activities in an industry in which the government also has statutory powers could result, for example, in suppliers assuming the government might be less strict in its assessment²⁰, than for private undertakings competing on the same market. When the government

¹⁶ These rules will govern which costs government organisations must include in the cost price and which integral costs the government organisations must pass on to government undertakings.

¹⁷ Communautaire kaderregelling inzake statsteun in de vorm van compensatie voor de openbare dienst (29 november 2005), PbEU C297, punt 16) (Community framework for State aid in the form of public service compensation).

¹⁸ Section 25k of the Bill.

¹⁹ Section 25k of the Bill.

²⁰ In this instance, assessment refers to the regulatory role the government has in authorizing, for example, permits, certificates and clearances.

organization has a competitive advantage of that nature, other market players will be unable to maintain their position, no matter how trustworthy they are or how good their products appear to be.

Furthermore, from the perspective of preserving a public administration's integrity, the Dutch government believes it would be wiser to avoid even the slightest appearance of a conflict of interest on the government's behalf. If roles are not separated, a conflict of interest may always seem to exist, even though the competitive situation may not necessarily have suffered from subjective or dishonest government conduct. The Bill therefore states that government organizations must ensure that in such situations the same individuals are prevented from being involved in the execution of the public duties and/or engaged in the economic activities related to those public duties.²¹

4.4 *Prohibition of preferential treatment of government undertakings*

As mentioned above, a government organization may allow its economic activities to be carried out by a government undertaking. As a government undertaking may be financed by public funds rather than by the profits it generates from its own business, unfair competition may result. This means that - to the disadvantage of other commercially operating businesses- the government may utilize public funds in order to subsidize its government undertakings by offering them goods or services at, or below, the cost price. Imposing the obligation to include all costs on these undertakings would leave them with little leeway to set their own prices. This Bill therefore seeks to ensure that the rules concerning government participation on the free market address the source of the competition (un)fairness, as directly as possible. A prohibition of preferential treatment by the government organization of its own government undertakings has therefore been included in the Bill.²² This prohibition not only covers the provision of financial resources, but also, for example, the benefits attached to allowing the government organization/undertaking to profit from the reputation of the government itself,²³ as well as supplying goods and services without charging at least the cost price thereof. The provisions discussed above under paragraph 1, regarding the calculation of the cost price, will also apply to the preferential-treatment prohibition.

5. Enforcement of the new law

As mentioned earlier, the Bill proposes to add several provisions to the Dutch Competition Act. The NMa is charged with the administrative enforcement of the Competition Act which, following ratification of the Bill, will also include the enforcement of the new rules for governments. The NMa will therefore have similar investigative powers over government organizations as it does over other areas of competition enforcement. The NMa is authorized to carry out enforcement activities at its own discretion, however it usually does so in response to complaints or tip-offs concerning alleged violations. When a violation of the rules has been established, the NMa may issue a declaration stating that it has found a violation. Should the NMa believe that such a declaration is insufficient, it is able to impose an administrative order subject to periodic penalty payments, forcing the government organization involved to terminate the violation.²⁴ The NMa's enforcement powers over government organizations are however, not entirely the same, as the Bill does not grant the NMa the power to impose fines on government organizations. This ability has been omitted from the Bill as it was considered prudent to prevent one administrative body from having the power to impose penalties on another.²⁵ The Dutch government believes that a public statement by the

²¹ Section 251 of the Bill.

²² Section 25j of the Bill.

²³ Section 25j, second paragraph of the Bill.

²⁴ Chapter 3.2.2 Explanatory Memorandum.

²⁵ Section B of the Bill.

NMa in conjunction with the threat of imposing an order subject to periodic penalty payments will prove to be sufficiently effective in engendering compliance with the law.

6. Important exception: services of public interest

A government organization may at times carry out economic activities in the context of its public duties, which provide a service of public interest. These services are different from ‘regular services’ because certain public interests that are involved (eg. quality, accessibility and supply reliability).²⁶ Under certain circumstances, strict enforcement of the rules, and the obligation to include all costs in particular, may impede the execution of public duties. For example, in order to increase the penetration rate of a good or service, the government organization may offer these goods or services below their cost price (e.g. offering swimming lessons or operating cultural events and/or businesses at or below cost price). The rules therefore do not apply insofar as a good/service of public interest is concerned. The relevant government organization’s judgment determines whether the exception to the rules will apply as a result of the fact that the goods or services offered fall under a public interest. The government organization needs to determine whether a service of public interest is concerned, whether the organization, or a part thereof, is charged with providing that service, and whether certain economic activities as well as the financing thereof using public funds are vital to the provision of that service. The decision concerning whether or not an individual economic activity qualifies as an activity of public interest will be made by the relevant democratically elected public body, such as provincial councils, municipal councils and regional water authorities.²⁷ Interested parties may influence this decision-making process, using the normal public-inquiry procedures or other instruments. Furthermore, interested parties may file objections against such decisions with an administrative judge.²⁸ The NMa is to follow that decision, and in practice steps back as regulator as a result.

7. Aspects raised during the debate in the Dutch Upper House of Parliament

Having been received somewhat critically at first, the Bill has been passed by the Dutch Lower House of Parliament and is currently being debated by the Dutch Upper House of Parliament. During the debate in the Lower House of Parliament, some of the critical questions addressed the fact that so many exceptions to the rules have been made, which raised further questions regarding whether the approach of tackling the problem of unfair competition by government organizations can still be effective. Questions were also posed regarding the problem’s exact magnitude: apart from being a theoretical problem, and taking into account the number of complaints, is the lack of transparency of costs really that big a problem in practice? An additional question raised was whether the obligations on government organizations, as set out in the Bill, will be sufficiently strenuous to achieve the goal of a level playing field between public and private undertakings that engage in economic activities.

Nevertheless, the Dutch Lower House of Parliament was convinced by the government’s arguments and approved the Bill. The Lower House agreed with the government that the distortion of competition by government organizations poses a serious problem; it was therefore decided that in view of the long-running debate regarding this distortion, that a legislative solution was desirable. The Lower House believed that the interests of small and medium-sized enterprises would be particularly served by the Bill. The Lower House was furthermore susceptible to the government’s argument that this Bill would

²⁶ Section 25i of the Bill which is based on articles 16 and 86 of the EC Treaty.

²⁷ Section 25h, paragraph 6 of the Bill.

²⁸ The judge will use a marginal test in this judicial review, as such decisions involve a large measure of discretion on the part of the elected public body.

be the first step towards a level playing field between private undertakings and government organizations, especially as it would face evaluation three years after its inception.

8. The Bill's anticipated effects

The new rules supplement general competition law. When the government assumes a business role, general competition law will also apply to its conduct. This raises the question of how the obligation to include all costs relates to the prohibition of abusing a dominant position in Section 24 of the Dutch Competition Act or Article 82 of the EC Treaty. According to case law, one of the ways an undertaking may abuse its dominant position is by precipitating foreclosure.²⁹ For example, this may be the case when, a dominant undertaking sets the price for its products or services below its average variable costs (or when in order to eliminate a competitor, an undertaking sets its price below its average total costs but above its average variable costs).³⁰

Current case law does not necessarily consider it to be an abuse of a dominant position if a dominant undertaking cross-subsidizes itself. At this stage, such conduct could only qualify as an abuse of a dominant position³¹ when an undertaking uses the profits it has earned on a market on which it has a dominant position, to cause foreclosure on another market. A government organization, which complies with the obligation to include all costs, can under no circumstances be seen as causing illegal foreclosure under Competition law. However, if a government organization conducts itself in accordance with the rules this does not necessarily mean that a dominant position is never abused within the meaning of Section 24 of the Dutch Competition Act or Article 82 of the EC Treaty, as there are naturally other ways for undertakings to abuse their dominant position (such as refusal to supply or tied-selling).

The law's effectiveness will depend in part on the effect publicity has on government organizations and on public accountability, since the NMa's enforcement efforts will not apply to situations where a government's economic activity (or part of an activity) qualifies as a public interest.³² In such cases, the NMa may deliver a finding stating that the government organization's decision to designate an activity as a service of public interest would have profound consequences for the market in question. However, it will still remain up to the government organization in question to decide whether this calls for a different approach.

The efficiency of the NMa's enforcement will also greatly depend on the exact drafting of the rules foreseen by the Bill, regarding the inclusion of all costs in the price of the product or service (see above). One of the challenges in drawing up these detailed rules is that they will have to apply to all government organizations, despite the fact that all government organizations do not necessarily have the same accounting system. Given that each government organization's autonomy should be respected when it comes to setting up an accounting system it is therefore considered undesirable to centralize the accounting systems. As a result, in an attempt to create a clear system of how to include all costs, efforts are now focused on identifying the common elements of all these different accounting systems.

²⁹ See for example (CFI) *Microsoft v Commission* Case T- 201/04 [2007] ECR II- 0000.

³⁰ See (ECJ) Case C-62/86, *AKZO Chemie v. Commission* [1991] ECR I-3359, para. 71–72; ECJ Case C-333/p4P *Tetra Pak II* [1996] ECR I-5951, para. 41).

³¹ For the definition of an abuse of a dominant position see Section 24 of the Dutch Competition Act and Article 82 of the EC Treaty.

³² See Section 8 Explanatory Memorandum.

9. In conclusion

The Bill has been passed by the Dutch Lower House of Parliament and is currently being debated by the Dutch Upper House of Parliament. If the Dutch upper House of Parliament passes the Bill, the law could come into effect in 2010. Due to transitional arrangements that have been included in the Bill, the rules' effects on current economic activities of government organizations will only become visible two years after the Bill's ratification. New activities that will be launched will immediately fall under the new rules. The NMa's role as enforcer of competition law across all markets will thus be advanced.

NORWAY

1. Public ownership in Norway¹

Economic theory depicts several good reasons for public ownership, first and foremost market failure. In addition, it can be a more effective (less distortive) way to obtain public funds than taxes, it can be an important governance tool and in some markets one more market player can be crucial for competition.

We can not say that one single strategy has driven the relatively high degree of Norwegian state or municipal ownership involvement. The ownership structure of companies in Norway can be attributed to a variety of factors rather than to one coordinated overall strategy. In some cases, state ownership has evolved as a result of chance events, or of assessments made and decisions taken during particular historical eras

A common feature of state-ownership, however, is the desire to safeguard various social and political interests (sectoral policy concerns). Norwegian public ownership has for example evolved out of a wish to control the use of natural resources at the national level and the need to develop infrastructure and related services linked to the development of the welfare state in a country with sparse population patterns and a challenging topography.

For instance, the concessionary laws on the acquisition of hydropower resources from 1906, which aimed at securing national ownership can be considered in that perspective. The founding of Den Norske Stats Oljeselskap A/S (Norwegian State Oil Company - Statoil) as a private limited company owned by the government in 1972 was motivated by the importance of Norwegian participation in the oil industry on the continental shelf and to build up Norwegian competency within the petroleum industry.

Many state-owned companies have also been established in order to separate the State's various roles. An example is the company Mesta AS (road construction) which, in 2003, was established when the construction part of The Norwegian Public Roads Administration was divested into a separate company, thus separating the State's role as planner and developer from that of producer, and opening this sector to competition.

The State also safeguards national ownership, and consequently head office functions, in key enterprises such as DnB NOR ASA (commercial banking) (34 per cent state ownership), Telenor ASA (telecommunication) (54 per cent), Statkraft SF (hydro electric power production) (100 per cent) and StatoilHydro ASA (oil exploration and production) (67.0 per cent).

Thus, the arguments used for state ownership in Norway can broadly be defined into four categories:

- **Sector policy concerns.** Ownership can be seen as an important means of attaining specific sectoral goals. For example, the state monopoly in the sale of wines and spirits is used to restrict and control availability of alcohol. Regulation of the provision of public services through ownership has also been an important argument for state ownership of infrastructure based companies such as Statnett (the national electricity transport grid).

¹ Main source: <http://www.regjeringen.no/en/dep/nhd/selected-topics/ownership/State-Ownership.html?id=382852>

- **Norwegian ownership in strategic sectors.** Maintaining Norwegian ownership in strategic sectors such as in the petroleum sector and the energy sector has been considered important for overall business activity.
- **Natural resources.** There is still a broad consensus on the need to maintain political control over the utilization and extraction of natural resources.
- **Head office location.** State ownership ensures that companies establish their head office in Norway, ensuring employment of key personnel and taxable earnings in the country.

During the financial crises and its attendant recession, it has been argued that a high degree of state ownership in major corporations has contributed to the relatively high degree of economic stability in Norway.

It is also worthy of mention that Norwegian municipalities are significant owners of enterprises. In Norway, the municipalities' have important responsibilities in the production of public services. This encompasses inter alia responsibilities for water supply and sewer as well as sanitation. Some municipalities and counties are for historical reasons (partly or fully) also owners of power production companies.

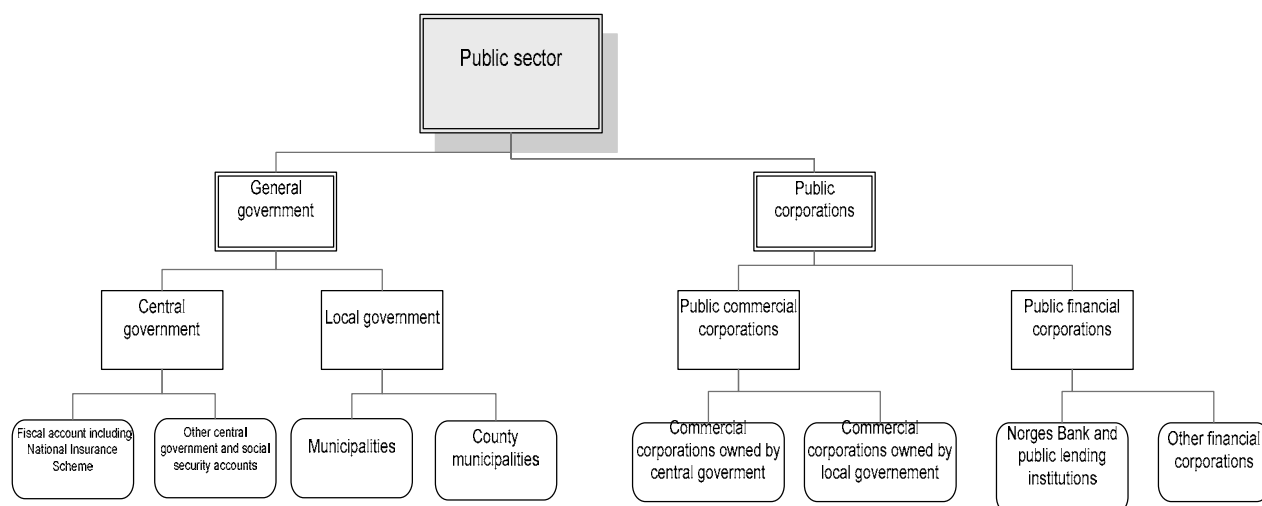
The municipalities have a large degree of freedom to decide how to organise their production of services. For instance, some municipalities have chosen to establish companies that compete with private companies over the right to produce public services in some areas. Figure below presents local government-owned corporations by industrial classification.

2. Definition and the importance of public corporations in Norway

2.1 Definitions

The public sector structure in Norway can be presented as depicted in Figure 1.

Figure 1. Public sector structure in Norway (source: adapted from Statistics Norway)



The public sector can be divided into two sub-sectors: general government and public corporations. General government can be divided categorised into central and local authorities. Both central and local

authorities encompass different non-commercial units that carry out a range of public tasks, for instance public hospitals, retirement homes and schools.

Public corporations are involved in commercial activities. A corporation is designated as *public* when it is controlled by the general government. Control means in this context that the public sector owns more than 50 per cent of the corporation. Examples of public corporations include municipal enterprises such as waterworks and refuse collection as well as companies quoted on the stock exchange, provided the central or local government owns more than half of the shares.

Public corporations can again be categorised into commercial and financial corporations. The commercial corporations include large enterprises such as StatoilHydro, Telenor, Statkraft and Hafslund. However, the majority of the non-financial corporations are municipal enterprises engaged in transport, property management, waste management and electricity and water supply.

Financial corporations include Norges Bank (Norway's central bank), and public lending institutions such as the Norwegian State Housing Bank and the Norwegian State Educational Loan Fund. In addition, central and local government own and control several pension funds, life insurance companies, general insurance companies and other financial companies, e.g. Norwegian Government Pension Fund – Global.

State ownership has taken a number of forms, ranging from portfolio investments or capital investments to direct ownership or full or partial ownership. Ownership varies from significant holdings in large OBX-listed corporations to small fully-owned enterprises. The State's ownership in more than 80 companies is managed by different ministries, and the Ministry of Trade and Industry has a coordinating and advisory role. The principles for governance will be expatiated on in our contribution to the WP3 session on corporate governance.

2.2 *Importance and sectors*

The Norwegian state and local government is today an owner of substantial economic assets. All together the ministries administer state-ownership interests in 80, fully or partially owned, companies, which together employ over 123 000 people.² The value of the State's shares on the Oslo Stock Exchange (OBX) amounted to total value of NOK 333 billion at year-end 2008.³ The total market value of OBX by the end of 2008 was NOK 768 billion,⁴ In addition to these numbers come companies owned by local government, but the market values for these companies are not readily available. Nevertheless, the figures clearly confirm the Norwegian public sector as the largest owner in Norway. Thus, the publicly owned companies manage large amounts of economic potential on behalf of the population, making these companies important operators in the economy.

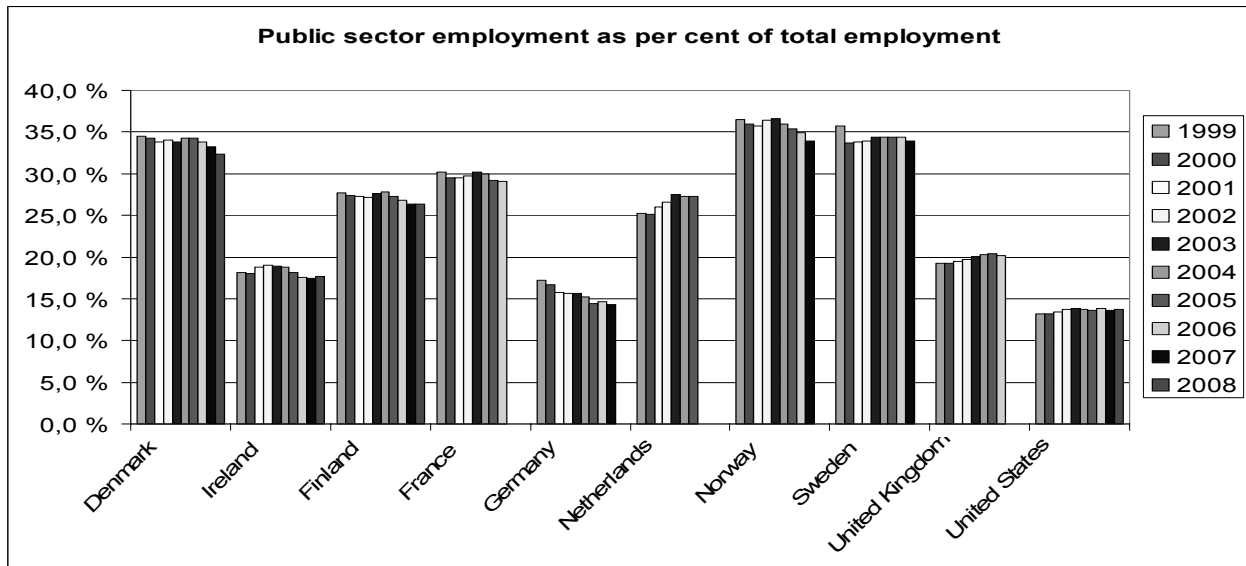
² Source for employment figures is ILO.

³ See http://www.eierberetningen.no/2008/index.php?seks_id=335&path=326|&element=Kapittel&lang=english

⁴ [http://www.oslobors.no/Oslo-Boers/Statistikk/AArsstatistikk/\(index\)/0/\(year\)/2008](http://www.oslobors.no/Oslo-Boers/Statistikk/AArsstatistikk/(index)/0/(year)/2008)

Figure 2 presents public sector employment as percent of total employment.

Figure 2. Public sector employment in some countries (source: ILO)

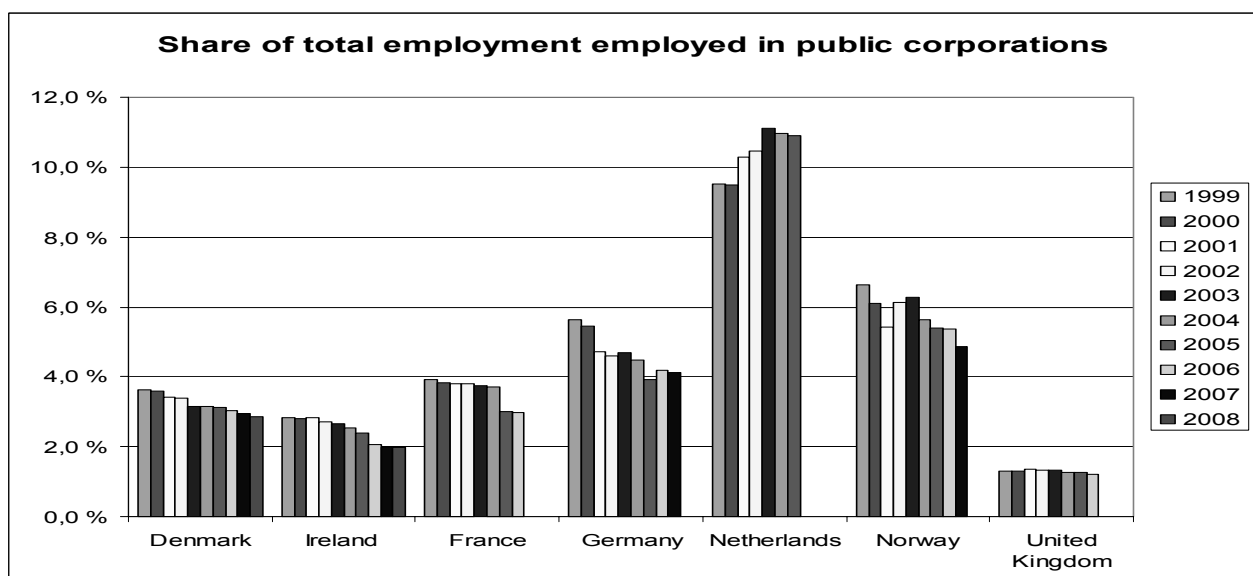


Here, we note that the three Scandinavian countries Norway, Denmark and Sweden have a relatively high share (of) public sector employment.

According to ILO statistics, approximately 123 000 persons were employed in public corporations in Norway in 2007, i.e. almost 5 per cent of total employment. These worked on approximately 3 200 different public (state and municipal) companies.

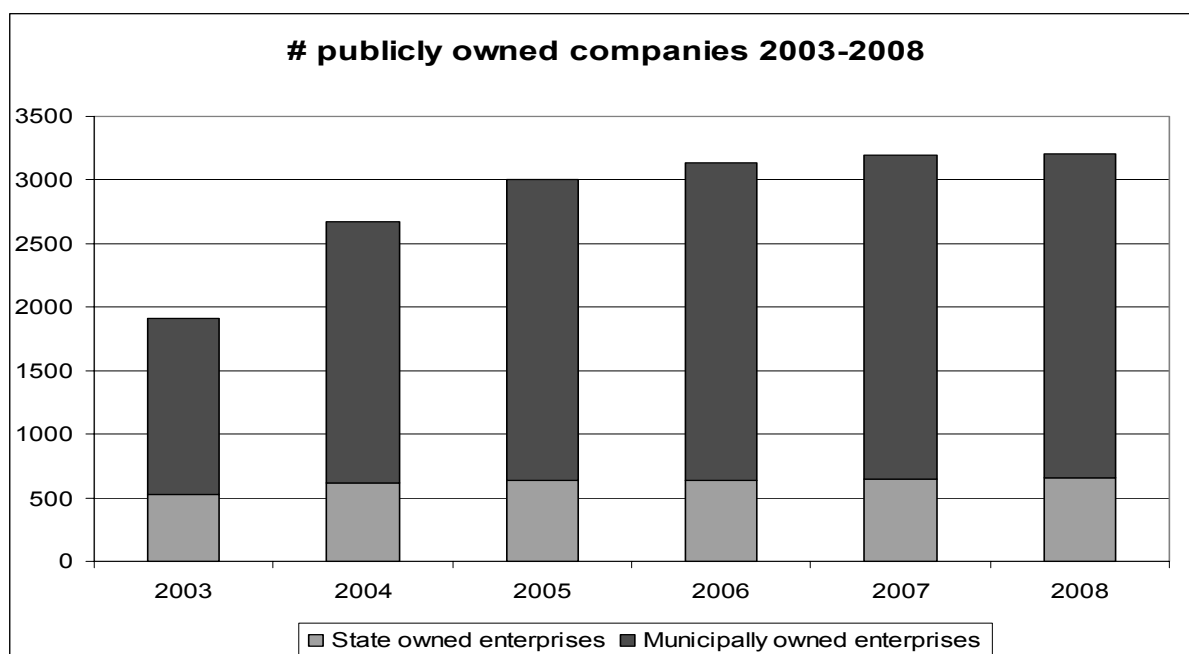
Figures 3 and 4 present percentage employment in public companies for those countries in the figure above where figures for number of employees in public corporations are available, as well as the development in the number of publicly owned companies in the period 2003 to 2008.

Figure 3. Employment in public corporations (source: ILO)



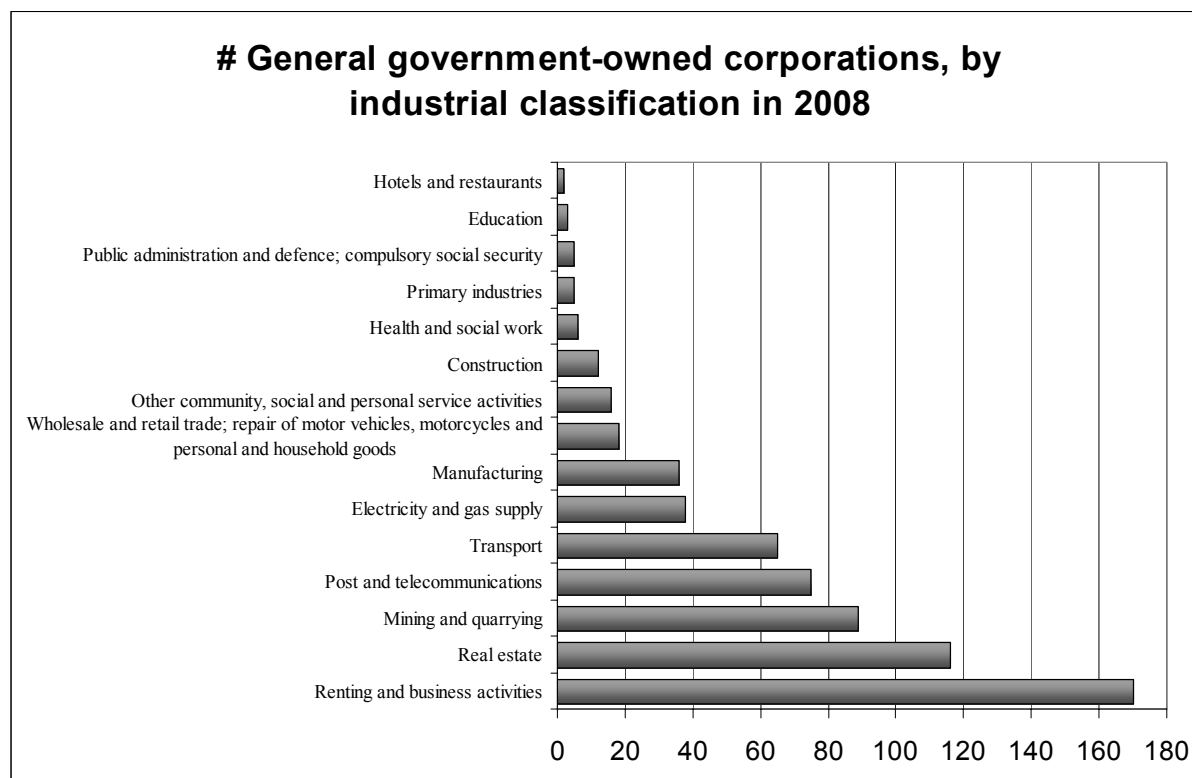
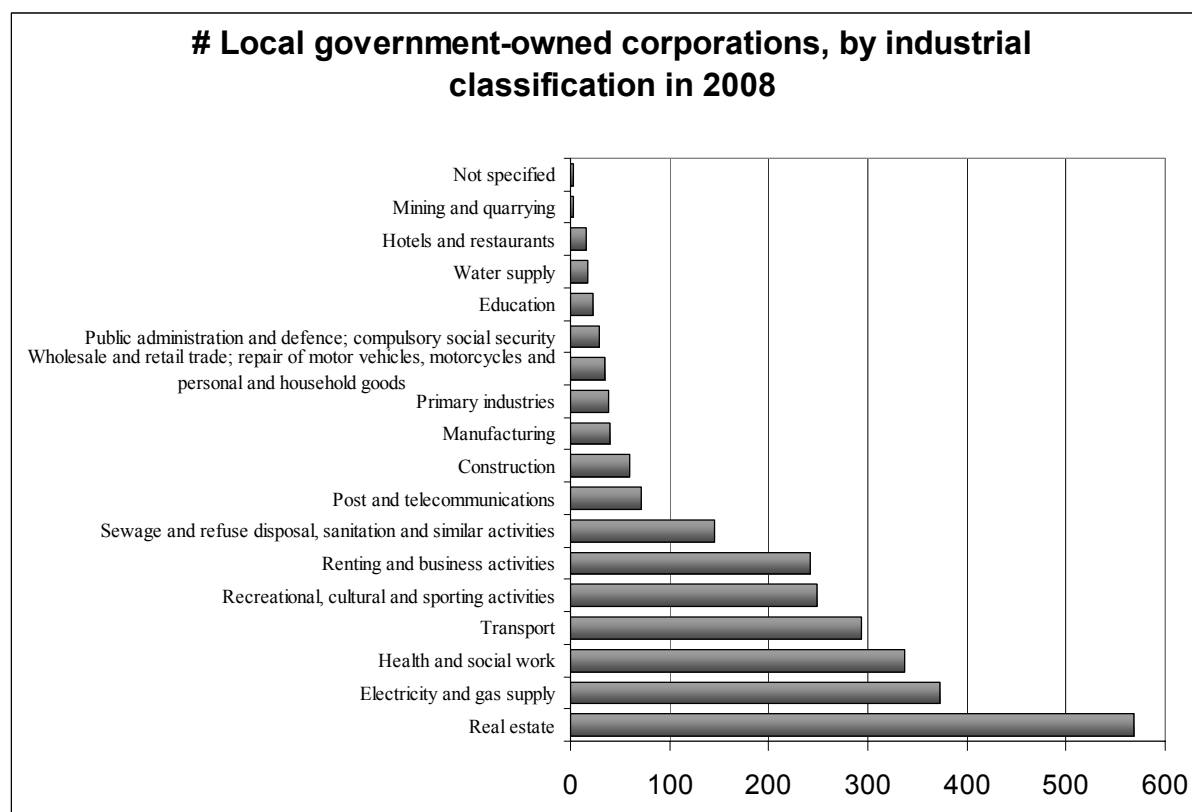
The diagrams show that Norway still figures relatively high, reflecting the public sector as an important owner. It is, however, interesting to note the downward trend in Norway as well as the other countries.

Figure 4. Number of publicly owned companies in Norway (source: Statistics Norway).



As presented by Figure 5 and Figure below, the corporations owned by general and municipal government are involved in wide range of activities, from oil and gas exploration, energy supply, transport, real estate operations and rehabilitation.

Obviously, when it comes to value, oil and gas is the dominating business area for central government, as this includes the State's Direct Finance Investment (SDFI) and Statoil ASA among others. Corporations in the transport and communication industry are the largest employers. These industries include Posten Norge AS, Telenor ASA and Norges Statsbaner AS. For local government, energy supply enterprises were the most profitable.

Figure 5. Number of general government-owned corporations in 2008 (source: Statistics Norway)**Figure 6. Number of local government-owned corporations in 2008 (source: Statistics Norway)**

3. Rules applicable to SOE's

Partially owned public companies are usually organized according to the Private Limited Companies Act (ASA/AS). A few fully owned state companies are designated state enterprises (Statsforetak – SF) and subject to the State Enterprise Act (Lov om statsforetak). In addition, it can be mentioned that there are some "special law companies", i.e. state-owned enterprises established according to special act.

SFs are wholly owned by the state, but the state does not hold limited liability in the company. Even though state-owned enterprises are subject to a different law, their management is carried out in accordance with the Private Limited Companies Act, with a clear division of roles between the owners, management, and board of directors, and in accordance with the currently held principles of corporate governance. It is important to note that public companies can be declared bankrupt or enter into composition proceedings.

Managing the State's share in these companies involves, amongst other things, nominating representatives to the companies' boards and corporate assemblies, representing the State at shareholder's meetings, monitoring the companies' financial results, formulating anticipated rates of return and dividends, and considering any eventual owner transactions within these companies.

When it comes to competition law, undertakings operating in Norway are obliged to comply with two sets of competition legislation: The Norwegian Competition Act and the competition rules applicable to undertakings of the EEA Agreement.

In the Competition Act, an undertaking means any *private or public entity* that carries out commercial activities. Thus, the Norwegian Competition Act applies fully to public corporations and state-owned enterprises in the same way as to private corporations to the extent they are involved in commercial activities.

The current Competition Act entered into force on 1 May 2004⁵ when it replaced the Act relating to competition in commercial activity (Competition Act 1993).⁶ The purpose of the Act is stated as to "further competition and thereby contribute to the efficient utilisation of society's resources". When applying the Act, special consideration shall be given to the interests of consumers.

The Competition Act is to a large extent harmonized with EU competition rules and includes prohibitions against cartels and abuse of dominance. A pre-merger notification system is introduced. The criterion for prohibiting concentrations of the Competition Act of 1993 ("the creation or strengthening of a significant restriction of competition") is carried on in the Competition Act of 2004. The NCA **shall** intervene if it finds that a merger creates or strengthens a significant restriction of competition.

Companies that cooperate in discovering cartels may have their (administrative) fines reduced (leniency).

4. Antitrust enforcement and SOEs

Terms of business, agreements and actions that are undertaken, have effect, or are liable to have an effect on competition between undertakings, are covered by the law; be it a private or a public undertaking.

⁵ Act on competition between undertakings and control of concentrations of 5th March 2004 No. 12 (Competition Act 2004).

⁶ Act relating to competition in commercial activity of 11th June 1993 No. 65 (Competition Act 1993).

Thus, mergers, abuse of dominance or illegal cooperation will not be treated differently if it involves public undertakings.

All agreements, decisions or concerted practices involving public undertakings, and which have as their object or effect the prevention, restriction or distortion of competition (section 10, corresponding to Article 81) will be treated in exactly the same manner as if the case had involved private undertakings.

In the same way, any abuse by one or more public undertakings of a dominant position (Section 11, corresponding to Article 82) will not be treated differently from a private undertaking. A case of abuse of dominant position involving general government owned companies is something the NCA has encountered in the domestic aviation market. In 2005 the NCA imposed a fine on Scandinavian Airline Service (SAS) for predatory pricing under the provisions of the Norwegian Competition Act, see box below.

Box 1. Case 1 Predatory pricing – the SAS air carrier group (200/2005)

On 8 December 2004, the Norwegian Competition Authority issued a statement of objection against the SAS air carrier group. Scandinavian Airlines System (SAS) is the multi-national airline of Denmark, Norway and Sweden, and the leading carrier in these Scandinavian countries. The Scandinavian countries own 50 per cent of SAS, and the Norwegian state's share is 14.3 per cent.

The NCA claimed that the carrier had abused its dominant position through predatory behavior on the Oslo-Haugesund domestic air route in May-June 2004. The Competition Authority warned that it considered imposing a fine of up to NOK 20 million (EURO 2.4 million). In investigating this case, the NCA made use of the material secured during the dawn raid carried out at the Oslo premises of the SAS Group.

The small carrier Coast Air started to serve the Oslo-Haugesund air route in June 2003, using an ATR 42-320 propeller aircraft with 48 seats and performing two to three daily round trips. The SAS Group was, in comparison, serving the route with Boeing 737 aircraft and five daily departures, offering a capacity of around 600 seats per day each way.

On 13 June 2004, Coast Air exited the market. The NCA found that while Coast Air was present in the market, the SAS Group was charging fares that did not even cover their average variable cost of operation on the route. Under the case law of the Court of Justice of the European Communities, in particular the well-known AKZO judgment, such behavior is to be deemed predatory. There was, according to the Norwegian Competition Authority, a strong presumption that the SAS Group had the intent of eliminating its only competitor on the Oslo-Haugesund route.

In Norway, abuse of dominant position by an undertaking had been illegal only since 1 May 2004, when the present Competition Act entered into force. The Act contains prohibitions corresponding to those laid down in articles 81 and 82 of the EC Treaty. Thus, although the predatory behavior of the SAS Group seemed to have lasted for about 12 months, only the last six weeks represented an infringement of the prohibition against abuse of dominance. This, and the fact that the affected market was quite small (less than 300 000 passengers annually), would have to be taken into account when the amount of the fine was finally determined.

In June 2005, the NCA decided to impose a fine of NOK 20 million (2,5 million euro) on the SAS air carrier group. The fine was imposed because the NCA found that the company had abused its dominant position through predatory behavior on a domestic air route between Oslo and Haugesund in May-June 2004. According to the Authority's decision, this resulted in the small carrier Coast Air having to withdraw from the route. Coast Air was SAS' only competitor on this route.

SAS did not accept the fine, and brought the Authority's decision to court. In July 2006 Oslo City Court concluded that SAS had not violated the Competition Act. The NCA decided to appeal against the judgment from Oslo City Court, where the Authority's decision to impose a fine of NOK 20 million on SAS was set aside.

However, prior to the start of the appeal proceedings, the NCA and SAS settled the case in December 2007. The background for settling the case was that the NCA, after a renewed assessment, decided to reverse its initial decision. The Authority maintained that SAS had infringed the Norwegian Competition Act but altered the decision as regards the fine.

The NCA will also intervene against a concentration involving public undertakings if the Competition Authority finds that it will create or strengthen a significant restriction of competition, contrary to the purpose of the Act (Section 16). This enforcement practice has been clearly confirmed through several cases, e.g. relating to mergers in the electricity market. In 2002 the NCA stopped/intervened in two acquisitions/mergers carried out by Statkraft, the major fully state-owned electricity producer, due to the strengthening of a significant restriction of competition.

According to Norwegian Competition Act, the Competition Authority shall also call attention to any restrictive effects on competition of public measures and, where appropriate, submit proposals aimed at furthering competition and facilitating market access by new competitors. If the Competition Authority so requires, a response from the public body responsible for the measure must be made within the deadline specified by the Competition Authority. The response must include inter alia a discussion of how the competition concerns will be dealt with. The NCA has basically two means to raise and follow up its concerns related to competition neutrality: Section 14 and Section 9 e of the Act, which are described in closer detail in our contribution to the WP3 session on corporate governance.

Two cases where the NCA expressed concerns with regard to restrictive effects on competition of public measures is presented below.

Box 2. Case 2 Norwegian Meteorological Institute (2002)

In a letter of concern to the Ministry of Labour and Government Administration, the NCA recommended divesting the Norwegian Meteorological Institute's commercial operations into a separate company. The NCA considered that with respect to competition in the market for provision of weather and climate forecasts, no barriers should be put in the way of Storm Weather Center AS and other potential competitors also offering their services. The NCA assessed that the Meteorological Institute's operations could create such barriers to competition.

In the NCA's opinion, the most appropriate method of removing these barriers was to divest the Institute's commercial operations into a separate company, for example a state-owned limited company. On the basis of this letter of concern from the NCA, the Ministry of Education and Research hired a consultancy firm (Statskonsult) to assess possible organizational solutions for the Meteorological Institute.

See the NCA contribution to WP3 session on corporate governance for further details.

Box 3. Case 3 The Bergen Area's Inter Municipal Waste handling Company

BIR is Norway's second largest waste management company and is responsible for waste handling from (for) approximately 320.000 inhabitants in the municipalities owning BIR. In 2005, the NCA received an approach from three private companies in the waste industry in the Bergen area. The companies claimed that the competitive situation in the waste sector was difficult, because BIR as a public waste disposal company operated in both shielded (BIR Privat AS) and the competitive market.

The NCA's express of concerns resulted in several changes to ensure competition on equal terms. The changes would result in a clearer distinction between competitive business and activities decreed by law. Furthermore, the changes would also help to reduce the possibility of illegal cross-subsidization and harmful under-pricing in the competitive market. The proposed restructuring would also help to ensure that tendering processes are implemented in a way that would be positive for the competition.

See the NCA contribution to WP3 session on corporate governance for further details.
--

These and other cases of advocacy the last ten years will be described in more detail in our contribution to the WP3 session on corporate governance.

POLAND

1. The definition and importance of SOEs

1.1 Please describe any legal definition of SOEs in your jurisdiction. What forms have state ownership (e.g. portfolio investment, capital investment, total or partial ownership, important minority shareholding) taken in your country? Please describe recent state involvement in your country's economy and the role played by SOEs. In which sectors are SOEs particularly important?

The legal basis for state owned enterprises' activity is the act of September 25, 1981 on state owned enterprises or a separate laws granting a particular enterprise legal personality. State-owned enterprise is defined as an independent, self-governing and self-funded entrepreneur having legal personality. The bodies of SOEs take their own business decisions and organize their activities in all business matters, in accordance with the law and aiming to perform SOE tasks effectively. State authorities can take decisions regarding SOEs' business activity exceptionally and only in the cases provided by the law.

An enterprise is established by the founding body: central public administration bodies (e.g. minister or a voivode), the National Bank of Poland or other national bank. State owned enterprises can be created either on general principles or as a public utility enterprise. (Public utility enterprises are intended primarily to meet the continued needs of the population. In particular, production or services in the field of transportation, the supply of electricity, heat and gas. Most of these companies are currently managed by local governments).

SOEs are entered in the commercial register of the National Court Register and the entry is equal to granting it legal personality.

Apart from the enterprises wholly owned by the State Treasury (e.g. Porty Polskie [Polish Ports]), there are public companies with the Treasury as a sole or majority shareholder. Minority shareholding by the state may also result in control over an enterprise by giving the state entities the right to designate board members. (e.g. PKN Orlen, a petroleum company dominant in the Polish market).

The state's ownership of SOEs is being significantly reduced. In the last few years progress in privatization and restructuring of state-owned enterprises has been observable in Poland. Many of the state-owned companies have already been sold, while those remaining are frequently in financial difficulty or are otherwise politically sensitive. These include state-owned companies in the coal, electric power, gas, chemical, and defense industries.

The most visible transactions were the sales of minority stakes in PKO BP, the largest Polish bank, LOTOS, the oil group and PGNiG, the gas company. A number of large state-owned companies had to initiate significant restructuring and labour reduction plans in order to adapt to increasingly competitive economic conditions.

SOEs' role in the Polish economy remains important, especially in a few strategic sectors. State-owned (or controlled) entities still dominate, most notably, in postal services, infrastructure, coal, chemicals, petrol production and utilities. Polish law identifies special obligations imposed on SOEs whose primary function is public utility, especially in the case of SOEs that hold a monopolistic position in the Polish market.

2. Rules applicable to SOEs

2.1 *Do the rules in your country applicable to private enterprises differ for SOEs? If so, how? Do SOEs enjoy any special treatment which would grant them competitive advantages over private firms?*

Generally, the same standards are applied to both private and public companies with respect to access to markets, credit and other business operations, such as licenses and supplies. SOEs used to enjoy special treatment regarding public levies. Tax authorities might not press troubled state-owned enterprises to pay taxes, to avoid forcing those enterprises into bankruptcy. Nevertheless, since EU accession, government activity favoring state-owned firms has received careful scrutiny from Brussels.

The commercial companies with state ownership are generally not exempt from general laws applicable to business organizations. Competition law, procurement law, and general bankruptcy laws apply to SOEs.

Although state enterprises are not favoured by the law, it is quite common for municipal undertakings to receive preferential treatment from municipalities (see next paragraph).

3. Antitrust enforcement and SOEs

3.1 *Have activities of SOEs raised any competition concerns? Please describe examples of competition problems in those markets where SOEs compete with the private sector. Please describe any competition investigations or cases involving SOEs and any issues that emerged from the application of competition law to them. How has advocacy been used to address distortions of competition by SOEs?*

According to the act on competition and consumer protection the definition of an enterprise is wide and also includes enterprises that provide public service. In fact, a large part of the decisions concerning abuses of dominant positions, relate to such entities. A majority of the Office of Competition and Consumer Protection's (OCCP) decisions in abuse of dominance involve local government (enterprises within the meaning of the act) and those enterprises whose sole owner is a district council (communal or municipal enterprises) such as: town refuse collection firms, waste storage sites, town water supply and sewerage networks, sewage treatment plant, cemeteries, and municipal public transport firms. The municipal services market is characterized by many enterprises which possess dominant positions in small, local markets. Typical cases involve municipalities (directly or through subsidiaries):

- refusing to grant “outsiders” access to a local waste collection market, raising their costs and shielding municipal waste collection companies from competition,
- forcing firms active in the local waste collection market to use exclusively the municipal deposition site, even though there are cheaper sites in the area,
- raising barriers to providing funeral services in a municipal cemetery by introducing discriminatory fees or outright bans on the activity of “outsiders”(it is also very often the behavior of private funeral services providers, entrusted with the management of cemeteries by municipalities),
- forcing customers seeking access to a local water supply network to use services of a municipal company with respect to necessary piping/construction works.

What those practices have in common, is shielding municipal companies from competition, by leveraging municipalities' position as a natural monopoly (supply of water) or an entity organizing a market (cemetery services, waste collection). Another important strand of cases against municipal companies involves imposing terms and conditions in contracts (usually concerning provision of water), which allow the municipal undertakings to obtain unfair gains at the cost of their customers.

Insufficient knowledge of competition law can also work the other way around – local governments fall victim of practices of businesses, such as bid-rigging. Therefore, adequate education of these market participants is of a crucial importance.

Cases concerning non-municipal SOEs are usually similar to those pursued against private undertakings. Majority of such cases involve state monopolies (actual or former), abusing their dominant position, typically by treating their customers in a discriminatory way.

One of the state monopolies which was prosecuted by the competition authority is the “State Forests” undertaking, which manages forests belonging to the state. It is a virtual monopolist in the wholesale supply of wood and was found several times to have abused its market position. Recent case involved the rules under which the wood was sold. There were two ways of obtaining wood from the State Forests: Internet negotiations and open Internet auctions. Internet negotiations were a primary way of obtaining wood for industrial purposes – as much as 80% of the wood was allocated on this basis - while the rest (usually lower quality wood) was sold via Internet auctions. The rules under which the wood was provided made it difficult for new firms to enter the market. The supplies of wood sold via Internet negotiations were allocated on the basis of past sales (usually a firm could not ask for more than it bought during the previous year), so entrepreneurs found it difficult to expand and outsiders were all but blocked from entering the market, as they had no history of past purchases and thus could only buy the leftover wood on the open auction. At the moment State Forests are changing their rules, considering moving most of their wood supply to open auctions.

Another case concerned imposing discriminatory airport charges by the State Undertaking Airports (PP Porty Lotnicze), the state-owned airport operator. As a result of the proceedings initiated upon a complaint from IATA, the undertaking was found to have abused its dominance in the market of “paid services related to making infrastructure of the airports available”, i.e. in the market for access to airport infrastructure. Airports had been groundlessly imposing different airport charges (landing, passenger, parking and special services charges) and navigation charges on the national and international carriers. The practice had been discontinued in the course of the proceedings.

Although some competition evolved as a result of organizational and structural changes which took place on the postal services market, Polish Post (Poczta Polska), public enterprise still holds a dominant position. Antimonopoly proceedings have been conducted against Poczta Polska for imposition of onerous agreement terms and conditions yielding unjustified profits. The practice consisted in obliging senders to pay an additional monthly fee for handling operations in regard to postal services paid in the form of a credit. The fees were calculated arbitrarily by the Post due to the lack of definition of “handling fees”. It was also shown that the charges which, according to the Polish Post, were additional/optional, in fact were standard and charged without proper analysis. A financial fine was imposed on the Polish Post.

Electricity market, majority of which is still in state hands, also witnessed several cases of anti-competitive behaviour. Several SOEs active in the distribution and sale of electricity were found to have abused their dominant positions in local markets. The cases concerned exploitative abuses (unlawful distribution and access fees), as well as exclusionary ones (raising costs of firms active in municipal lightning maintenance market by charging them unreasonable fees for access to infrastructure).

Finally, several abuse of dominance cases were pursued against the National Health Fund (NFZ), a public health insurance fund. Since it is an entity organizing public services, it has been recognized by the courts as an undertaking, which allows competition authority to control some of its activities. In most of the cases involving NFZ the competition authority came to a final conclusion that there was no infringement of the competition law. Majority of the cases where infringement was found, concerned applying discriminatory or unfair conditions to health-care contracts.

SOEs conflicts with competition law are not limited to abuse of dominance. In 2007 two petroleum companies: Grupa Lotos (state-owned) and PKN Orlen (state-controlled) were found to have concluded an anti-competitive agreement. The documentation gathered by the authority, mainly during an inspection carried out at the headquarters of both companies, showed that in light of decreasing demand for universal petrol U-95 (containing lead and used with older cars) and the consequent unprofitability of its production, PKN Orlen decided to withdraw it from the market, but considered it necessary to take this step simultaneously with the Lotos Group, in order to avoid customers' dissatisfaction and possible defection. U-95 was replaced with a special addition, which when mixed with unleaded petrol, made the latter a reasonable substitute of U-95. Lotos did not stand fully by the agreement and continued to sell U-95 petrol after the agreed date, which could be due both to a prompt reaction by the competition authority, and to a desire to liquidate inventories. The OCCP found that the explicit objective of the agreement was to prevent competition in the U-95 market and imposed fines on both companies.

4. Antitrust exemptions applicable to SOEs

4.1 *Please discuss any exemptions that SOEs enjoy from the application of antitrust law in your jurisdiction. Under what conditions can SOEs benefit from the so called "state action doctrine"? Are there any specific exemptions which apply to non-commercial activities of SOEs (e.g. public service obligations, universal services, services of general economic interest, etc.) and under which conditions these exemptions apply?*

The SOEs generally do not enjoy any special exemptions from the application of antitrust law. State action doctrine can shield SOEs if their anti-competitive behaviour was expressly mandated by the state and the SOE had no sufficient freedom of action to avoid acting in an anti-competitive manner.

SPAIN

1. Public enterprise in Spain

The privatisation programmes undertaken in Spain in the last decades of the 20th century have reduced the size of the State entrepreneurial sector. This has not been the case as regards the regional and local entrepreneurial sectors, which have gained weight as a result of the reassignment of administrative and economic responsibilities from the State government to the regional and local governments.

The Spanish legislation defines ‘public enterprise’ as any firm over which the public authorities may, directly or indirectly, exercise a dominant influence by virtue of ownership, finance or management rules. The same legislation distinguishes the following types of public enterprises:

- *Public trading entities*: Public entities which provide goods and services considered *of public interest* subject to compensation. They are governed by private law, except in their creation, their exercising of administrative powers, their statute and in respect of budgetary issues.
- *Public law entities*: Public entities governed by administrative law whose income derives, at least fifty per cent, of market transactions.
- *State trading companies*: Trading companies in which the State’s direct and indirect participation exceeds fifty per cent. They do not exercise any administrative powers.
- State trading companies in which the State holds control without a majority share in the capital. Holding control means having the majority of the votes or the right to appoint or dismiss the majority of the board’s members.

From a functionality perspective, a difference can be made between industrial public enterprises and *instrumental* public enterprises, meaning the entities in charge of implementing public interest policies.

Some of these instrumental public enterprises are considered *own means of management* of the Public Administration. Due to this consideration they can be appointed to provide goods and services to the Administration without the public tender that would otherwise be necessary, which has evident implications in terms of competition.

The SEPI Group agglutinates the industrial State enterprises, while the rest of State enterprises, of instrumental nature, depend from the ministries holding the public service responsibilities constituting the object of these public enterprises.

1.1 SEPI Group

Act 5/1996 on the creation of certain public law entities, created SEPI (*Sociedad Española de Participaciones Industriales* - Spanish Society of Industrial Stakes) as a strategic instrument for implementing the Government’s policy for the State entrepreneurial sector.

SEPI’s main goals are the following: making the shares and shareholdings assigned by the Government profitable; safeguarding the public interest, combining social and economic criteria; and adding extra value when applying the Government’s strategies and guidelines.

The existence of an only manager for the bulk of the State entrepreneurial sector has been justified on grounds of the advantages that would come out from a coordinated management, planning and control of the different enterprises; synergies and economies of scale; and preservation of a balance between autonomous management and government strategy.

In 2008, SEPI made an income of € 4,080 million (3.3% of Spain's GDP) and a profit of € 104 million. SEPI and its Group accounted a workforce of 33,273 people.

According to SEPI's own classification, the following enterprises in which SEPI holds the majority share can be mentioned:

- Market-oriented enterprises: NAVANTIA (shipyard), DEFEX (export of military material) and several in the nuclear energy sector.
- Enterprises providing public services (although they can also provide market-oriented services in competition with private firms): TRAGSA (engineering), MERCASA (food supply), EFE (news agency).
- Companies which play an instrumental role in promotion and development: INFOINVEST (real estate), SEPIDES (investment).
- Enterprises which are subject to restructuring plans: HUNOSA and MAYASA (both in mining).
- Enterprises in liquidation.

Besides, SEPI holds minority shares in a number of enterprises such as the listed EADS (aeronautics), Iberia (air transport), Ebro Puleva (whole food), Red eléctrica and Enagás (energy), and the non-listed RTVE (broadcasting), Hispasat (telecommunications) y P4R (export promotion).

1.2 *Enterprises that implement public interest policies*

As already mentioned, many State enterprises are attached to ministries. They provide public services for citizens or the ministry itself. ICEX (export promotion), Interés (promotion of foreign investment in Spain) and Red.es (encouragement of the use of new technologies), all of them attached to the Ministry for Industry, Tourism and Trade, are just three examples. As the *Instituto de la Vivienda de las Fuerzas Armadas* (Institute for the Army Housing), the *Fábrica Nacional de Moneda y Timbre* (National Mint) or Aeropuertos Españoles y Navegación Aérea, AENA (public trading entity attached to the Ministry of Infrastructure, in charge of managing civilian airports of general interest and infrastructures for air navigation) are examples of *own means of management* of the Public Administration, entitled to do in-house providing for that Public Administration as well as, in some cases, competing with private firms in certain markets (for instance, the National Mint in the market of digital certification).

2. **Competition law and public enterprise**

The Spanish Competition Act (Act 15/2007, of July 3) applies to both public and private undertakings without distinction¹. The same Competition Act defines an undertaking, subject to competition law, as any person or entity which carries out an economic activity, regardless of its legal form and the manner in which it is financed². Thus, the recipient of the prohibitions of articles 1 to 3 of the Competition Act

¹ As the previous Competition Act (Act 17/1989) did.

² Fourth Additional Provision of Competition Act 15/2007, of July 3.

(prohibiting anticompetitive agreements, the abuse of dominant positions and the acts of unfair competition which affect the public interest by the distortion of free competition) is any entity involved in economic activity, i.e. any natural or legal person who independently participates in the production or distribution of goods and services, regardless of its legal status, financing and corporate form, including both public and private nature.

But these prohibitions of articles 1 to 3 do not apply to conducts harboured by Law (as stated by Article 4 of the Competition Act). This exemption is applicable to public enterprises, but also to private ones. By contrast, the anticompetitive conducts emerging from the exercise of other administrative powers or caused by the action of public authorities or entities without this legal protection are not exempted³⁴.

Even if the law allows anticompetitive conducts that cannot be prosecuted by the Competition Authority, the law itself could be breaching article 86 of the European Treaty. In respect of public undertakings, undertakings granted with special or exclusive rights and undertakings that operate services of general economic interest, this article establishes that Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular the rules on competition.

3. Resolutions from the Spanish National Competition Authority

The Spanish National Competition Authority has referred several times to the application of antitrust rules to public undertakings⁵, as stated both in EU and Spanish rules on competition, and ratified by the EU Court of Justice.

When establishing the Competition Authority's competence to assess conducts of the Public Administrations the key is to identify if at the time they were acting as regulators within the scope of its responsibilities or just as economic operators. Only in the second case the conduct of the Public Administration would be subject to competition rules. This criterion emanates from the doctrine of the Spanish Competition Authority, upheld by the Courts⁶.

According to the above, the Competition Authority has prosecuted and fined several public undertakings. Some examples are hereby presented:

- *For participating in anticompetitive agreements:* In 1997, *La Lactaria Española S.A.*, a public enterprise attached to the Ministry of Agriculture, was sanctioned with a fine of € 1.01 million for leading a cartel of industrial dairy firms that agreed on the basic prices, quality bonuses and discounts for raw milk. Total fines reached € 6.61 million⁷.

³ “1. Without prejudice to the eventual application of the Community provisions regarding competition, the prohibitions of this chapter [those of articles 1 to 3] shall not apply to those conducts resulting of the application of an Act.

2. The prohibitions of this chapter shall apply to situations restricting competition which are derived from the exercise of other administrative powers or are caused by the action of public authorities or public companies without this legal protection.”

⁴ This is a state-action-doctrine, as mentioned in DAF/COMP/WP3(2009)2.

⁵ See for instance cases 325/93 Emorvisa and 361/95 Funerarias de Madrid 2.

⁶ As an example, case r 267/97 Tragsa 3, case r 409/00 Seguridad marítima, case r 447/00 Piñas Andalucía, case r 621/06 CST/ AENA, case r 572/03 Servicios Deportivos Logroño, case 2779/07 Consejo Regulador de Denominación de Origen Vinos de Jerez y Manzanilla de Sanlúcar.

⁷ Case 352/94, Industrias lácteas.

- *For abusing dominant positions:* La Sociedad Estatal Correos y Telégrafos, the State postal service, a 100% State-owned public limited company has been fined several times for abuse of dominance. In 2003 and 2004 the sanctions rose up to € 5.4 Euros⁸ and € 15 million⁹. In both cases, the enterprise had taken advantage of its dominant position in the market in which it held a monopoly to prevent new entrants in a connected liberalized market.
- *Commitments:* Case 2458/03 CORREOS/ASEMPRE. The public postal undertaking, Sociedad Estatal de Correos y Telégrafos, committed to the Spanish Competition Authority to implement prices above costs, thanks to a new accounting methodology.

The Spanish Competition Authority has elaborated on the aforementioned criterion in several resolutions. For instance, in the case *Ports of Andalusia*¹⁰, decided upon in 2008, the public enterprise acted as the regulator and as an undertaking in the same market, which, according to the Competition Authority, could cause severe distortions on competition due to asymmetric information problems and biased incentives in the drafting and implementation of the regulation. No sanction followed in this case since the abuse of dominance could not be proven.

Finally, an issue of concern of the Spanish Competition Authority is that coming from those public enterprises which, by virtue of their consideration as *own means of management* of the Public Administration, can be entrusted with the provision of goods or services regardless of the rules on public tenders which would otherwise apply.

This situation has been dealt with in the *Tragsa 3* case¹¹, which has sprung a deep debate. The Competition Authority decided to shelve the complaint filed against Tragsa, an engineering public enterprise, by two associations of private firms operating in the same field as Tragsa. The Authority found that, as long as Tragsa functioned as an *own means of management* of the Public Administration in the provision of in-house services, its behaviour was not autonomous but subordinated to the public authority. Moreover, Tragsa could not harm competition as the services it delivered were not subject to competition in the first place (the market did not exist for those services). The competition problems that could arise emerged from legal provisions, hence were not subject to the analysis of the Competition Authority from the perspective of antitrust rules. Only in the cases where Tragsa did not operate as such *own means of management* of the Public Administration, its conduct would be subject to competition law.

⁸ Case 542/02, Suresa-Correos.

⁹ Case 568/03, ASEMPRE/Correos.

¹⁰ Case R 718/07, Puertos de Andalucía.

¹¹ Case r 267/97 Tragsa 3.

SWITZERLAND

1. Introduction

Traditionally, states run economic activities in certain sectors such as infrastructure services, education and health services, though the fields of activity have changed over the past years. In parallel to the abolishment of former state monopolies, privatization initiatives transferred corporate control increasingly often from public to private hands in many countries. In line with this development, Swisscom – a Swiss company in the telecommunications sector – was partially privatized by a going public in autumn 1998. If totally or partially state-owned enterprises are providing products and services in competition with private sector businesses, or in areas where private sector businesses could potentially compete, competitive distortions might arise: public sector businesses might have advantages or disadvantages due to their government ownership status.

Against this background the subsequent presentation will briefly summarize the application of antitrust law to state-owned enterprises in Switzerland considering questions suggested by the OECD Secretariat. It starts with the legal definition and the forms of state ownership (see 2.1. and 2.2.). Afterwards there will be shown whether rules applicable to private enterprises differ for state-owned enterprises (see 3). Finally the question of antitrust enforcement and state-owned enterprises (see 4) as well as antitrust exemptions applicable to state-owned enterprises will be illustrated on a few examples (see 5).

The law governing undertakings that are parties to cartels or to other agreements affecting competition, that exercise market power or that participate in concentrations of undertakings in Switzerland is the Federal Law on Cartels and Other Restrictions of Competition (ACart).¹ The Acart came into effect on July 1, 1996 and was revised in 2003. The revised Acart entered into force on April 1, 2004. The authority that enforces the merger control provisions of the Acart is the Competition Commission.

2. Definition, forms and importance of state-owned enterprises

2.1 *Legal definition*

Although there is no general definition of state-owned enterprises (SOEs) in Swiss law, there are certain rules on legal forms of public enterprises. According to those rules enterprises are regarded as public in different cases:

- if they are constituted as public-legal forms as autonomous or non-autonomous institutions incorporated under public law;
- federal or cantonal offices are considered as public, if they render commercial services in addition to the execution of their sovereign tasks;

¹ Bundesgesetz vom 6. Oktober 1995 über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz), SR 251.

- and finally, enterprises are regarded as public, if they are subject to private law and totally or partially in public ownership.

Whether such enterprises are bound or not to universal service obligations (Grundversorgungsauftrag), does not make any difference. Rather they are seen as public, if they are controlled and strategically governed by public authority. Despite the delegation of certain tasks to enterprises under private law, the goal to achieve remains the same, although there are advantages as for example with regard to organization and terms of employment.

According to art. 2 para. 1 the ACart “(...) applies to private or public undertakings that are parties to cartels or to other agreements affecting competition, that exercise market power or that participate in concentrations of undertakings”, and further according to art. 2 para. 1bis ACart “(u)ndertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form”. In brief: the application of competition law is neutral as to ownership and organizational form of companies. Hence the lack of a general legal definition of state-owned enterprises in Swiss law does not hinder the enforcement of competition law.

Although competition law applies to the conduct of both private and public entities regardless of their legal form, its application is excluded, if “(s)tatutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of this Act” (art. 3 para. 1 ACart). Such statutory provisions include in particular provisions that establish an official market or price system and provisions that grant special rights to specific undertakings to enable them to fulfill public duties (art. 3 para. 1 lit. a and b ACart). This general formulation implies that the competition authorities are obliged to check on a case-by case-basis whether provisions which establish an official market or price system do exist and whether those provisions leave room for competition. The law proceeds on the assumption that an official market organization is only given when the legislator has the actual intention to exclude competition in a specific area. That means: as long as there is room left for competition, the ACart applies. Note also that the existence of an official price system does not necessarily mean that the products or services concerned are provided by state-owned companies or vice versa. For example, several official price systems are in place in the Swiss health sector, but still, services are often provided by both private and public companies.

Amongst all enterprises subject to art. 3 para. 1 ACart the ones operating not only in the fields regulated by an official market or price system, but also competing in unregulated fields in addition to that, are of particular interest. There are numerous such entities in Switzerland, on the national as well as on the cantonal level. The legal form of two important state-owned enterprises is shown afterwards.

2.2 *Forms and importance*

Public involvement in economic activities is characterized by a large number and considerable variety of forms. By the end of 2007 about one thousand participations by the state in different enterprises were found. These were just on cantonal level and corresponded to some CHF 8.3 bn in cantonal public accounts, in fact worth far more.² The following remarks focus on selected forms of state ownership of general interest out of the postal, health, transportation, telecommunications and electricity sector. In these sectors state-owned enterprises are particularly important.

² Urs Meister, Kantonsmonitoring: Kantone als Konzerne – Einblick in die kantonalen Unternehmensbeteiligungen und deren Steuerung, Avenir Suisse, Mai 2009.

2.2.1 *Autonomous institution incorporated under public law*

The legal form of autonomous institutions incorporated under public law will be shown on the examples of the Swiss Post and the University Hospital Zurich:

The Swiss Constitution stipulates that “the Confederation shall ensure sufficient and reasonable basic postal (...) services in all regions”. The Postal Organization Act (POG) sets the organizational framework to achieve this goal.³ According to art. 2 POG under the commercial firm name an autonomous institution incorporated under public law exists. “Autonomous” means in this context that the institution has legal personality and is capitalized to enable it to fulfill its objectives (art. 5 POG). In addition the Confederation sets the strategic goals for the period of four years and the Federal Council elects the board of directors, whereas they can be recalled by the Federal Council for important reasons (see art. 6 and 8 POG).

The organizational framework of the Swiss Post is set on the national level. Meanwhile there can be found identical legal forms of state-owned enterprises on cantonal levels, so for example – in the sanitary sector – University Hospital Zurich, which has the form of an autonomous institution incorporated under public law too.

2.2.2 *Corporation under special law*

The legal form of corporation under special law will be shown on the examples of Swiss Railway and Swisscom:

According to art. 2 Federal Railway Act (SBBG) under the commercial firm name “Schweizerische Bundesbahnen SBB” exists a corporation (spezialgesetzliche Aktiengesellschaft), whereof the Confederation is shareholder and holds all shares at the moment.⁴ Although according to art. 7 para. 2 SBBG the Federal Council is entitled to sell shares to other parties, it is obliged to keep the majority of capital and votes at anytime (para. 3).

Enterprises are regarded as public, if they are subject to private law and totally or partially in public ownership. Swisscom – a company in the telecommunications sector – fulfils these requirements. In autumn 1998 Swisscom was partially privatized by a going public. One third of all shares were placed with private and institutional investors, the rest is still kept by the Confederation. According to the law in force the Confederation is not only obliged to hold shares, but to keep the majority of capital and votes (art. 6 para. 1 TUG).⁵ By the end of July 2009 the Confederation held 56,9 % of outstanding shares, thereby being the majority shareholder.

Like the Federal Railway Company SBB, Swisscom is a corporation under special law (spezialgesetzliche Aktiengesellschaft); that means Swiss corporation law is applicable unless there are different rules in a particular act as for example TUG or SBBG. In contrary to SBB Swisscom is a listed company.

³ Postorganisationsgesetz, POG, SR 783.1.

⁴ Bundesgesetz über die Schweizerischen Bundesbahnen, SBBG, SR 742.31.

⁵ Telekommunikationsunternehmungsgesetz, TUG, SR 784.11.

3. Rules applicable to SOEs

3.1 General

As mentioned before application of competition law is neutral as to ownership and organizational form of enterprises in Switzerland. Basically the rules applicable to private enterprises do not differ for state-owned enterprises. Nevertheless there are many special acts concerning state-owned enterprises, a couple of which were named above. Below an insight shall be given in competition of state and private owned enterprises having regard to special treatment which would grant them advantages over private firms.

The examples based insight is divided into the following categories: enterprises operating partially based on a monopoly and partially in fields open to competition; enterprises executing sovereign tasks and rendering commercial services at the same time; and enterprises operating in fields totally open to competition.

3.2 SOEs operating in monopoly and competitive markets

3.2.1 Postal services

According to the Swiss Constitution “the Confederation shall ensure sufficient and reasonable basic postal (...) services in all regions. The rates shall be fixed according to uniform principles”. Still, the 1998 Postal Act introduced competition for a limited range of services, for so called “non-reserved” services (letters over 50 g since July 1, 2009, parcels and payment services)⁶. Furthermore, the financing of Swiss postal services is not assured by public subsidies; instead, the law prescribes that universal service obligations are to be financed by the revenues from reserved services and non-reserved services and services supplied in competition.

Therefore Swiss Post is operating in monopoly and competitive markets at the same time. Competitive distortions consisting of advantages as well as of disadvantages in comparison to the Post’s private competitors arise mainly due to universal service obligations by constitutional prescription (see for an example part 4 below), the granting of a monopoly for letters and the salaries of Swiss post’s employees, which are to be fixed according to the Federal Civil Servants Act. This act implies that salaries for the same work are to be equal in the whole territory whereas private competitors may adapt salaries to differences found in the respective branches and / or regions.

3.2.2 Railway freight transportation

Since 1996 the Swiss railway sector has been the object of step-by-step liberalization and a continuous market opening. By January 1, 1998 the market of freight transportation was completely liberalized. But as far as the market for passengers is concerned, national passengers transport is still exclusively reserved to the former monopoly operator Swiss Railway (SBB). In regional passenger transportation, a concession system grants monopoly rights and subsidies to various regional suppliers. Also, rail track infrastructure is heavily subsidized and owned by SBB and other regional monopolists. Although Swiss Railway and other infrastructure owners are obliged to give non-discriminatory access to train lines and infrastructure to competitors in freight transportation there is an obvious risk to draw advantage out of the monopolies in the fields of infrastructure, passenger transportation and the related subsidies (see art. 4 para. 2 SBBG). Additionally Swiss Railway are exempted from the liability to pay taxes and the legal obligation to insure (art. 21 SBBG), which gives them an advantage against private

⁶ See art. 3 Postverordnung vom 26. November 2003 (VPG), SR 783.01.

competitors. On the other hand Swiss Railway is obliged to pay salaries fixed according to the Federal Civil Servants Act (see art. 15 para. 1 SBBG). This is obviously a disadvantage compared to private freight transportation companies, which do not have to comply with this clause.

3.3 *SOEs executing sovereign tasks and exploiting commercial services*

Besides SOEs operating in the fields of monopoly and competition, there are SOEs executing sovereign tasks and rendering commercial services at the same time. In those cases customers demand services provided by state-owned-enterprises, based on which they reoffer their own services. Due to performance mandates (Leistungsauftrag) public enterprises are obliged to render commercial services to achieve a certain financial return (finanzieller Deckungsgrad). This system can be found with the Federal Office for Meteorology and Climatology MeteoSwiss (hereafter MeteoSwiss) or Swisstopo.

MeteoSwiss is a federal office in the Federal Department of Home Affairs, which is obliged by the Act on Meteorology to execute certain sovereign tasks. The act leaves MeteoSwiss the possibility to prepare meteorological data and exploit them commercially (see art. 1 and 4 para. 1 Act on Meteorology).⁷ The situation regarding to Swisstopo is fully comparable, but instead of meteorological data it deals with topographical data (see art. 8 and 19 para. 1 Act on Geoinformation).⁸

It is quite obvious that sovereign positions of state-owned enterprises like MeteoSwiss or Swisstopo might cause concerns regarding cross-subsidisation: such enterprises might use their sovereign position or public money to strengthen their position vis-à-vis competitors in the field open to competition. Hence there are usually clauses in the corresponding legislations, *in casu* art. 4 para. 2 MetG and art. 19 abs. 3 GeoIG, according to which services – amongst others – must not be provided below actual costs. Nevertheless there still remains an advantage, because state-owned enterprises in the form of a federal office do not have to make a profit and the state will guarantee for an eventual deficit.

3.4 *SOEs operating in competition*

Finally there are totally or partially state-owned enterprises operating in fields fully open to competition. On the national level the state is majority shareholder of Swisscom and owns Swiss Post to a hundred percent as mentioned above and on the cantonal level cantonal banks and electricity producers are often owned by cantons. Several cantonal banks benefit from a state guarantee, which makes them seen as a “safe haven” for customers in times of a financial crisis. Out of this fact they draw advantage with regard to privately owned competitors, which have to fund equity on their own and are at least formally not backed up by the state in case of liquidity crises. At the same time, some argue that many private banks benefit from an implicit state guarantee if their bankruptcy would impose systemic risks, i.e. if they are “too big to fail” or “too interconnected to fail”.

Additionally in these constellations competition issues might arise regarding the state operating as owner of public enterprises on one hand and regulating exactly these markets on the other hand. For example, government or parliament might be tempted to set regulations that allow publicly-owned companies to earn high rents, as these rents earned by public enterprises directly or indirectly end up in state treasury. Furthermore, the state is obliged to guarantee universal service in some sectors and could be risk-averse to allowing “too much competition”, as its own companies could lose market shares as a consequence and need financial funds in order to provide universal service. Additionally there might arise concerns regarding to state guarantee for deficit. Due to this guarantee state-owned enterprises might take

⁷ Bundesgesetz über die Meteorologie und Klimatologie, MetG, SR 429.1.

⁸ Bundesgesetz über Geoinformation, GeoIG, SR 510.62.

risks at the market they would not take otherwise. Since private enterprises do not have such guarantees, they operate much more cautiously in general.

4. Antitrust enforcement and SOEs

The leading case in Switzerland concerning antitrust enforcement to state-owned enterprise is a case involving the “Swiss Institute of Meteorology (SIM)”. This case from year 1999 illustrates numerous substantive and procedural issues when enforcing competition law to state-owned enterprises. It is an real “imbroglio” of state issues. This case prompted as well a revision of the ACart (cf. below).

4.1 Leading case

The Swiss Institute of Meteorology (now called MeteoSwiss, hereafter SIM) has been put in place by a Law (Act on Meteorology, MetG) which dated back to year 1901. This institute is integrated into the Department of Home Affairs with no legal distinct personality (see before 3.3). This law does not provide for a strict separation between non-commercial activities (basic data) and commercial activities. It neither provides a definition of what data fall into the non-commercial activity nor a separation on the accountancy level between the two areas.

As a result, all the services of the SIM were subject to an ordinance on fees. However, this ordinance of fees left the SIM some room to grant discounts and rebates for its services, which the SIM in praxis did.

In 1996, the SIM entered into a contract to supply weather data to the state-owned Swiss Broadcast Company (Schweizerische Rundfunk Gesellschaft, SRG). In July 1998, The SIM made an offer for similar services to Meteotest, a private weather forecasts enterprise, for a sum amounting to approximately twice the amount paid by SRG. Meteotest refused to pay this price and asked for interim measures by the Swiss Competition Commission. The Competition Commission issued some provisional measures in which SIM was prohibited to discriminate between trading partners until the substantive issue is decided. In the substantive decision, the Competition Commission attested SIM a dominant position in several markets related to weather data in Switzerland and prohibited SIM to discriminate between trading partners (abuse of a dominant position). SIM lodged an appeal against the Competition Commission’s decision before the Appeals Court. The Appeals Court upheld the appeal of SIM. The Department of Economics (to which the Competition Commission belongs) lodged an appeal to the Federal Supreme Court against the Appeals Court’s decision.

The Federal Supreme Court rejected the appeal of the Department and judged that the Appeals Court should not have entered into the matter as the Competition Commission’s decision was void as the Competition Commission was not competent. The Supreme Court made two points which are interwoven:

Substantive issue: It does not matter if emphasis is put on art. 2 para 1 ACart (enterprise) or on art. 3 para. 1 Acart (antitrust exemptions).⁹ Competition law applies to state-owned enterprises when they have a commercial activity with free market prices and a distinct legal personality. SIM has no legal distinct personality and all its services are subject to an ordinance on fees. Prices are not the result of competition but are fixed by an ordinance.

Considering the revision of the SIM’s decree which entered into force in the meantime, the Federal Supreme Court did not exclude that Competition Law could apply to MeteoSwiss as the revised law provides that in certain areas MeteoSwiss should act as a private and set its prices like a private enterprise.

⁹ Federal Supreme Court, Consid. 1 d) in fine, DPC /RPW 2001/1, p. 220.

Procedural issue : As SIM did not have a distinct legal personality, the Competition Commission could not issue a subpoena against a State agency. The State cannot be “double” party. Appeals against costs decisions of a state agency like the SIM should follow the public law. Notwithstanding the revision of the SIM’s decree, the law maker did not confer to SIM a distinct legal personality. As Swiss Meteo has still no distinct legal personality, a private action against the Federal State to challenge MeteoSwiss’ action in the commercial area should be possible. The question if competition law would apply to MeteoSwiss under the revised law has been finally left open by the Supreme Court.

The SIM case was politically contentious and during the 2003 revision of the Federal Law on Cartels and Other Restrictions of Competition Members of Parliament wanted to make sure that State agencies (with no legal distinct personality) competing with private enterprises like the SIM are subject to antitrust law in the future. Thus, the definition of enterprise has been enclosed more precise in art. 2 para. 1bis in the following manner: “(u)ndertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form”.

4.2 *Advocacy activities to avoid distortions of competition between private and state-owned enterprises*

Even if the more recent laws provide for a clearer separation between commercial and non-commercial activities of state-owned enterprises, all competition distortions are far from removed as the example of the postal services illustrates. In this advocacy example of 2008, one sees how difficult it is to strictly separate universal services mandate and commercial activities.

The Competition Commission ascertained that Swiss Post enjoyed competitive advantages when compared with private logistics companies in the area of postal services open to competition (letters and parcels over 100 g). In contrast to private logistics service providers, Swiss Post is exempted from the ban on driving on Sundays or at night due to its universal service obligation. The disadvantages for Swiss Post of being required to provide universal services, is however already compensated for by the monopoly that Swiss Post has over postal deliveries of up to 100 g (the threshold has been lowered to 50 g from July 1, 2009, see 3.2.1). In addition to these universal services with service level mandate, however, Swiss Post also provides services where it competes with private companies without having a service level mandate. The privilege enjoyed by Swiss Post also gives it the right to fill a quarter of its loading capacity with transit goods related to its competitive services. Swiss Post’s privileges lead to distortions of competition to the detriment of private providers. In a recommendation to the Federal Council dated 3 November 2008, the Competition Commission therefore proposed that the relevant provision in the Ordinance on Road Traffic Regulations be amended and reformulated so that it becomes competitively neutral. In response, the Department advised the Competition Commission that the exemption in favour of Swiss Post was necessary in order to be able to guarantee their universal service mandate and that it saw no need to act on the recommendation. In the meantime, the content of the recommendation has been taken up in a parliamentary request. The Federal Council will now have to explain to Parliament why there is no need for action, even though the regulations distort competition.

5. Antitrust exemptions applicable to SOEs

According to Art. 3, para. 1 ACart, the Act is not applicable to actions of enterprises in accordance with legal provisions that do not allow competition in a market for certain goods or services. This particularly concerns provisions which establish an official market or price system or provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.

In other words, the application of competition law does not depend of whether an enterprise is state-owned or not but if there is some room for competition. The competition authorities have to clarify it on a

case by case basis. The law is based on the assumption that an official market organisation only exists if it was actually the legislator's intention to exclude competition in a specific area. However, the competition authorities do not examine if a market failure actually exists nor if this exclusion from competition law is justified. When the application of competition law according to art. 3 para. 1 ACart is contended by the involved parties, a separate decision on competency can be required. However, this demand should be "timely, substantiated, and not manifestly unfounded"¹⁰. However, this clarification is far from trivial as it could be difficult to interpret the intention of the legislator in older laws, in particular because the concept of sovereign's tasks by the State can change over time. This aspect is illustrated by the case of electricity supply in Fribourg.

In 2000, Competition Commission opened an investigation to clarify whether Entreprises Électriques Fribourgeoises (EEF) abuses its dominant position when refusing the transmission of electricity by a third party (Watt) on the network owned by EEF in the canton of Fribourg.

EEF alleged that the Cartel Act is not applicable because EEF was entrusted by the canton of Fribourg with a legal mandate to supply power in this canton, which amounts to a public interest task. Furthermore, the electricity tariffs of EEF are subject to the approval of the said canton. They also argued that the transmission of electricity from third parties could jeopardise this task and endanger security of supply.

In a decision dated 17 June 2003, the Federal Supreme Court ruled that the monopoly on the operation and construction of the power grid does not imply a monopoly on the use of the network. Electricity prices are not regulated. The transmission of power from competitors through the power grid is neither detrimental to security of supply nor does it imply that EEF is per se an unprofitable business. If, under particular circumstances, the security of the energy supply were to be at risk, the government could intervene by excluding the application of competition law for political reasons (exceptional authorization according to art. 8 Cartel Act). There are therefore no legal provisions preventing the application of the Cartel Act. Therefore, the Federal Supreme Court stated that EEF was abusing its dominant position and ordered it to comply with the Cartels Act. Still, the Supreme Court's did not take effect because 1) the canton of Fribourg introduced a legal monopoly for the use of its Network and 2) EEF concluded a new electricity supply contract with its client and adapted the one of its competitor.

¹⁰ Federal Supreme Court in „Elektra Baselland“, DPC/RPW 2003, p. 704.

UNITED KINGDOM

1. Introduction

This submission addresses the application of the UK competition regime to government involvement in markets¹. The UK competition authorities have a variety of tools available which can and have been applied to address government involvement in markets.

Government and markets are tightly linked. Markets do not exist independently of government, which has a legitimate role in intervening in and shaping them. Government also intervenes more widely in markets to achieve other policy goals and to correct market failures. The ways in which it chooses to do so are crucial to both the effectiveness of its interventions and their consequences.

With respect to government involvement in markets generally, sections of this paper draw on a report which the UK Office of Fair Trading (OFT) recently published on ‘Government in Markets: why competition policy matters – a guide to policy makers’². The report sets out the rationale for government intervention and the impact that government policy can have on markets. In addition, it sets out how interventions might be designed to minimise any distortions on competition.

In relation to the application of the competition enforcement rules to the activities of state-owned enterprises (SOEs), this submission focuses on the OFT’s jurisdiction to apply the competition rules governing anti-competitive agreements and abuse of dominance. The OFT’s competition enforcement powers allow it to address anti-competitive behaviour by both privately-owned enterprises as well as state-owned enterprises. The OFT can and does apply the competition rules governing anti-competitive agreements and abuse of dominance to both privately-owned enterprises and state-owned enterprises equally.

This submission also touches on the application of market studies³ and market investigation references (MIRs) to SOEs. These tools are particularly useful where the competition enforcement rules do not apply. The OFT has specific powers to provide advice and make proposals to the UK Government. Government has given a commitment to respond within 90 days to recommendations addressed to Government in market study reports from the OFT under these powers and to recommendations from the CC following a MIR when these authorities do not have the necessary powers of remedy themselves, for example where legislative change is recommended.

1.1 Background

Government and markets are tightly linked, as described in the OFT’s report on ‘Government in Markets’. Markets do not exist independently of government, which has a legitimate role in intervening in

¹ This paper addresses the application of antitrust law (ie rules on behaviour and conduct) and does not deal with merger control.

² The OFT report ‘Government in Markets: why competition policy matters – a guide to policy makers’ is available on the OFT website: http://www.offt.gov.uk/advice_and_resources/resource_base/guidelines/

³ OFT market studies are carried out under Section 5 of the Enterprise Act 2002 (EA02) which allows a market-wide consideration of both competition and consumer issues.

and shaping them. Government also intervenes more widely in markets to achieve other policy goals and to correct market failures.

Government intervention – both globally and nationally– has more recently been observed following the financial crisis and economic downturn. Since the onset of the crisis, governments across the world have recently intervened in markets more actively than in recent history. This may be attributed, at least in part, to a feeling that markets, left to their own devices, may not deliver efficiency and stability.

In the UK, Government has sought to minimise the impact of the financial crisis and the economic downturn on both consumers and business, and to promote economic recovery. The UK Government has intervened in markets by increasing its spending in large capital infrastructure projects (such as national broadband cables) and by increasing investment in innovation and education to secure future economic growth. More generally, governments around the world have also intervened to help their economy respond to longer term challenges, such as energy and climate change, through, for example, providing subsidies for renewable energy production.

Naturally, there are costs and benefits associated with any government intervention in a market. Potential distortions to competition may not be immediately visible and experience suggests it takes time for the full consequences of interventions to emerge and that anticompetitive measures can be very difficult to reverse.

The OFT, in its report, has identified the importance for policymakers– whose focus tends to be on the more short-term benefits than on the long-term costs– to consider *all* of the costs and benefits of a policy intervention.

The mission of the OFT is to make markets work well for consumers and the OFT has a variety of tools available to achieve this goal, as does the UK Competition Commission (CC). The OFT's competition enforcement powers which address anti-competitive behaviour by state-owned enterprises are discussed in the following section.

2. Competition enforcement: state-owned enterprises

This section discusses how the OFT would apply competition law, under the Competition Act and Articles 81 and 82 EC, to anti-competitive agreements involving or abuse of a dominant position by state-owned enterprises.

The OFT has powers to enforce Articles 81 and 82 in cases involving anti-competitive agreements and abuses of dominance affecting trade between EC Member States. This is in addition to its powers to enforce the UK Competition Act 1998 which applies to anti-competitive agreements and abuses of dominance with the potential to affect trade within the UK.⁴

2.1 Application of competition law: concept of 'undertakings'

The prohibitions of the Competition Act 1998 apply to enterprises (whether state-owned or privately-owned) in so far as the enterprise constitutes an 'undertaking' within the meaning of Articles 81 and 82 of

⁴ The Competition Act 1998 is also enforced by the regulators for communications matters, gas, electricity, water, railway and air traffic services (under section 54 and Schedule 10 of the Competition Act 1998). These regulators can exercise powers under the Competition Act 1998 concurrently with the OFT in relation to their respective sectors. In addition, these regulators also have concurrent powers to apply Articles 81 and 82 EC.

the European Community Treaty (EC) and the UK Competition Act 1998, which is modelled on Articles 81 and 82 EC. The application of the prohibitions is therefore neutral to the ownership of the enterprise.

Article 81 EC and section 2 of the Competition Act 1998 prohibit agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition. Article 82 EC and section 18 of the Competition Act 1998 prohibit conduct by one or more undertakings which amounts to an abuse of a dominant position. Such activities within the common market which may affect trade between Member States fall within Article 81 and/or Article 82 EC; activities which may affect trade in the UK, or part of the UK, fall within the section 2 of the Competition Act 1998 and/or section 18 of the Competition Act 1998.

The term ‘undertaking’ is not defined in the EC Treaty or the Competition Act 1998, but its meaning has been set out in case law.

2.1.1 *Engaged in an economic activity*

European case law defines the concept of an undertaking as any entity engaged in economic activity, regardless of its legal status or the way it is financed.⁵

It is the offering of goods or services on a given market that is the characteristic feature of an economic activity.⁶ State-owned enterprises engaging in economic activities can be undertakings for these purposes⁷ as well as quasi-governmental bodies which carry on economic activities⁸.

When the State acts as an undertaking, the OFT can and does apply the competition rules governing anti-competitive agreements and abuse of dominance. The text box that follows provides a recent example.

Box 1. Cardiff Bus⁹

In 2008, the OFT found that a publicly-owned bus company (Cardiff Bus) – owned by a local authority – had engaged in predatory behaviour designed to eliminate a competitor.

The OFT considered that the publicly-owned bus provider Cardiff Bus competed directly with commercial bus providers and as a result was engaged in an ‘economic activity’. On this basis, the OFT considered that Cardiff Bus constituted an ‘undertaking’ for the purposes of the Competition Act 1998.

Cardiff Bus had responded to the introduction of a new ‘no-frills’ bus service by another bus company, 2 Travel, by introducing its own no-frills bus services which ran on the same routes, at similar times as 2 Travel’s services and made a loss for Cardiff Bus. Shortly after 2 Travel’s exit from the market Cardiff Bus withdrew its own no-frills services. The OFT concluded that Cardiff Bus had infringed the prohibition imposed under the Competition Act 1998 by engaging in predatory conduct which amounted to the abuse of its dominant position in the relevant markets.

⁵ Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR I- 1979.

⁶ Case C-180/98 etc *Pavlov* [2000] ECR I-6451, [2001] 4 CMLR 30, para 75.

⁷ See Case 155/73 *Sacchi* [1974] ECR 409, [1974] 2 CMLR 177; Case 41/83 *Italy v Commission* [1985] ECR 873, [1985] 2 CMLR 368.

⁸ See Case 258/78 *Nungesser KG v Commission* [1982] ECR 2015, [1983] 1 CMLR 278.

⁹ See Decision of the Office of Fair Trading No CA98/01/2008 (Case CE/5281/04): http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/cardiffbus.

In addition, the DG of Fair Trading (now OFT) has investigated Companies House¹⁰ (an executive agency of the UK Department for Business, Innovation and Skills) which is required by statute to maintain a register of information about companies but which also acts commercially in the markets for the provision of information.¹¹ The OFT considered that Companies House was acting as an undertaking for the purposes of the Competition Act 1998 in the market for the supply of refined data products¹², in that it had competed directly in that market, but concluded that it had not breached competition law.

This case also exemplifies that the State may be an undertaking for some activities, where the activity is of an economic nature, and not for others. Another example of this in the UK is the provision of health care by the National Health Services (NHS). The NHS ensures that all citizens have access to healthcare. Where NHS bodies generate private patient income through commercial or economic activity, in respect of those activities they would constitute undertakings under the Competition Act 1998 and/or Articles 81 and 82 EC. However, the provision of non-commercial health services would not constitute commercial or economic activity, as is further explained below.

2.1.2 *The concept of solidarity*

The European courts have, however, carved out an exception to the general rule that the provision of goods or services constitutes an economic activity: where the provision of goods or services takes place in the context of performing an exclusively social function, this does not constitute economic activity. The prohibitions in the UK Competition Act 1998 against anti-competitive agreements and abuses of a dominant position, and Articles 81 and 82 EC, will therefore not apply to state-owned enterprises that are performing an exclusively social function.

In determining whether the provision of goods or services is a purely social function the European courts have typically looked to whether there is some element of 'solidarity' in the manner in which goods and services are provided. Solidarity was defined by Advocate General Fennelly in *Sodemare v Regione Lombardia* as the 'inherently uncommercial act of involuntary subsidisation of one social group by another'¹³. In *Poucet v Assurance Générales de France*¹⁴ for example, the ECJ held that regional social security offices administering insurance schemes were not acting as undertakings but were acting according to the principle of solidarity and were therefore exempt from the application of competition law.

The European courts have generally required that the activity in question have also a non-profit making character or can be characterized as having a social function, even where the entity levies some form of charges¹⁵.

2.1.3 *Activities connected with exercising of the powers of a public authority*

Although it is clear that state-owned enterprises may qualify as 'undertakings' when engaged in economic activity, the ECJ has held that an entity would not be pursuing economic activity where it acts in

¹⁰ See the OFT website for further details on this case: http://www.oft.gov.uk/shared_of/ca98_public_register/decisions/companieshouse.pdf

¹¹ OFT decision of 25 October 2002, [2003] UKCLR 24.

¹² The OFT did not assess the other activities of Companies House.

¹³ [1997] ECR I-3395, [1997] 3 CMLR 591, para 29.

¹⁴ Case C-159/91 and 160/91 [1993] ECR I-637.

¹⁵ Joined cases *AOK Bundesverband* C-264/01, C306/01, C-354/01 and C-355/01 judgment of 16 March 2004.

the exercise of official authority in so far as it is pursuing ‘a task in the public interest which forms part of the essential functions of the State’ and where that activity ‘is connected by its nature, its aim and the rules to which it is subject with the exercise of powers...which are typically those of a public authority’.¹⁶

For that reason, in *SAT Fluggesellschaft v Eurocontrol*¹⁷ the ECJ concluded that Eurocontrol was not acting as an undertaking when it created and collected route charges from users of air navigation services.

2.1.4 Purchasing activities

The scope of the application of the competition rules to state-owned organisations, both as a purchaser of goods and services and as a provider has highlighted principal differences between the UK and EC cases. This issue arose in *BetterCare Group v Director General of Fair Trading*¹⁸ which is discussed in the text box below.

Box 2. Bettercare

The OFT received a complaint from BetterCare Group Ltd (BetterCare), a UK provider of residential and nursing care that a UK Health and Social Services Trust, had abused its dominant position by offering unfairly low prices and unfair terms in its purchases of social care from BetterCare. The Trust provided residential and nursing care to the elderly both directly and through a private contractor. Whilst the Trust charged for its services, it did not recover its costs in full.

The OFT considered that the Trust was not an undertaking for the purposes of the Competition Act 1998 when engaging in purchasing activity. On appeal to the UK Competition Appeals Tribunal (CAT) in *BetterCare II* the CAT held that the Trust was acting as an undertaking, both in the purchasing of services from BetterCare as well as in the direct provision of care.¹⁹ The CAT’s reasoning was that, in deciding whether the activity was economic in character, a key consideration was whether an entity is in a position to generate the effects which the competition rules seek to prevent.²⁰

However, the subsequent judgments of the CFI and ECJ cast some doubt on the CAT’s reasoning. In *FENIN v Commission* the Courts concluded that the nature of the purchasing activity had to be determined according to whether or not the subsequent use of the purchased goods is an economic activity.²¹ The CFI considered that where an organisation purchased goods, not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as an activity of a purely social nature, then it is not acting as an undertaking simply because it is a purchaser of those goods. This judgment was upheld on appeal to the ECJ²².

Clarification through further case law on the scope of the application of the competition rules to state organisations in this context may be needed in order to settle these differences.

¹⁶ Case C-343/95 *Cali e Figli* [1997] ECR I-1547, [1997] 5 CMLR 484, para 23.

¹⁷ Case C-364/92 [1994] ECR I-43, [1994] 5 CMLR 208.

¹⁸ Case No 1006/2/1/01 [2002] CAT 7, [2002] CompAR 299.

¹⁹ Ibid, paras 191-194.

²⁰ Ibid para 190.

²¹ Case T-319/99 *FENIN v Commission* paragraph 36.

²² Case C-205/03 P [2006] ECR I-6295, [2006] 5 CMLR 559, paras 25-26.

2.2 Conclusion

Whether the UK and EC competition prohibitions apply to an entity thus depends on whether the entity is engaged in economic activities and therefore can be categorised as an ‘undertaking’, or is not an ‘undertaking’ because the activities in question are not economic or are solidarity-based.

This emphasises the need for close and regular dialogue with Government in order to ensure that policymakers understand the implications of certain conduct on the market, and in order to ensure that where governments compete alongside private firms, they do not distort the market unfairly.

3. Application of competition law: exceptions for services of general economic interest

In addition to the exception referred to above, EC and UK competition law excludes from the application of the competition prohibitions certain categories of agreements and types of conduct. Therefore even where an entity (whether state-owned or privately-owned) constitutes an ‘undertaking’, consideration must be given to whether the conduct in question is excluded from the application of EC and UK competition law.

Article 86(2) of the EC Treaty provides for an exclusion from the application of Articles 81 and 82 EC in respect of undertakings entrusted with the operation of services of general economic interest or monopolies producing revenue for the State.²³

The exclusion from the UK Competition Act 1998 for ‘services of general economic interest’ and ‘revenue-producing monopolies’ is contained in paragraph 4 of Schedule 3 of the Competition Act 1998. Although not identical, the provision is closely modeled on Article 86(2). The provision states that:

‘Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.’

In considering whether this exclusion applies, the OFT will, in particular, need to be satisfied that the undertaking has been ‘entrusted’ with the operation of a service of general economic interest, and that the application of the Competition Act 1998 or Articles 81 and 82 EC would obstruct the performance, in law or in fact, of the particular task entrusted to it.

The act of entrustment may be by way of legislative measures, regulation²⁴, through the grant of a concession²⁵, or licence governed by public law. Alternatively, the method of entrustment could be through an act of a public authority²⁶.

²³ Article 86(2) states: ‘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 this Treaty, in particular to the rules on competition, insofar 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 Community.’

²⁴ British Telecommunications OJ 1983 L360/36.

²⁵ C-159/94 and C- 160/94 *EC Commission v the French Republic* [1997] ECR I 05815.

²⁶ Commission Decision 91/50/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 – *IJsselcentrale and others*) OJ 1991 L28/32.

For obligations imposed on an undertaking entrusted with the operation of a service of general economic interest to fall within the particular tasks entrusted to it, they must be linked to the subject matter of the service of general economic interest in question and must contribute directly to that interest²⁷.

The European Commission has stated²⁸ that to constitute a service of general economic interest, the service must be provided in all cases (and widely available and not restricted to a class, or classes, of customers) whether or not there is an incentive for the private sector to do so and must not be one that is concerned with managing private interests.

The ECJ has held that the services of general economic interest exclusion may apply where the restriction on competition is necessary for an undertaking to perform the service of general economic interest under economically acceptable conditions²⁹.

In a number of cases³⁰ the exclusion was found to apply to exclusive rights to provide a service of general economic interest in order to protect a 'universal service' obligation, as otherwise the undertakings in question would not have been able to meet their service obligations. Without the benefit of the exclusion, competition would allow new entrants to target profitable customers (so called 'cherry picking' or 'cream skimming'), while leaving unprofitable customers to the incumbent (leading to higher prices being charged to those customers or a reliance on state subsidies).

The OFT considers that the burden will, in principle, be on the undertaking seeking to benefit from the exclusion to show that the obligations could not be discharged in other ways which would have a less restrictive or distorting effect on competition. Further, that the application of the Competition Act 1998 prohibitions or Article 81 or 82 would require it to perform the task entrusted to it under economically unacceptable conditions.

The OFT has stated in its guidelines that it is sufficient for the performance, in law or fact, of the obligations on the undertaking would not be possible were the prohibitions to apply. It is not necessary that the survival of the undertaking itself is threatened for the exclusion to apply³¹. However the OFT considers that it would be insufficient to show that there is a mere possibility that the application of one or more of the prohibitions would lead to a situation where the prevailing economic conditions were unacceptable.

3.1 Undertakings having the character of a revenue-producing monopoly

The exclusions contained in paragraph 4 of Schedule 3 of the Competition Act 1998 and Article 86(2) EC also allow for tasks entrusted to undertakings which have the character of a revenue-producing monopoly to be excluded from the prohibitions of the Competition Act 1998 and of Articles 81 and 82 EC.

²⁷ Case C-159/94 *Commission v France (French Gas and Electricity Monopolies)* [1997] ECR I-5815.

²⁸ Communication from the Commission, Services of general interest in Europe, European Commission, 19 January 2001 OJ 2001 C17/4.

²⁹ Case C-157/94 *Commission v Netherlands*, Case C- 158/94 *Commission v Italy* [1997] and Case C- 159/94 *Commission v France* [1997] ECR I- 5815, ECR I-5699, 5789, 5815.

³⁰ Including Case C- 320/91 Criminal proceedings against *Paul Corbeau* [1993] ECR I-2533, and Case C- 266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. And Others* [1998] ECR I-3949.

³¹ Joined cases C- 157/94 *Commission v Netherlands*, C-158/94 *Commission v Italy* and C-159/94 and C- 160/94 *Commission v France* [1997] ECR I-5699, 5789, 5815.

The OFT considers that in order to benefit from the exclusion as a revenue-producing monopoly, an undertaking must have as its principal objective the raising of revenue for the state through the provision of a particular service. In addition, undertakings must have been granted an exclusive right to provide the service, and hence be the monopoly provider of that service. A revenue-producing monopoly must also show that the application of the prohibitions of the Competition Act 1998 or Article 81 or Article 82 EC would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

There are very few cases in the jurisprudence of the European courts or in the decisions of the European Commission in which the revenue-producing monopoly exclusion has been considered³² - the main reason being that there are very few monopolies established with the principal objective of raising revenue for the state.

3.2 *Conclusion*

The legal concepts of service of general economic interest and revenue producing monopoly offer ways of imposing proportionate restrictions on competition to the benefit of undertakings, whether state-owned or privately-owned, to the extent necessary to perform the tasks with which they are entrusted. They therefore allow for legitimate government interests to be taken into account and allow for solutions to be devised for each service of general economic interest or revenue producing monopoly by means of a proportionate exemption based on paragraph 4 of Schedule 3 of the Competition Act 1998 and Art 86(2) EC.

4. **Examining markets more broadly**

In addition to competition enforcement through the application of the prohibitions under the Competition Act 1998 and Articles 81 and 82 EC, the OFT can conduct market studies in order to examine a market more broadly, and for example to focus on the social costs of public restrictions on competition and to engage in advocacy and promote a competition culture in the public sector. The OFT has the power to refer a market to the CC for further investigation and report, and the CC has wide ranging powers to take remedies following a MIR. These powers to conduct market studies³³ and MIRs can be useful in addressing potentially anti-competitive restrictions where the competition enforcement rules do not apply.

The market studies/MIR regime is particularly well suited to assessing and addressing the effect of government intervention generally, including the activities of SOEs. Market studies/MIRs can cover markets subject to regulation as well as markets where they operate, including where SOEs are the only operators and where SOEs operate alongside privately owned firms, or where they are upstream/downstream. The OFT has specific powers to give advice and make proposals to the UK Government. Government has given a commitment to respond within 90 days to recommendations addressed to Government in market study reports from the OFT under these powers and also to recommendations from the CC following a MIR when these authorities do not have the necessary powers of remedy themselves, for example where legislative change is recommended.

³² The application of exclusion to the French and Italian match monopolies was considered and rejected in two Commission recommendations in 1962. (*Recommandation de la Commission à la République française au sujet de l'aménagement du monopole des allumettes* [1962] JO 48/1502; and *Recommandation de la Commission à la République italienne au sujet de l'aménagement du monopole des allumettes*[1962] JO 48/1505).

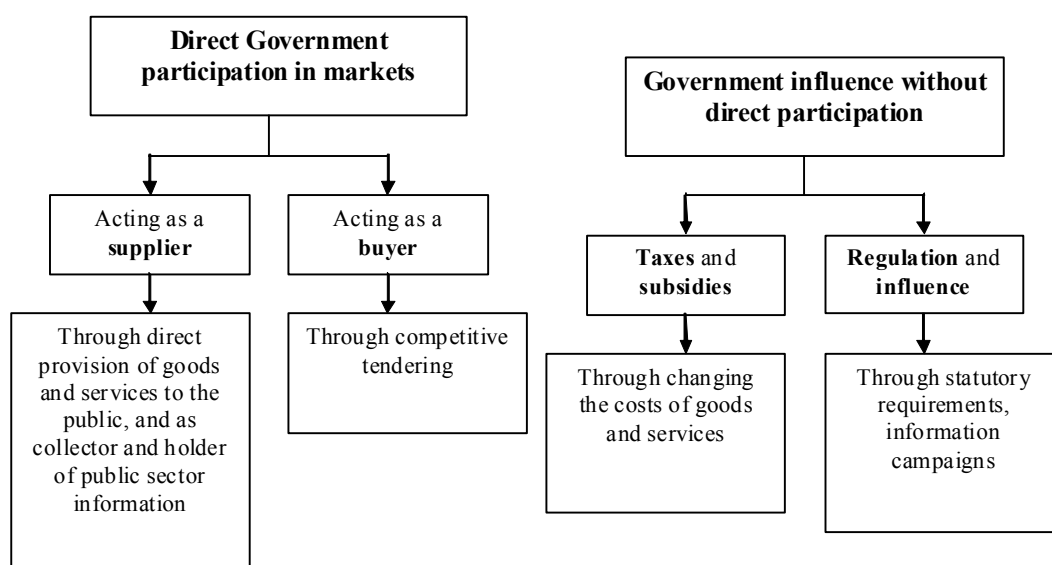
³³ OFT market studies are carried out under Section 5 of the Enterprise Act 2002 (EA02) which allows a market-wide consideration of both competition and consumer issues.

The OFT's market study into Commercial use of Public Information (see further below) is a good example. A number of MIRs in the recent past (ROSCOs³⁴, BAA³⁵) illustrate the type of analysis and issues that can be addressed. Although these particular examples were not concerned with SOEs directly, rather with former SOEs, the analysis would have been no different but there would have been no direct remedial power; the CC would have been able to make recommendations to Government, as explained above.

The OFT may also decide to use its powers under section 7 of the Enterprise Act 2002, to influence Government policy to promote competitive markets and to increase awareness amongst governmental policymakers on how government interventions in markets might be designed to minimise any distortions on competition. The OFT's recently published report on 'Government in Markets' for example is one example of how the OFT has used its advocacy powers to this effect.

Part of the value in market studies and advocacy is in addressing the variety of ways in which Government can affect markets. In many markets, Government participates directly as a provider or as a buyer (procurer) of goods and services. Where this is not the case, Government can also influence firms indirectly through taxes, subsidies and regulation, and increasingly through 'softer' forms of influence on businesses and consumers. This is summarised in Figure 1 below.

Figure 1: Ways in which Government participates in markets



The following sections outline the OFT's recent work in highlighting the costs and benefits associated with certain types of government interventions in a market. The OFT has published a practical guide to policymakers on how to consider *all* of the costs and benefits of a policy intervention.

There can be situations where governments' direct provision of goods and services is in the interests of consumers. However, as is highlighted in the OFT's 'Government in Markets' report, where it is the direct provider, Government needs to be aware of the costs of crowding out private sector activity.

³⁴ <http://www.competition-commission.org.uk/inquiries/ref2007/roscos/index.htm>.

³⁵ <http://www.competition-commission.org.uk/inquiries/ref2007/airports/index.htm>.

Similarly, governments should ensure that public bodies which compete alongside private firms do not distort the market unfairly (see the following section on competitive neutrality for further detail).

In some cases governments can open up new markets by freeing up access to monopoly services – for example by making it easier for private firms to access public sector information.

The OFT considers that where government is the only provider of a good or service, there may be opportunities to secure efficiencies through greater use of competition. Two options for example involve competitive tendering of services or making use of consumer choice in determining how spending is allocated within the public sector. Even in markets that were initially considered natural monopolies in the UK, competition has been effectively used to achieve significant cost savings, improve quality, foster innovation and to develop new products for consumers. In addition, through statutory monopoly schemes, the UK Government has provided the essential facilities and has allowed private firms to compete for the operation of these markets within a regulatory framework. This has been applied in the UK in sectors such as the postal service, broadcasting, transport and utilities.

In some cases, governments may also be able to generate greater economic benefits by allowing third party access to public sector assets. For example, the OFT's market study on commercial use of public sector information suggested that greater access to public sector data by commercial firms could generate benefits of at least £500m per year³⁶. The OFT's market study is discussed in further detail below.

5. Corporate governance and the principle of competitive neutrality for state-owned enterprises

Competitive neutrality can be defined broadly as ensuring a 'level playing field' between public and private enterprises where they compete alongside one another. More specifically, the concern is that no competitor should have an advantage resulting purely from whether it is state-owned or privately owned. Where competitive neutrality does not exist, the OFT would expect this to lead to allocative inefficiency. Perhaps more importantly, lack of competitive neutrality could also hinder the development of new markets where there is scope for greater involvement of private firms alongside existing public sector providers, with a dynamic cost in terms of lack of competitive pressure and innovation in future.

OFT considers that it is helpful to look at competitive neutrality from two perspectives: first, the behaviour of public and private sector suppliers in a market; and second, the behaviour of buyers (with buyer power) in mixed markets, particularly in markets involving significant procurement by the public sector.

The latter perspective has been particularly important in the recent UK debate, because of increased competitive tendering of contracts for some public services (e.g. some hospital treatments, prisons), creating the potential for entry by the private sector alongside existing public sector providers. Before considering these two perspectives, we briefly summarise some of the recent developments in the UK policy debate.

5.1 *Summary of recent discussion around competitive neutrality in the UK*

The recent debate around competitive neutrality in the UK has focused particularly on the provision of public services. The introduction of new forms of competition to foster innovation and choice in the delivery of some services, including competition in the delivery of some services – such as health, prisons,

³⁶ OFT861 The commercial use of public information (CUPI) (December 2006) available on the OFT website: <http://www.uk-legislation.hmso.gov.uk/advice/poi/oft-cupi.pdf>.

and job centres – has led to the possibility of private sector involvement in new markets. A recent government review (the ‘Julius Review’) estimated that in 2007/08 the ‘public services industry’³⁷ generated revenues of £79bn, and value-added of £45bn.

At the same time, there have been concerns that lack of competitive neutrality acts as a barrier to entry by the private sector. For example, the Confederation of British Industry (CBI) has produced a series of reports on competitive neutrality starting with ‘A Fair Field and No Favours’³⁸ in 2006. More recently, ‘Counting the Cost’³⁹ focused particularly at the accounting issues in comparing public and private sector bids, for example in relation to pensions and tax treatment (see below for more detail).

In addition, the UK Government’s Julius Review identified a lack of competitive neutrality as one of the barriers to expansion of the public service industry. Although several government departments have taken steps to ensure greater competitive neutrality, at present there are no public moves by government to institute an overarching ‘competitive neutrality framework’ of the type that is used, for example, in Australia.

6. The supplier perspective: Behaviour of state owned enterprises and corporate governance issues

From the perspective of state-owned enterprises participating in a commercial market, competition law provides the basic framework for ensuring competitive neutrality. As stated above in the sections concerning the application of the Competition Act 1998 and Articles 81 and 82 EC to state-owned enterprises, the OFT would view UK competition law, in line with Articles 81 and 82 EC, applying to commercial activities of ‘undertakings’ regardless of the form of their ownership. Thus state-owned enterprises are subject to the same competition law framework as private firms where they engage in commercial activities.

In practice however, there are sometimes wider policy discussions about how best to increase productivity and efficiency in markets in which state-owned enterprises participate. In some cases this can go beyond simple compliance with competition law.

For example, the OFT’s market study on the commercial use of public information (CUPI) referred to below considered how value might be unlocked from information held by public bodies. In broad terms this might be seen as an issue of ‘market design’.

Where public sector bodies are engaged in mixed markets alongside private firms, it is important for the public bodies to ensure that they are not exploiting unfair advantages over the private sector - see below reference to the OFT’s market study into the commercial use of public information.

³⁷ The ‘Public Services Industry’ was defined as: ‘All private and third sector enterprises that provide services to the public on behalf of Government or to the Government itself’.

³⁸ CBI (2006), ‘A fair field and no favours – competitive neutrality in UK public service markets’, <http://publicservices.cbi.org.uk/reports/00199/>.

³⁹ CBI (2008), ‘Counting the cost: full cost comparison between public service providers’, <http://publicservices.cbi.org.uk/reports/00186/>.

Box 3. OFT market study on commercial use of public information⁴⁰

Many public bodies hold valuable information assets. For example, the UK Meteorological Office holds weather data, UK Ordnance Survey holds mapping data, and UK Land Registry holds land ownership information. All have significant potential in commercial applications. The underlying data is vital for businesses wanting to make value-added products and services such as in-car satellite navigation systems.

Public sector information holders (PSIHs) are usually monopoly providers (typically because of high fixed costs of collection, or statutory collection powers) for much of this data, and although some make this available to businesses for free, others charge. A number of PSIHs also compete with private firms in the downstream market, turning the data into value-added products and services. This could create incentives for PSIHs to restrict access to information provided solely by themselves.

In its 2006 market study, the OFT concluded that access to public sector data needed to improve, and estimated that the potential benefits of increased competition could include a doubling of the value added to the UK economy, contributing around £1bn. The OFT's study found that data is not as easily available as it should be, licensing arrangements are restrictive, prices are not always linked to costs and PSIHs may be charging higher prices to competing businesses and giving them less attractive terms than their own value-added operations.

The report also found that much of the legislation and guidance which aims to ensure access to information is provided on an equal basis, lacks clarity and is inadequately monitored. As a result the full benefits of public sector information are not being realised.

The OFT concluded that PSIHs should:

- make as much public sector information available as possible for commercial use/re-use
- ensure that businesses have access to public sector information at the earliest point that it is useful to them
- provide access to information where the PSIH is the only supplier on an equal basis to all businesses and the PSIH itself
- use proportionate cost-related pricing and to account separately for their monopoly activities and their value-added activities so that PSIHs can demonstrate that they are providing and pricing information fairly and in a non-discriminatory manner, and
- enable the regulator (Office of Public Sector Information) to monitor PSIHs better, with improved enforcement and complaints procedures.

Subsequent UK Government reviews, including a broad study called the UK Trading Funds Assessment, have set out principles of improving access to public sector information. These principles are:

- make information easily available – where possible at low or marginal cost;
- clear and transparent pricing structures for the information, with different parts of the business accounted for separately;
- simple and transparent licences to facilitate the re-use of information for purposes other than that for which it was originally created; and

⁴⁰

Ibid.

- clearly and independently defined – with input from customers and stakeholders – core purposes (public tasks) of the organisations.⁴¹

The UK CUI case exemplifies the potential for tension between trying to encourage the public sector body to be more commercial and innovative, while allowing third parties to access the data and create new products in a competitive market.

More generally, the OFT would agree that corporate governance arrangements of state-owned enterprises can play an important role in addressing competitive neutrality concerns. For example, the UK Government's guidance to central government departments notes that "In the case of companies or other entities in which the department has a controlling shareholding, the departmental board needs to distinguish between the department's role as a shareholder and any other business relationship it or other departments may have with the company (for example as customer). This is meant to improve the transparency of subsidies and clarifying conflicting policy objectives."⁴²

7. Competitive neutrality from the public procurement perspective

From the perspective of public procurement, the principal concern is that public procurers should take account of the full costs of public and private bidders. The concerns expressed, for example in the CBI's 'Fair Field' paper are that tender bids do not always fairly reflect the true cost differentials between private and state-owned firms.

The UK Government's Julius Review⁴³ commented:

'In one sense the term competitive neutrality is a misnomer in that there will always be inherent differences between different classes of providers and some of these differences may provide them with a comparative advantage (or disadvantage) in particular types of procurement. However, where these differences are created by government policies and where they act as a barrier to effective competition, government should take steps to remove or correct them as part of the bid comparison process.' (para 4.29)

Areas identified by the Julius Review as potential barriers to effective competition included⁴⁴:

- **Tax Treatment** - There are inconsistencies in how taxation is applied to public, private and third sector providers. Whilst these reflect their differing roles in the economy they may also be a source of unfair advantage.
- **Pension Obligations** - Private and third sector providers must explicitly recognise pension costs on their balance sheets whereas public sector providers do not; this can give public sector bid teams an advantage due to the different treatment they receive.
- **Pre-Qualification / Bid Criteria** - Government often restricts competitions to organisations with a clear track record in the area in order to ensure they have the appropriate expertise. This can limit the ability of new entrants to break into the market.

⁴¹ HM Treasury (2009), 'Operational Efficiency Programme: final report', April 2009, page 41.

⁴² HM Treasury (2005), 'Corporate governance in Central Government Departments: Code of good practice', July 2005.

⁴³ BERR (2008), paragraph 4.29.

⁴⁴ BERR (2008) p. 46-47.

- **Lack of Shared Information** - Where there is a lack of shared information on current service levels or the costs of providing them, incumbents are likely to have an advantage over other bidders
- **Ability to Manage Risk** - Private and third sector organisations can only take on financial risks up to the level of their balance sheets and should only be expected to shoulder risks that they can influence, such as cost overruns.
- **Transition Costs** - A challenger to the incumbent provider of a service will incur start-up or transition costs if it wins the bid. Where these are likely to be significant, they could outweigh other cost advantages and thereby limit competition.

8. Conclusion: minimising negative impacts on competition by government and state-owned enterprises

Competition law provides the basic framework for ensuring competitive neutrality and for minimising distortions of competition. The prohibitions of anti-competitive agreements and abuses of a dominant position, as set out in the UK Competition Act 1998 and Articles 81 and 82 EC, as relating to commercial activities of ‘undertakings’ apply regardless of the form of the enterprise’s ownership. Thus state-owned enterprises are subject to the same competition law framework as private firms where they engage in commercial activities. When the State acts as an undertaking, the OFT can and does apply the competition rules governing anti-competitive agreements and abuse of dominance.

The OFT also uses market studies and advocacy powers in order achieve its goal of ‘making markets work well for consumers’ for example by providing advice to government about the potential costs of different kinds of intervention, in particular where distortions on competition may be hard to identify or quantify because they tend to manifest in the long term, and to propose solutions.

To identify interventions more likely to distort or restrict competitive markets, the OFT has outlined the key points in its ‘Government in markets’ report in order for policymakers to consider:

- **Does the intervention affect the possibility of entry and exit in a market** – for example by granting exclusive rights to supply; limiting the number of suppliers; or significantly raising the cost to new firms of entering the market?
- **Does it affect the nature of competition between firms in a market**, either through direct restrictions (such as price or product regulation) or by reducing the incentive on firms to compete strongly?
- **Does it affect the ability of consumers to be shop around between firms and exercise choice** – for example, does it raise costs of switching?

Conducting competition assessments along these lines during the policy making process can be a useful way of identifying unintended consequences, and it is important that this assessment takes place during the early stages of policy development.

UNITED STATES

The commercial activities in which various levels of government in the United States – federal, state, and local – are involved traditionally have been quite limited. Competition among private entities has been and remains the current norm for the U.S. economy. It is through this competitive market-based economy that consumers receive the best, most innovative products at the lowest prices. At the same time, however, there is and has been a limited role in certain circumstances for so-called “state-owned enterprises.”

The term “state-owned enterprise” (SOE) is not used in U.S. law or legislation. A range of entities linked to the federal government exists, however, with varying degrees of government ownership, control, and participation in governance and funding. Most of these entities have responsibilities that are nearly indistinguishable from traditional government functions or pursue governmental policies where a market-based approach is not considered appropriate or has failed to achieve governmental objectives. In the U.S., the role of such enterprises is usually specialized and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. The applicability of constitutional and statutory rules, including antitrust law, and the availability of sovereign immunity defenses, vary depending on the nature of the entity.

Part I of this paper suggests some notional principles for effective management and regulation of SOEs, based on the 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* and our own national experience. Part II describes existing federal government enterprises and the applicability of antitrust rules to them, and Part III provides a brief discussion of sub-federal (state and local) entities, with a description of the “state action” immunity from federal antitrust laws for certain activities of such entities, and the limits on their conduct under the Commerce Clause of the U.S. Constitution. Part IV concludes with a brief discussion of the principle of competitive neutrality.

1. Notional principles for effective management and regulation of state-owned enterprises

The 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises*¹ are an important source of guidance for government corporations, and are consistent with much of our experience relating to federal government corporations. For purposes of the WP3 discussion of this topic, we suggest the following notional principles, based on the *OECD Guidelines* and the U.S. experience, to guide policymakers in this area.

First, an SOE’s legal status, as established by its corporate charter or statutory authorization, should clearly identify its relationship to the government, any exemptions from suit or regulatory frameworks, and any special privileges, for the benefit of other economic actors with which it interacts. In particular, any public service responsibilities assigned to an SOE should be clearly and transparently mandated by laws or regulations. For example, costs related to an SOE’s public service responsibilities should be covered in a transparent manner, enabling a ready determination as to whether public service activities are subsidizing the costs of any operations in markets where the SOE competes with private sector companies.

Second, governments should seek to ensure an equitable competitive environment in markets where SOEs compete with private sector companies, so as to avoid unnecessary market distortions and inefficiencies that reduce consumer welfare. In the same way, to the maximum extent consistent with an

¹ The guidelines are available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>.

SOE's public service responsibilities, governments should minimize favorable financial terms bestowed on the SOE.

Third, there should be a clear separation between the state's ownership function and other state functions that influence market conditions, particularly with regard to market regulation. To the maximum extent consistent with an SOE's public service responsibilities, government regulatory authorities should treat SOEs and their private sector competitors equally and the overall business framework (including antitrust laws) should apply equally as well. To that end, the government's ownership rights should be clearly identifiable, separated from any regulatory authority, divorced from day-to-day management of the SOE, and should not intrude on the SOE board's independent exercise of authority. To evaluate compliance with such principles, SOEs should be subject to an annual independent external audit and should be subject to the same accounting and auditing standards as publicly traded companies.²

Finally, government investment in private corporations necessitated by exigent circumstances should be transitory in nature and limited to the taking of investment positions that do not compromise the independent direction and management of the company. The United States has pursued these kinds of self-limiting policies during similar crises in the past. "In 1917 and 1918, Congress created, among others, the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation. These entities were dissolved after the war ended."³ Similarly, during World War II, the U.S. Government seized enemy-owned assets by taking controlling interests in the U.S. subsidiaries of German and Japanese corporations such as the predecessors of General Aniline & Film Corporation, Rohm & Haas Company, and Schering-Plough Corporation.⁴ The government's policy and practice was to sell the firms and return them to the private sector as soon as possible.⁵

2. Federal government enterprises and the applicability of antitrust rules

A series of recent Congressional Research Service (CRS) reports have classified existing federal government enterprises. Different types of federal government enterprises include "federal government corporations," so-called "quasi government" entities such as government-sponsored enterprises and federally funded research and development centers. These structures and the extent to which they are subject to federal antitrust laws are described below.

² Consistent with this principle, Congress enacted the Government Corporation Control Act (GCCA) in 1945. 31 U.S.C. § 9101. The GCCA required that specified corporations, both wholly owned and partially owned by the Government, be audited by the Comptroller General. Additionally, the wholly owned corporations were required to submit budgets that would be included in the budget submitted annually to Congress by the President. The GCCA also ordered the dissolution or liquidation of all government corporations created under state law, except for those that Congress chose to reincorporate, and prohibited creation of new Government corporations without specific congressional authorization.

³ *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 388 (1995) (citations omitted).

⁴ See Stacey R. Kole, *The Government as a Shareholder: A Case from the United States*, 40 J. Law & Econ. 1 (1997), for a study of the performance of firms seized by the U.S. government during World War II.

⁵ The government used business techniques that sped the process. A study of a sample of 17 of these firms found that most "were returned to the private sector via sealed bid auctions. In six cases, the highest bidder in the auction was either the president of the company at the time of vesting or a corporation in the same industry. The disposition of the larger firms, such as American Potash, General Aniline & Film, Rohm & Haas, and Schering, was intermediated by investment banking syndicates that offered the re-privatized shares to the public." *Id.* at 4.

2.1 *Federal government corporations*

The CRS defines a “federal government corporation” as “an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures.”⁶

The CRS notes that although “[n]o two federal government corporations are completely alike,”⁷ they share certain characteristics. They are agents of the federal government subject to constitutional limitations such as the First Amendment (freedom of speech); they generally are subject to and may initiate civil suits; and they do not enjoy the traditional sovereign immunity from suit that the United States government enjoys.⁸ Although government corporations are exempt from executive branch budgetary regulations, the Government Corporation Control Act of 1945 (GCCA) mandates that each wholly-owned government corporation prepare and submit to the President a “business-type budget,” after review and revision, the President submits these budget programs to Congress for its oversight and approval.⁹

The CRS notes that some government corporations are located within executive departments with employees who are actually employees of the parent government agency, while others are federally chartered corporations like Amtrak, the government-controlled national passenger rail service corporation.¹⁰ All but two government corporations have boards of directors; the governance format varies, with full-time boards, part-time boards (in some cases made up of Cabinet-level officials of other agencies; in others, mixed boards of governmental and private appointees), or a single administrator under an executive department secretary.¹¹ Federal corporations can also facilitate privatization of federally-owned assets, as occurred with Consolidated Rail Corporation (Conrail) and the U.S. Enrichment Corporation.¹² Finally, federal corporations can serve as a public utility, such as the Tennessee Valley Authority (TVA).¹³

⁶ Kevin R. Kosar, Federal Government Corporations: an Overview, Congressional Research Service Report RL30365 (2009) 2. The 17 federal government corporations included under this definition are: Commodity Credit Corporation, Export-Import Bank, Federal Crop Insurance Corporation, Federal Deposit Insurance Corporation, Federal Financing Bank, Federal Prison Industries, Financing Corporation, Government National Mortgage Corporation, Amtrak, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, Presidio Trust of San Francisco, Resolution Funding Corporation, St. Lawrence Seaway Development Corporation, Tennessee Valley Authority, U.S. Postal Service, and Valles Caldera Trust. All but five of these entities are included in the current GCCA enumeration of 28 government corporations.

⁷ *Id.* at 5.

⁸ *Id.* at 7.

⁹ *Id.* Government corporations must also submit annual management reports to Congress.

¹⁰ *Id.*

¹¹ *Id.* at 8-9.

¹² Conrail, a government corporation established in 1976 from bankrupt northeastern railroads, created a viable freight rail system that was eventually sold to private investors; the U.S. Enrichment Corporation (USEC) operated two Department of Energy uranium enrichment plants that were divested in an initial public offering in 1998. *Id.* at 12-13.

¹³ The TVA provides wholesale power to 158 municipal and cooperative power distributors and directly serves 58 large industries and government installations, thereby supplying the electricity needs of about nine million people. TVA no longer receives federal appropriations, and finances its operations through revenues of \$9 billion from energy sales and bond sales. TVA website, <http://www/tva.gov/abouttva/keufacts.htm#howfunded>. The United States also maintains the Bonneville, Southeastern, Southwestern, and Western Area Power Administrations within the Department of Energy

2.2 *Applicability of federal antitrust laws to federal government entities and corporations*

As a general matter, agencies and instrumentalities of the U.S. government (e.g., National Science Foundation, Small Business Administration) are not subject to liability under the federal antitrust laws, even when engaging in commercial activity.¹⁴ But the situation with respect to federal government corporations depends heavily on the facts and circumstances of the case. In 2004, for example, the U.S. Supreme Court held that the federal antitrust laws did not apply to the U.S. Postal Service (USPS).¹⁵ The Court's opinion in *Flamingo* noted that the USPS by statute was "an independent establishment of the executive branch of the Government of the United States."¹⁶ It discussed the USPS's monopoly over carriage of certain letters and its "significant governmental powers," along with Congress's explicit waiver of the USPS's immunity from suit, giving it the power to sue and be sued in its own name. Although the USPS did not benefit from sovereign immunity from suit, the Court held that for purposes of the federal antitrust laws, the USPS was no different from the United States, which has long been held not to be a "person" subject to federal antitrust laws.

*The [Postal Reorganization Act of 1971] gives the Postal Service a high degree of independence from other offices of the Government, but it remains part of the Government. The Sherman Act defines "person" to include corporations, and had the Congress chosen to create the Postal Service as a federal corporation, we would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment."*¹⁷

The Court observed that its decision was consistent with "the nationwide, public responsibility" of the USPS, which differs from private enterprise in not seeking profits, in its universal service and recent national security responsibilities, and in its possession of Government powers (state-conferred monopoly, eminent domain, power to conclude international postal agreements). The USPS also lacked certain powers available to private business, such as the power to set prices (a separate Postal Rate Commission was involved in setting prices, and price decisions were not governed by profitability, but rather subject to a long-run breakeven requirement).^{18 19}

(DOE). These Power Marketing Administrations (PMAs) market wholesale electricity generated at hydroelectric dams owned and managed by the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation, which also provide or manage water for such multiple purposes as irrigation, flood control, navigation, recreation, municipal water supply, and environmental enhancement. Bonneville is self-financed, while the other PMAs are funded primarily by DOE. World Trade Organization, Working Party on State Trading Enterprises, New and Full Notification Pursuant to Article XVII:4(a) of the GATT and Paragraph 1 of the Understanding on the Interpretation of Article XVII, United States, 23 June 2008 (G/STR/12/USA).

¹⁴ IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 252a (3rd ed. 2006).

¹⁵ *United States Postal Service v. Flamingo Industries (USA), Ltd.*, 540 U.S. 736 (2004).

¹⁶ 39 U.S.C. § 201.

¹⁷ *Flamingo*, *supra* n. 15, at 746.

¹⁸ *Id.* at 747.

¹⁹ In a post-*Flamingo* case, a federal Court of Appeals held that the TVA, because it was a federal corporation (unlike the USPS, an "independent establishment of the executive branch"), could not use its "public characteristics" to claim immunity from antitrust liability. *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399 (6th Cir. 2006). The TVA's conduct in that case enjoyed an implied exemption from the antitrust laws, however, "because the TVA's primary concern is to provide services,

Following the *Flamingo* decision, in an effort to promote “competitive neutrality” in postal markets open to competition and to clarify the status of the USPS with respect to the federal antitrust laws, Congress enacted the Postal Accountability and Enhancement Act (PAEA).²⁰ A new Postal Regulatory Commission (PRC) was established as the regulator of USPS’s rates for “market-dominant” services; USPS was empowered to set its own prices for “competitive” products, subject to publication and filing requirements.²¹ The PRC was also mandated to issue and enforce regulations to prohibit subsidization of competitive products by market-dominant products, ensure that each competitive product covers its attributable costs, and ensure that all competitive products collectively cover what the PRC determines to be an appropriate share of the USPS’s institutional costs.²² For competitive products, as well as market dominant products outside the scope of the letter monopoly, the PAEA explicitly provides that the USPS will be subject to the federal antitrust laws.²³

2.2.1 *FTC Study of the U.S. postal service and the effects of its governmental status*

The PAEA also required the Federal Trade Commission (FTC) to prepare “a comprehensive report identifying the Federal and state laws that apply differently to the [USPS] with respect to the competitive category of mail and to private companies providing similar products.”²⁴ The FTC’s report²⁵ concluded that “from the USPS’s perspective, its unique legal status likely provides it with a net competitive disadvantage versus private carriers” stemming largely from federally-imposed restraints regarding labor costs and constraints related to its operations network caused by the universal service and other requirements that increase USPS’s costs in providing competitive products.²⁶ At the same time, “because the USPS is a federal government entity, the USPS’s competitive products operations enjoy an estimated implicit subsidy [avoidance of costs associated with various federal, state, and local legal requirements, preferential interest rates, eminent domain powers, and limits on the extent to which it can be sued].”²⁷ Though the estimated costs associated with the restraints exceeded the implicit subsidy, the FTC report made a number of recommendations concerning options for eliminating some of the inefficiencies and market distortions resulting from the postal monopoly and the economic advantages and disadvantages discussed in the report.

and concerns about competition would conflict with the fulfillment of TVA’s purpose.” The Court noted that “[t]he TVA is authorized to enter into contracts for the purpose of ‘promot[ing] the wider and better use of electric power for agricultural and domestic use, or for small or local industries.’ 16 U.S.C. § 831i.” *Id.* at 414.

²⁰ Pub. L. 109-435, 120 Stat. 3189 (Dec. 20, 2006), *codified* at 39 U.S.C. §§ 101 *et seq.*

²¹ The PAEA defines “market-dominant” products as those for which the USPS exercises sufficient market power to raise price or decrease output without significant loss of business; “competitive” products, which accounted for 9% of USPS total revenue in FY2006, are defined as “all other products.” 39 U.S.C. § 3642(b)(1).

²² 39 U.S.C. § 3633(a).

²³ 39 U.S.C. § 409(e)(1)(A)-(B).

²⁴ PAEA § 703(a).

²⁵ Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors, FTC Report, December 2007.

²⁶ *Id.* at 8.

²⁷ *Id.*

2.3 *Quasi government entities*

The CRS reports refer to another category of “federally related entities that possess legal characteristics of both the governmental and private sectors” as “quasi government” entities.²⁸ These entities can vary widely in their structure, ranging from government-sponsored enterprises (GSEs) (e.g., Fannie Mae, Freddie Mac) to the federally funded research and development centers (e.g., Los Alamos National Laboratory). Within the quasi government category, GSEs have the greatest impact on the domestic economy.²⁹ The CRS identifies “four readily observable characteristics of GSEs: (1) private sector ownership, (2) limited competition, (3) activities limited by congressional charter, and (4) chartered privileges that create an inferred federal guarantee of obligations.”³⁰ Of the seven existing GSEs, the best-known are the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two of the largest financial institutions in the U.S.³¹ The theory behind the creation of such bodies is that the government “should use some of its sovereign powers (e.g., full faith and credit of the U.S. Treasury) to encourage the development of private financial intermediaries to serve selected markets.”³² Notably, GSEs are not agencies of the Government, and thus are exempt from general federal management laws and regulations (e.g., personnel, budgetary, procurement rules). Nonetheless, they may enjoy, according to their charters, some benefits associated with sovereign authority, such as immunity from state taxes.

3. **State enterprises related to states and their political subdivisions**

Beyond the federal level, U.S. states, counties, municipalities, and other sub-divisions of the states own, control, or participate in the management of entities that might be defined as SOEs. These entities play a significant role in the following sectors: transportation (including rail, urban transportation, airports and ports), energy (including electricity production and distribution), sports facilities, universities, hospitals, concessions in state-owned parks, buildings, and facilities, and distribution of alcoholic beverages. In some cases these entities compete with private firms offering the same or similar products or services, but in most cases the public offerings are differentiated and provided with a view to achieving a governmental, public service objective.

3.1 *The state action doctrine*

Under the state action doctrine, first set forth by the Supreme Court in *Parker v. Brown*,³³ the federal antitrust laws do not apply to “anticompetitive restraints imposed by the States ‘as an act of

²⁸ Kevin R. Kosar, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics, Congressional Research Service Report RL30533 (2008).

²⁹ Each GSE is created *sui generis* by Congress, which defines a GSE for budgetary purposes as a corporate entity created by a law of the U.S. that: has a federal charter; is privately owned; is under the direction of a board of directors, a majority of which is elected by private owners; is a financial institution with power to make loans or loan guarantees for limited purposes such as to provide credit for specific borrowers, and raise funds by borrowing; does not have certain sovereign Government powers; cannot commit the Government financially; and has employees paid by the enterprise who are not Federal employees subject to federal employee rules. 2 U.S.C. § 622(8).

³⁰ Kevin R. Kosar, Government-Sponsored Enterprises (GSEs): An Institutional Overview, Congressional Research Service Report RS21663 (2009) 2.

³¹ In September 2008, the U.S. Treasury placed Fannie Mae and Freddie Mac into government receivership.

³² Kosar, *supra* n. 30.

³³ 317 U.S. 341 (1943).

government.”³⁴ The state action doctrine immunizes acts of the highest levels of the state government itself, acting as sovereign; this includes actions of a state legislature and probably of the governor.³⁵ Application of the doctrine to subordinate instrumentalities of the state, on the other hand, such as political sub-divisions, agencies, and business enterprises, depends on whether the challenged restraint is undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition, and a clear delegation of that power to the subordinate entity.³⁶

The Supreme Court therefore held that the state action doctrine did not immunize a municipal electric utility from federal antitrust law in *City of Lafayette v. Louisiana Power & Light Co.*³⁷ The U.S. Department of Justice (DOJ) and FTC subsequently have challenged several mergers involving locally managed hospitals, and the DOJ successfully challenged a tying arrangement involving a city and its development authority that provided both electricity and water/sewer service.³⁸ The DOJ and FTC have also filed amicus briefs opposing application of the state action doctrine in cases involving state-level enterprises.³⁹

A 2003 FTC Staff Report⁴⁰ recommended that litigation, *amicus curiae* briefs, and competition advocacy be used to further clarify the state action doctrine and preclude it from being misapplied to grant overly broad antitrust immunity. In particular, the FTC State Action Report urged that quasi-governmental entities be subject to a requirement of active supervision by the state, in addition to requiring clear articulation of their powers. A supervision requirement will help ensure that any anticompetitive actions taken by such entities are truly in furtherance of state policy. Specifically, according to the Report, “[t]he category of entities subject to the active supervision requirement [sh]ould include either: (a) any market participant, or (b) any situation with an appreciable risk that the challenged conduct results from private actors’ pursuing private interests, rather than from state policy.”⁴¹

3.2 The Commerce Clause

The conduct of state government businesses is also governed by the Commerce Clause of the U.S. Constitution. “[B]y reading the Commerce Clause as a general charter for a free internal trade system, the Supreme Court decided very early that it implicitly forbade the states from enacting any legislation that either discriminated against interstate commerce or that placed an undue burden on interstate commerce. ... One would think, based on this theory, that a state would also be forbidden to use a state-owned company

³⁴ *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 370 (1991).

³⁵ ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) 1279.

³⁶ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Antitrust Law Developments*, *supra* n. 35, at 1273-83.

³⁷ 435 U.S. 389 (1978).

³⁸ *United States v. City of Stilwell, Oklahoma, and Stilwell Area Development Authority*, No. CIV 96-196-B (E.D. Okla., filed April 26, 1996), *see* <http://www.usdoj.gov/atr/cases/stilwe0.htm>.

³⁹ *See, e.g., Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999)(en banc); *Jackson, Tennessee Hosp. Co. LLC v. West Tennessee Healthcare, Inc.*, 414 F.3d 608 (6th Cir. 2005) for antitrust cases involving state-affiliated hospitals where DOJ and FTC filed joint amicus briefs.

⁴⁰ Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) (“FTC State Action Report”) *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

⁴¹ *Id.* at 3.

to hamper interstate commerce.”⁴² Where Congress has not directly controlled the state through positive legislation, however, a “market participant” exception to the Commerce Clause allows a state in some cases to favor its own citizens through the conduct of its state-owned businesses,⁴³ though there are limits to how far it can extend substantial regulatory effects outside its own territory.⁴⁴

4. Competitive neutrality

As noted in the notional principles in Part I above, governments should seek to ensure an equitable environment in markets where SOEs compete with private sector companies, so as to avoid unnecessary market distortions and inefficiencies that reduce consumer welfare. The 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* state that “[t]he legal and regulatory framework for state-owned enterprises should ensure a level-playing field in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions.”

The International Competition Network (“ICN”) has also done work in this area related to state-created monopolies. In this regard, the ICN issued a set of Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws.⁴⁵ Those Recommended Practices specifically urge that competition authorities should, to the extent there are no exemptions: (1) protect and promote competition by taking appropriate enforcement action against anticompetitive unilateral conduct by state-created monopolies; (2) treat state-created monopolies like private undertakings by using standard antitrust analysis to assess dominance/substantial market power, regardless of state ownership or legal status of the firm; (3) possess effective investigative tools and remedies to carry out successful enforcement of unilateral conduct rules regarding state-created monopolies; and (4) apply sound antitrust analysis and remedies when investigating potentially anticompetitive unilateral conduct of state-created monopolies and deciding whether enforcement action is appropriate.

5. Conclusion

The notional principles in Part I of this submission provide important guidance to governments in managing their SOEs. As detailed in Parts II and III, the rather limited U.S. experience with SOEs illustrates the broad range of issues related to the exercise of government control over these entities, managing them effectively, and ensuring that the public policies that justify governmental participation in the economy are properly focused to avoid distorting adjacent markets benefiting from competition among private firms. Antitrust agencies should be vigilant in their advocacy and law enforcement roles in monitoring the creation and conduct of SOEs.

⁴² Diane P. Wood, State Trading in the United States, in *State Trading in the Twenty-First Century* 211, 225 (Thomas Cottier and Petros Mavroidis eds., 1999).

⁴³ *Reeves v. Stake*, 447 U.S. 429 (1980).

⁴⁴ *See Wood, supra* n. 42, at 225-226.

⁴⁵ ICN Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws, available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_2.pdf.

EUROPEAN COMMISSION

1. Introduction¹

The topic of this roundtable raises the important question of principle regarding the reach of competition law in relation to state-owned companies. To what extent should competition law be applied not only to private but also to state-owned undertakings? More precisely, are there certain aspects of the business of state-owned enterprises that should be exempt from the control of antitrust law? Or should they on the contrary be scrutinised more carefully than private companies?²

As regards EC competition law, the answer to this question is clear: EC competition law applies just as well to state-owned companies as to private companies.

However, not only does EC competition law apply to the behaviour of state-owned companies but it also creates obligations for the Member States themselves. This is linked to the specific legal system of the European Union.

The EC Treaty has a different legal status than other international treaties. By creating the European Community, and later on the European Union, the Member States have transferred part of their sovereignty to the Community. In those parts where the Member States have transferred their rule making power, they can no longer unilaterally decide how to regulate a certain issue. In fact, Community law has primacy over national law (this is often referred to as the supremacy of Community law).³ It gives rights directly to the citizens of the Member States and may, on certain conditions, be directly enforced in front of national courts. In case national legislations conflict with Community law, the national court is under a clear duty to set aside the national law.

One of the most important goals of the EC Treaty is the creation of a single European market (i.e. a market without barriers *de facto* working as one integrated market). A key pillar for achieving a fully integrated market is an efficient competition policy. With the goal of market integration in mind, Community law prohibits devices such as tariffs, quotas and the like which can impede the attainment of this goal. This type of prohibitions is directly addressed to Member States and their legislative measures.

¹ This paper owes to the contribution of Anna Emanuelson, Directorate-General for Competition of the European Commission.

² See for example Sappington and Sidak, "Competition law for state-owned enterprises", 71 Antitrust Law Journal, No. 2(2003). Their conclusions however would seem to be of more relevance to purely state-owned companies than to undertakings which are controlled by the state but also traded on the stock exchange (or partly owned by other private investors), i.e. partly privatized.

³ See e.g. Case 26/62, NV. Algemene Transporten Expeditie Onderneming van Gend en Looos v. Nederlandse Administratie der Belastingen [1963], ECR I, at para. 164: "The objective of the EEC Treaty, which is to establish a Common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states... It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights... The conclusions to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

The competition articles of the Treaty are, in contrast to the prohibitions just mentioned, addressed to companies. The duty of the Member States to respect the rules of the EC Treaty together with the concept of supremacy of Community law, however also leads to an obligation for the Member States not to enact any legislative measure which could risk endangering the effectiveness of the Treaty. According to the case-law of the European Court of Justice, a Member State may not adopt or maintain in force any measure which would deprive the competition rules, i.e. Articles 81 (prohibition of anti-competitive agreements) and 82 (prohibition of abuse of a dominant position), of its effectiveness or prejudice its full and uniform application. A state can be in breach of this obligation either when it requires or encourages companies to conclude cartels which are in violation of Article 81, or when it divests its national provisions of their public nature by, in effect, delegating to the firms the responsibility for taking decisions about the boundaries of competition.⁴

When it comes to state-owned companies (public undertakings in the words of the Treaty) or companies to which the state has given exclusive or special rights, the obligation for states not to adopt legislative measures which deprives the competition rules of their effectiveness is even specifically provided for in the Treaty.⁵ Article 86 of the EC Treaty reminds the Member States that the competition rules apply also to state-owned companies (and companies given special or exclusive rights) and that national laws depriving the competition rules of their effectiveness would be in violation of the Treaty.

The application of competition law to the traditionally state-owned undertakings (in sectors such as post, telecoms, electricity etc) however also lead to a certain tension due to the specific public interest of the services which are performed by such companies. The interest of providing a certain public service, for example affordable and nation-wide postal services, could sometimes conflict with a full application of competition law. This is why EC competition law provides for a narrow exception to the application of competition law, when competition law enforcement would make it impossible to provide the public service (in the context of EC law referred to as a "service of general economic interest"). This exception is applicable both to state-owned companies and companies to which a Member States give exclusive or special rights.

The remainder of this paper briefly analyses the application of EC competition law to state-owned enterprises (and so called privileged undertakings, i.e. undertakings having been given special rights by the state to provide a certain service). Even if the topic of the roundtable is defined as the application of competition law to state-owned enterprises, the application of EC competition law to pure state measures will also be touched upon since in practice cases concerning the behaviour of state-owned companies often deal with the issue of whether it is the state or the company, or both, that are responsible for a certain potential infringement. The paper is however limited to the (*ex post*) application of competition law and

⁴ The state may be liable for an infringement of the Treaty by way of Articles 3(g), 10 and 82. According to the case-law of the Court of Justice those state measures that impose or induce anti-competitive behaviour by undertakings, reinforce the effects of anti-competitive behaviour or delegate regulatory powers to private operators can be considered as violating these provisions, see cases C-2/91 (Meng) [1993] ECR I-05751, C-245/91 (Ohra) [1993], ECR I-05851, and C-185/91 (Reiff) [1993] ECR I-05801. In essence this jurisprudence is the means whereby the ECJ has extended the type of obligation imposed on a state by Article 86 to situations where the undertakings are neither public nor enjoy any specially privileged situation.

⁵ Where the state intervenes not to support an existing agreement which is itself illegal under Article 81 but through an independent measure which undertakings must follow, Article 28, i.e. the free movement of goods, would be the most appropriate provision to employ in the case of goods and Article 49 in the case of services.

excludes (*ex ante*) regulation of this type of companies, even though in practice this is also an important competition tool for remedying competition failures in these type of markets.⁶

The important topic of state-aid in relation to public undertakings is dealt with in a separate paper submitted by the Commission in preparation of this roundtable.

2. Is the state or the company responsible?

Both companies and the Member States can be responsible for violations of EC competition law according to the circumstances of the case.

When the potentially anticompetitive practice is an autonomous decision of the undertaking the competition rules of the Treaty (articles 81 and 82) apply. If, on the contrary, an undertaking would be forced by legislation (or other types of binding state measures) to behave in a certain way, the undertaking can no longer act autonomously and may invoke the so called "state action defence", to escape responsibility under competition law.⁷

Only the state is responsible for state-imposed abuses or anti-competitive agreements. Article 86(1) (see below) in combination with Article 81/82 obliges the Member States to refrain from imposing anti-competitive behaviour on their public or privileged undertakings. The lack of liability of the company in such cases is thus compensated for by the liability of the state.

If however the anti-competitive behaviour is only state-induced (as opposed to state imposed), both the state and the undertaking are liable. Article 86(1) in combination with Articles 81/82 not only prohibits the Member States from obliging the public undertaking to behave anti-competitively, it also prohibits them from inducing their state-owned or privileged companies to e.g. abuse their dominant position. Obviously, the mere state inducement does not remove the autonomous character of the actions of the public undertaking and thus the potential liability under EC competition law.⁸

3. Rules applicable to companies

As described above the application of EC competition law is, in principle, neutral to the ownership of the company. Whether the company in question is privately or publicly owned (or controlled) is as such irrelevant.

In order to fall under the competition rules the company must however qualify as an undertaking under EC competition law. This implies that the entity performs an economic activity but is not dependent on whether the entity is considered a company under company law or whether it is privately or publicly financed.⁹ An "economic activity" is defined as "any activity consisting in offering goods and services on a

⁶ During the last 30 years many state-owned monopolies in Europe have been wholly or partly privatized. The traditional utilities sectors have been liberalised (i.e. opened up for new entry). Just privatizing a former monopoly however might lead to a private monopoly replacing the former public monopoly. This is why liberalisation in most cases has to be accompanied either by *ex ante* regulation or by *ex post* competition law intervention to open up the market.

⁷ See for example Case T-65/99 Strintzis Lines [2003] ECR II-5433, paras. 119-122.

⁸ It could however be seen as a mitigating factor when it comes to setting the level of the fines, c.f. case T-65/99 Strintzis Lines [2003] ECR II-5433, para. 171.

⁹ The European Court of Justice defines the concept of an undertaking as "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed", see f.ex. case C-41-90 Kraus Höfner and Fritz Elser v. Macrotron GmbH [1991] ECR I-1979, para 21.

given market".¹⁰ It is not necessary that the activity is intended to earn revenues. For example, part of the activity of a public authority can be an economic activity qualifying the entity as an undertaking under Article 81/82 while other parts of its activity might be the classical tasks performed by an authority (i.e. the exercise of public powers) falling outside the scope of the competition rules.¹¹

The Commission has on several occasions intervened against state-owned companies abusing their dominant position on the internal market. This section sets out a few examples illustrating the direct application of Article 82 to such companies.¹²

As described above state-owned companies are often found in the traditional utilities sectors. It is therefore illustrative that the examples below concern respectively postal services, telecommunications and gas.

The *Deutsche Post* case from 2001¹³ is widely cited in the background literature as a landmark case for applying anti-trust law to public monopolies. This case is the first time that the Commission applied the test for predatory pricing to a traditional public service such as postal service (and also the first time it applied the test to a network industry which gives rise to particular concerns when calculating the pricing floor for the purpose of predatory pricing).¹⁴

In 1994 UPS lodged a complaint with the Commission alleging that Deutsche Post was using revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services (a service open to competition). The complainant alleged that it was only with the "cross-subsidies" from the monopoly that Deutsche Post could finance the below-costs prices on parcel services. In its decision the Commission laid down the test for measuring "cross-subsidies" between the monopoly area and competitive activities that result in predatory prices (in the competitive area): any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector.¹⁵ In applying this test, the Commission found that Deutsche Post did not cover the costs incremental to providing the mail-order delivery service during five years.¹⁶

¹⁰ See f.ex. case C-118/85 Commission v. Italy [1987] ECR 2599, para 7.

¹¹ See f.ex. case C-113/07 P, SELEX Sistemi Integrati SpA v. Commission, not yet reported, paras. 69-70 ff.

¹² In practice most cases relating to public undertakings have concerned Article 82, which, which is why this section, and the paper in general, focuses on interventions against abusive behaviour.

¹³ Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 (Case COMP/35.141 – Deutsche Post AG), OJ 2001 L 125, p. 27.

¹⁴ The decision also finds that Deutsche Post had abused its dominant position by its fidelity rebates scheme.

¹⁵ The decision distinguished between costs for network capacity and network usage. The costs incurred for providing network capacity to give everyone an option to ship parcels at a uniform rate as part of Deutsche Post's universal service obligation. This forces Deutsche Post to hold capacity in reserve in order to meet demand at peak load. These costs are treated as common fixed costs. The costs for actual usage of the network for offering product X are, on the other hand, long-term variable or "incremental" costs. In this context incremental costs are thus equal to network usage.

¹⁶ Exceptionally Deutsche Post was however not imposed a fine since the economic cost concepts used to identify predation were not considered sufficiently developed at the time the abuse occurred. It was therefore, before this case, difficult for a company to concretely calculate the price floor for predatory pricing. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C45, 24.2.2009, footnote 39 which makes a reference to the type of situation dealt with in the Deutsche Post case.

Two years later, the Commission intervened against *Deutsche Telekom's*¹⁷ pricing behaviour in relation to its customers and potential competitors. The Commission found that Deutsche Telekom, which at the time was a publicly owned company, had abused its dominant position by way of a so called margin squeeze. Deutsche Telekom was charging new entrants higher fees for wholesale access to the local loop than what Deutsche Telekom's own subscribers paid for fixed line subscriptions thereby discouraging new entry.

Deutsche Telekom was, at the time of the abuse, legally obliged to provide competitors access to its local loops but in spite of this, there was still only very limited competition (Deutsche Telekom retaining 95 per cent of the relevant retail markets in 2003).¹⁸

The Commission's decision was recently upheld by the Court of First Instance¹⁹. The Court confirmed that Deutsche Telekom had a sufficient scope to end the margin squeeze, while still complying with the price ceiling imposed by the German regulator. This is an interesting aspect of this case in relation to the topic of this roundtable. Public undertakings, and privatised previously public undertakings in the utilities sectors, are often subject to sectoral regulation. However, in accordance with the principles of state action defence set out below, the company's behaviour will still fall under competition law on condition that it has a sufficient margin of manoeuvre for rectifying an anti-competitive behaviour. The fact that Deutsche Telekom's charges had to be approved by the German regulator did not therefore absolve it from its responsibility under competition law.²⁰

Both cases above could serve as examples of typical behaviour of a public monopoly trying to prevent entry in order to continue enjoying its privileged position on the market. However, it is also interesting to note that these two types of abuses have just as well been investigated in cases concerning privately owned enterprises. Whether there are more important incentives for a public undertaking to, for example prevent entry by predation or to try to raise rivals costs by margin squeeze than for any private company with the sole goal of profit-maximisation, is an interesting debate. Though, practical experience at Commission level at least shows that such type of behaviour are in the interest of a company with monopoly power (for example those which have taken over the old "natural monopolies") be it a private or public undertaking.

¹⁷ Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ 2003 L 263, p. 9.

¹⁸ In the Telefónica case (Commission Decision of 04.07.2007 relating to a proceeding under Article 82 (Case COMP/38.784 – Wanadoo España vs. Telefónica)) from July 2007 the Commission recently also found that a telecom incumbent (but this time privatized) tried to pre-empt new entry by a margin squeeze: The Commission forced Telefónica to end its practice of imposing unfair prices in the Spanish broadband market, a very serious abuse of its dominant position, and fined Telefónica over €151 million. In particular, for more than five years, Telefónica imposed unfair prices in the form of a margin squeeze between the wholesale prices it charged to competitors and the retail prices it charged to its own customers. Competitors who bought access to the network at Telefónica's inflated wholesale prices were forced to make losses if they wanted to match Telefónica's retail prices. Telefónica's actions weakened its competitors, making their continued presence and growth difficult.

¹⁹ Judgment of the Court of First Instance of 10 April 2008 not yet reported in case T-271/03, Deutsche Telekom AG v. Commission.

²⁰ There are many technically interesting aspects of this case that will not be discussed here. It could just be mentioned that the Court found that it was enough to show an insufficient margin between wholesale and retail prices and not to show predatory retail prices. The Court also found that the Commission's was correct in calculating the margin squeeze on a comparison of wholesale access with a weighted average of retail prices for all Deutsche Telekom's access services (analogue, ISDN and ADSL).

The Commission is still today very attentive to potential abusive behaviour by public undertakings. For example, the behaviour of the state-owned company *EdF* (the largest supplier of electricity in France) is presently subject to investigation by the Commission. The Commission has preliminarily concluded that contracts concluded by EdF with industrial customers in France may prevent customers from switching (especially when considering the exclusive nature and duration of the contracts as well as the share of the market they relate to) to other providers thereby reducing competition. If confirmed by the on-going investigation such practices could have prevented entry on the French market and constitute a violation of Article 82 of the EC Treaty.²¹

4. Rules applicable to state measures

Article 86 of the EC Treaty, clarifies that the competition rules apply also to state-owned undertakings and other "privileged" undertakings. However, Article 86 also clarifies that the state in itself can infringe the rules of the Treaty by enacting state measures depriving the competition rules of their effectiveness.

Article 86(1), which is addressed to the Member States, lays down the following broad principle:

"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 this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 90".

Before briefly setting out the conditions for application of Article 86, it should be mentioned that this Article is can only be applied in conjunction with another Article of the Treaty (for example in conjunction with an infringement of the competition rules). Secondly, it is also worth underlining that the Article is not limited to infringements of competition law but that it can also be applied on measures that infringe for example the rules on free movements of goods.

4.1 The conditions for application of Article 86(1)

If the conditions set out in Article 86(1) are satisfied, a state measure as such may be held contrary to the EC Treaty.

Article 86(1) refers to "*public undertakings*" but do not further define these. This term is a concept of community law and is defined in the Transparency Directive²² by the Commission 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*". Conceptually this is equivalent to the question of control raised in merger proceedings.

Article 86 applies both to public undertakings as defined above, but also to private undertakings with *special or exclusive rights*. Examples in the case-law of companies having been granted exclusive rights is an entity granted a monopoly over the provision of recruitment services or a dock-work undertaking

²¹ A statement of objections was sent to EdF in December 2008, see press MEMO/08/809 on <http://europa.eu/rapid/pressreleases>. See also MEMO/09/191 about opening of formal proceedings with respect to the behaviour of the public undertaking Svenska Kraftnät, the Swedish electricity Transmission System Operator, for possible abuse of a dominant market position. The Commission believes at this stage that Svenska Kraftnät may be abusing its monopoly position as the Swedish monopoly electricity transmission service provider by limiting export transmission capacity on Swedish interconnectors to neighbouring countries and thereby hindering the proper functioning of the Single Market in electricity.

²² OJ [1980] L 195/35, as amended most recently by Directive 2006/111/EC OJ [2006] L 318/7.

entrusted with the exclusive right to organise dock work for third parties. Special rights, on the other hand, could be defined as rights that are granted by a Member State to a limited number of undertakings which limits the number of undertakings authorised to provide a certain service (having been designed otherwise than according to objective and non-discriminatory criteria)²³. The logic with extending the scope also to undertakings having been granted special or exclusive rights is that the same rules should apply regardless of whether a Member State chooses to remain the owner of the undertaking performing the public service or whether it delegates this to a private company.

Moreover, the scope of Article 86 is limited to *state measures*. This expression has been given a wide meaning and covers even measures which are not legally binding such as recommendations, provided that it is capable of exerting an influence and of frustrating the aims of the Community.²⁴

4.2 *Examples of when a state measure infringes Articles 86(1)*

The case-law of the European Courts on state measures infringing Article 86 in conjunction with the competition rules is complex and the list of cases is long. Therefore this section only exemplifies situations in which state measures have been considered contrary to Article 86(1) and Articles 81/82.

- *Discrimination*: state measures leading to discrimination between different economic operators can be contrary to Article 86. For example in *Merici* the European Court of Justice found that the discriminatory treatment of customers can be an abuse for which a Member State could be held responsible under Article 86(1).²⁵
- *Conflict of interest/discrimination in favour of own down-stream arm*: In the *ERT* case²⁶ the European Court of Justice held that there would be an infringement of Article 86(1) where Greece had created a situation in which the broadcaster ERT would be led to infringe Article 82 by virtue of a discriminatory policy in favour of its own broadcasting arm.
- *Reservation of ancillary activity/extension of monopoly*: The extension of a previous monopoly to an ancillary activity on a neighbouring market can also be contrary to Article 86(1) in combination with Article 82. In *RTT v. GB-Inno-BM*²⁷ the European Court of Justice found that the extension of RTT (the Belgian telecom incumbent) to an ancillary activity on a neighbouring but separate market infringed Article 86(1).

These examples illustrates well the type of cases in which EC competition law can intervene against state measure which leads to an abuse under Article 82. However, it should be kept in mind that this list is not exhaustive. In each specific case, the question has to be answered whether a Member State has adopted a measure that infringes or might infringe Article 81/82 for which it bears responsibility under Article 86(1).

²³ See the Commission's decision in "Second operator of GSM Radiotelephony Services in Italy" OJ [1995] L 280/49, para 6.

²⁴ Case 249/81 Commission v. Ireland, [1982] ECR 4005 (the "Buy Irish" case), para 28.

²⁵ Case C-179/90 [1991] ECR I-5880, [1994] 4 CMLR 422.

²⁶ Case C-260/89 [1991] ECR I-2925, [1994] 4 CMLR 540.

²⁷ Case C-18/88 [1991] ECR I-5941.

5. The exception to the application of competition law

Article 86(2) provides for a narrow exception to the rule that competition law is applied to all types of undertakings.

"Undertakings entrusted with the operation of services of general economic interest of having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, 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 Community".

Article 86(2), which is (contrary to Article 86(1)) addressed to the undertakings themselves, thus specifies the conditions under which the competition rules can be set aside for public or privileged undertakings. Three cumulative conditions have to be satisfied before the exemption becomes applicable:

- (a) the undertakings in question must have been entrusted with the "operation of a service of general economic interest"²⁸;
- (b) the application of the Treaty would obstruct the performance (in law or in fact) of the tasks assigned to this undertaking and
- (c) the exemption is anyway not available if the development of trade is affected to an extent contrary to the interests of the Community.

The practical effect of Article 86(2) is that undertakings entrusted with the task of performing a public service, or rather a service of general economic interest, can escape the application of Articles 81 and 82 to their behaviour if the application of competition law would prevent them from carrying out the tasks assigned to them by the Member State. Article 86(2) can be invoked, and is indeed often invoked, by companies as a defence in Article 82 proceedings (they are more rarely invoked in Article 81 proceedings even if technically possible).²⁹ However, the exception can equally be invoked by the Member States in proceedings where it is alleged that state measures are in violation of Articles 86(1) in combination with Articles 81 or 82.

A typical case of an activity that could come within the ambit of Article 86 is the provision of postal services. The Member State would normally require the Postal operator to provide a minimum service (for example classical postal services over the whole territory). The Postal operator would then provide this service for the same price all over the country and finance this by making the inhabitants of the densely populated areas subsidise the cost of providing the service in regions which are scarcely populated. Should this be seen as a discrimination amounting to an abuse under Article 82 or should it be seen as a necessary and proportionate measure to justify the dis-application of Article 82 under Article 86(2)?

It follows from condition 1 above that an undertaking can only claim the applicability of the exception if it has been entrusted with the performance of a *service of general economic interest*. This raises the issue

²⁸ Or having the character of a revenue producing monopoly. Since this last case is of little practical importance it will not be further dealt with in this paper. There seems to be a consensus that exclusive rights where the only objective is the generation of revenues would not be justified under Article 86(2), see the articles cited in footnote 215 and 216 of Faull and Nikpay, "The EC law of competition", Second edition, Oxford.

²⁹ See for example Case C-393/92 Almelo [1994] ECR I-1517, paras 33-50.

of what to include in services of general economic interest. The term "services of general economic interest" is not defined in the Treaty. It covers obviously the conventional utilities such as provision of postal services, telecommunication services, gas, electricity etc. However, the concept has also been applied to provision of services in the transport sector which are not viable on its own³⁰ or to the treatment of waste material³¹. In practice, the Member States has a wide discretion to define the scope of what they consider to be services of general economic interest.³²

Moreover, the exception will only apply if the restriction is *proportionate*, i.e. necessary for the fulfilment of the service of general economic interest. For example in *British Telecommunications* British Telecom's defence based on Article 86(2) was rejected. On appeal the European Court of Justice held that it had not been shown that British Telecom's refusal to allow private message-forwarding agencies from using its network to forward messages from other Member States endangered the performance of its tasks.³³ In *Corbeau* the European Court of Justice dealt at length with to what extent the postal monopoly in Belgium was justified under Article 86(2).³⁴ It was found that the Post was indeed entrusted with a service of general economic interest and that it might be necessary for it to benefit from a restriction of competition in order to be able to offset less profitable activities against profitable ones. It could therefore in certain cases be legitimate to prevent a new entrant from "cherry picking" the most profitable services if that could prevent the Postal operator from fulfilling its universal service obligation.

An example of a case where the restriction was considered necessary is *Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH*.³⁵ The European Court of Justice considered that Article 86(2) justified the grant by a Member State to its postal operators of a statutory right to charge internal postage on items of so-called remail. The exclusive rights of a pension fund to manage supplementary pensions in a particular sector has also been justified under Article 86(2) with the motivation that otherwise "young people in good health engaged in non-dangerous activities" would leave the scheme (raising the costs for the remaining people).³⁶

Finally, in order to qualify for an exemption the behaviour may *not negatively affect trade* to such an extent as being contrary to the interest of the Community.

6. Case studies of recent cases involving 86 in conjunction with 82

The Commission has recently adopted two decisions finding an infringement of a Member State by violation of 86 in conjunction with Article 82 regarding state-owned companies. In both these cases the exemption provided for in 86(2) was not applicable. This section briefly analyses these two cases to exemplify the type of cases that have recently arisen in this field.

In 2008 the European Commission adopted a decision finding that Greece had infringed Article 86 of the EC Treaty in combination with Article 82 by maintaining rights giving the state-owned electricity

³⁰ Case 66/88 Ahmed Saeed [1989] ECR 803 [1990] 4 CMLE 102, para 55.

³¹ Case C-209/98 Entreprenørforeningens Affalds/Miljøsektion v. Københavns Kommune [2000] ECR I-3743, para 75.

³² See for example case T-106/95 FFSA v. Commission [1997] ECR II-229, para 99.

³³ OJ [1982] L 360/36, [1983] 1 CMLR 457 and case 41/83 Italy v Commission [1985] ECR 873, [1985] 2 CMLR 368.

³⁴ Case C-320/91 [1993] ECR I-2533, [1995] 4 CMLR 621.

³⁵ Cases C-147/97 et al [2000] ECR I-825; [2000] 4 CMLR 838.

³⁶ Cases C-67/96 etc Alabany International B V v SBT [1999] ECR I-5751, [2000] 4 CMLR 446.

incumbent "Public Power Corporation" (PPC) quasi-exclusive access to lignite (i.e. brown coal).³⁷ The state measures created inequality of opportunity between economic operators as regards access to lignite. As a result, despite liberalisation of the electricity wholesale market which started in 2001, PPC continues to enjoy today a virtual monopoly over access to lignite and Greece has protected PPC's dominant position in the electricity market (85 per cent).

Lignite is the cheapest and therefore also primary fuel for production of electricity in Greece. The state-measures in question, giving PPC preferential access to lignite, enabled PPC to maintain or reinforce its dominant position on the Greek wholesale electricity market because it had a low-cost advantage on the market. PPC was given a special advantage in access to a cheap fuel input, enabling PPC to compete more effectively in the electricity market distorting competition on that market. Due to the advantages given to PPC it is more difficult for new entrants to enter and compete on the electricity market in Greece. By granting and maintaining the quasi-monopolistic rights of PPC for lignite exploitation (i.e. privileged access to the cheapest source of fuel in Greece), the Greek state had reinforced the dominance of PPC in the wholesale electricity market. Greece did not rely on 86(2) to justify granting the privileged access to lignite to PPC. In this case, the decision was not addressed to PPC but only to the Greek state since the behaviour of PPC in only accepting these privileged rights was not equivalent to an abusive behaviour under Article 82 of the EC Treaty.

In August 2009, the Commission accepted commitments by Greece to ensure fair access to Greek lignite deposits.³⁸

A few months after the adoption of the Greek lignite decision, the Commission decided that certain amendments introduced to Slovakia's postal legislation infringed Article 82 in conjunction with Article 86. The amendment in question extended the monopoly of the incumbent postal operator, Slovenská Pošta, to the delivery of hybrid mail services, which had so far been open to competition. This extension endangered directly the viability of Slovak postal operators which had already entered this market.

Hybrid mail is a specific type of mail, in which the content is electronically transferred from the sender to the postal service operator, who prints, envelopes, sorts and delivers the postal items. Hybrid mail is a product that is important to companies who regularly send large amounts of mail, such as invoices (for example insurance companies or banks).

In the Slovak Republic, the delivery of hybrid mail was open to competition and several private companies were active in that sector. In February 2008, the Slovak Republic amended its postal laws, reserving the delivery of hybrid mail to Slovenská Pošta. Private operators were thus prevented from sending hybrid mail, and therefore suffered financial losses.

This latter case is an example of the rule that the extension of a statutory monopoly into neighboring but competitive markets is incompatible with Articles 82 and 86. It is obvious in this case that a monopoly on the neighbouring market was not necessary for the fulfilment of the universal service obligation, since the market for hybrid mail was previously a competitive market. It was not demonstrated that, without the extension, the achievement of the universal service would be precluded or that it could at least not be carried out under economically accepted conditions. The Commission therefore concluded that neither the

³⁷ IP/08/36, March 5, 2008. The Commission's Decision is on the DG COMP webpage with a one pages summary at [2008] OJ C93/3.

³⁸ See IP/09/1226, 6 August 2009. In particular Greece committed to grant exploitation rights to four lignite deposits through public tenders excluding PPC, to ensure that competitors of PPC in the Greek electricity market get access to lignite. On the basis of these commitments, competitors of PPC will potentially access about 40 % of all exploitable Greek lignite deposits.

Slovak Republic nor Slovenská Pošta had been able to demonstrate that the reservation of hybrid mail services was necessary to finance the universal postal service (c.f. the Corbeau case referred to above). In addition, the Commission found that Articles 86(1) and 82 were also infringed on the ground that the reservation of hybrid mail services to the incumbent limited the services available although there were demand for certain value added services such as track-and-trace services of the mail items (which were offered by Slovenská Pošta's competitors)³⁹.

7. Conclusion

According to Article 295 of the EC Treaty, the Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership. This means that the mere fact that certain activities are operated in the public or in the private sphere could not in itself be contrary to the Treaty. It is therefore the decision of each and every Member State to what extent it remains the owner of the traditionally state-owned industries (such as post, telecommunications, electricity, gas).

However, if it was allowed to treat state-owned undertakings more favourably than other enterprises, removing the level playing field that should be the characteristic of free competition, the competitive process and the long-term goal of one European integrated market could be considerably damaged.

Therefore, as outlined above, not only is EC competition law applicable to any company performing an economic activity irrespective of whether the company is state-owned or private, it can also be directly applicable to legislative acts of the Member States. Indeed, the Commission has vigorously applied competition law to state-owned companies as well as to state measures with anti-competitive effects. The examples given above show the importance and priority that the Commission gives to such cases of abusive behaviour.

When it comes to the provision of services of general economic interest the right balance between pure competition law concerns and the interest of the Member State ensuring the provision of a specific public service in pursuit of economic and social goals has to be found. This is done by the balancing act of assessing which types of restrictions are necessary and proportionate in order to allow for the company to provide the service.

In essence, Articles 86(1) and (2) attempt to find this balance between the sometimes conflicting interests of national policy and EC competition law. As the European Court of Justice expressed it:

"[P]aragraph 2 of Article 86, read with paragraph (1), seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common market".⁴⁰

Experience shows that sometimes this right balance can only be found in the careful assessment of the facts of the specific case at hand.

³⁹ Referring to case C-41/90 *Höfner and Elser* [1991] ECR p. 1979.

⁴⁰ Case C-463/00 *Spain v. Commission* [2003] ECR I-4581, [2003] 2 CMLR 557, para 82.

BRAZIL

1. Definition and importance of SOEs

In Brazil, federal SOEs are defined by the Legal-Decree no. 200 of 1967 as either public companies¹ or joint capital companies. According to the legal-decree, both types of companies are legal entities created by statute. Also, both are subject to private law, as opposed to public law. The difference between the two lies in stock ownership. All of the capital of public companies is exclusively owned by the federal government. On the other hand, the majority of the capital, with voting rights, of joint capital companies has to be held by the federal government while the rest may belong to private investors. In Brazil, state and municipal governments also have SOEs and follow rules that are similar if not identical to the aforementioned legal-decree.

Today SOEs still play a significant role in Brazil despite major privatization initiatives in the 1990s by the governments of Presidents Fernando Collor and Fernando Henrique Cardoso. According to the Brazilian Department of SOEs, which responds to the Ministry of Planning, Budget and Management, federal SOEs today play a major role in the infrastructure and financial sectors in Brazil. Infrastructure sectors include: energy; petroleum derivatives and natural gas; water sanitation, rail transportation; air transportation; and telecommunications.

In the Brazilian energy sector the federal government plays a large role through Eletrobrás, a joint capital company which focuses its activities on electrical energy. Eletrobrás is ranked as Brazil's 7^o largest company and the world's 312^o biggest by a Forbes (2009). Likewise, in the Brazilian petroleum, derivatives and natural gas sector the federal government plays a big role through Petrobras. This company is also of the joint capital type and is Brazil's biggest firm and the world's 25^o largest according to the same Forbes (2009). In the Brazilian water transportation sector, there are several federal SOEs, nearly all of which are dedicated to the management of Brazil's ports in the south-east and north-east coast. In the nation's rail transportation sector there are few federal SOEs. They are dedicated to either urban or interstate rail infrastructure. In the Brazilian air transportation sector, the federal government has a prominent role. Through Infraero, a public company, the government administers the great majority of the nation's airports. In the telecommunications sector there are four noteworthy federal SOEs: Telebras, a general telecommunications joint capital company that has gone from giant to relatively modest enterprise since privatization initiatives in the 1990s; Radiobras, a public company specialized in radio; the Brazil Communication Company (EBC), a radio and television joint capital company; and the Brazilian Mail and Telegraph Company (ECT), a public company. In the financial sector there are several federal SOEs but three deserve special note due to their sizable port and/or function. These are: Bank of Brazil, a joint capital company that is the nation's 4^o biggest firm and the world's 106^o largest according to Forbes (2009); CAIXA a financial public company with a strong mission of social justice; and the Brazilian National Economic and Social Development Bank (BNDES) an economic and social development bank also classified as a public company. Federal SOEs are less present in other sectors but do still have significant roles in some of them. Embrapa, for example, is a public company dedicated to cutting edge research in agriculture. It should also be noted that state and municipal SOEs are, in general, less present in the Brazilian economy, though some bigger states, such as São Paulo for example, do have some relatively larger SOEs.

¹ In this case the word "public" refers only to the fact that the enterprise is owned by the state, it does not refer to the fact that the company is apt for public trading.

More recently, Petrobrás' great national importance has become even greater. This is due to the firm's discoveries, since November 2007, of very extensive oil reserves - a total of about 80 billion barrels of oil equivalent - in the Santos oil Basin, 300 km from the coast at Rio de Janeiro in south-eastern Brazil according to the Economist Intelligence Unit. Also, in recent times, the Bank of Brazil has stepped up its role of thwarting even the slightest risks of systemic failure in the nation's financial sector by increasing lending to other financial institutions, by buying Nossa Caixa (a São Paulo state bank) and by studying further acquisitions for the future.

2. Rules applicable to SOEs

The Brazilian Constitution did allow for some special privileges for SOEs up to 1995 when such provisions were revoked by the 6th Constitutional Amendment. The Constitution expressly prohibits national, state and municipal governments from giving SOEs which pursue economic activities any fiscal privileges that do not apply to the private sector (Article 173 of the Constitution). Also according to the Constitution, Brazilian SOEs are subject to antitrust laws just like any private company (Article 173 of the Constitution). This norm is expressly reaffirmed by Brazil's antitrust law (Article 15 of Law no. 8884 of 1994).

Brazilian federal, state and municipal SOEs are also subject to some specific rules for hiring personnel to ensure higher performance. They must hire people through competitive examinations or competitive examinations and curriculum evaluation (Article 37 of the Constitution). Interviews may be included in this procedure. In the case of most senior positions, this rule does not apply; rather a more flexible appointment system is used. But the practice of appointing career personnel to senior positions is also quite widespread, especially among leading SOEs. Furthermore, unlike central government officials, SOE personnel are subject to the same labor code that is applied to private companies.

In terms of finance, Brazilian federal, state and municipal SOEs are classified as either financially independent or dependent on the National Treasury (Article 1 of Law no. 101 of 2000 – Law on Fiscal Responsibility, LRF). A dependent SOE is defined as a state enterprise that receives, from the National Treasury, financial resources for general expenditures, including personnel and capital expenditures and excluding expenditures that result from increase in company stock participation. Capital expenditures include physical and financial capital according to National Treasury classification. Unlike independent SOEs, dependent state enterprises are subject to more strict financial regulations under the LRF, especially in terms of personnel expenditures and deficit and debt management. According to the Brazilian Department of SOEs, the great majority of federal state enterprises are financially independent. Furthermore, independent and dependent SOEs that experience difficulties with deficits can receive financial aid from the National Treasury through special authorization that may only be granted by statute (Article 26 of the LRF).

Brazilian federal, state and municipal SOEs are subject to rigid control in terms of procurement under Law no. 8,666 of 1993. The federal constitution, under Article 173, stipulates that a new law should be passed to define procurement policy specifically for SOEs but the creation of such a law is still under debate in the National Congress.

In terms of auditing and control, federal SOEs in Brazil, unlike their private counterparts, have to answer to federal government audit bodies according to Decree no. 3,591 of 2000. State and municipal SOEs follow similar rules.

3. Antitrust enforcement and SOEs

Brazil's current antitrust law structured the nation's antitrust system into the following three bodies: the Secretariat of Economic Defense (SDE) of the Ministry of Justice, the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, and the Administrative Council for Economic Defense (CADE) which is linked though not subordinate to the Ministry of Justice. There is no subordination between the three bodies, each having its own role in the system. SDE specializes in investigating bad conduct and in consumer protection; SEAE focuses on preparing advisory opinions on mergers and acquisitions and in competition advocacy; and CADE on judging all antitrust cases after evaluating the works of each Secretariat. CADE's decisions can only be reviewed by the Judiciary Branch (Article 50 of Law 8884 of 1994).

The Brazilian Antitrust System (SBDC) has had to deal with a few cases involving state enterprises in recent years. In these situations the SBDC has sought not to distinguish state firms from private companies when applying antitrust legislation as this is its legal duty according to Article 15 of Law no. 8884 of 1994. In accordance with Article 54 of Law no. 8884 of 1994, any benefices which SOEs may produce due to their social role are taken into account by the SBDC in the same measure as it considers positive externalities and other social benefits which may be generated by acquisitions between private enterprises.

A recent example this is how CADE dealt with a case involving the acquisition of assets held by Ipiranga, a private petroleum company, by the federal SOE Petrobras.² Ipiranga was a sizable firm - in 2005 it was ranked Brazil's 19th largest company by Forbes. The operation involved the petroleum, derivatives and natural gas sector and affected several states and municipalities in Brazil. In late 2008 CADE ruled in favor of the operation but negotiated an Agreement of Commitment to Performance with Petrobras. The Agreement sought to reduce the impact of high market concentration, high barriers to entry and low rates of rivalry which were noticed by the SBDC in some specific relevant markets. The Agreement obligated Petrobras to:

- Divest fuel tanks acquired in the fuel distribution market of the Federal District.
- Guarantee free access to part of the fuel tanks it acquired in the markets of Mato Grosso and Mato Grosso do Sul (two western Brazilian states).
- Allow selected Ipiranga gas stations to partially rescind fuel delivery contracts with the SOE.
- Distribute petroleum asphaltic cement and petroleum diluted asphalt to other producers of asphaltic products in a non-discriminatory fashion.

The SBDC's success in enforcing the nation's antitrust law in equal measure towards private and state enterprises is due mainly to two factors: its clear legal duty of acting in such a manner and the continual improvement of the professional capacity of its workforce. Top appointees in the SBDC are usually highflying private sector lawyers and economists, leading university professors and career civil servants. The technical cadre is composed mostly of well compensated career civil servants hired through demanding competitive recruitment processes. Also, CADE, SDE and SEAE are always keen to invest in continual professional education for its personnel. Hence the SBDC has been able to accumulate more value and recognition for its work over the years and, consequently, sectors within the federal government which would, in the past, pressure for the reduction of rigorous enforcement of antitrust policy in favor of state driven industrial policy are now rethinking their positions.

² Process number: 08012.002820/2007-93.

Currently, SBDC representatives are working with Congress to pass a bill which would improve the system further. The bill intends to extend CADE's commissioner's mandates from two to four years to allow for more independent and technical decisions and elevate their pay grade and hierarchical level to strengthen their authority. The bill also provides for a significant and necessary increase in the number of career civil servants working in the system as well as the fusion of all three SBDC authorities into one agency in order to reduce red tape.

4. Conclusion

In sum, Brazil's two types of SOEs, public companies and joint capital companies, play a major role in the nation's economy, especially in the infrastructure and financial sectors. Brazil's SOEs with economic activities are not allowed to have fiscal privileges that do not apply to their private sector counterparts. On the other hand they are subject to some differentiated legislation in the areas of personnel, finance and auditing. But antitrust policy does apply in equal measure to SOEs and private sector firms.

CHILE

The Competition Act, DL 211/1973 and its amendments does not provide special treatment to publicly owned or managed enterprises. Public entities are subject to the enforcement of the Competition Act in the same terms than private ones.

In Chilean law, the regime of public enterprises is very strict and constitutionally regulated, and carefully balanced with private individuals' constitutionally granted economic freedom and with the principle of subsidiarity. The State and its bodies may develop or participate in entrepreneurial activities only when authorized by a law that has been approved by a qualified quorum of the Congress. In such cases, those economic activities are subject to the common legislation applicable to private individuals, notwithstanding the exceptions on justifiable motives established by law, which must also be approved by a qualified quorum of the Congress.

If the State violates the restrictions established for participating in entrepreneurial activities or the subsidiarity principle, there are constitutional recourses available for affected private parties to initiate procedures before courts. Some parties have argued that the TDLC (The Competition Tribunal) should also guarantee these constitutional principles, and one recent decision might support this idea¹.

Two types of public enterprises can be identified in the Chilean system:

Stated owned Public Enterprises, created by a special statute. They are public entities in nature. Entities of this kind may be identified in the following markets:

- Banks: Banco del Estado de Chile;
- Postal Services: Correos de Chile;
- Copper: Corporación Nacional del Cobre –Codelco-;
- Transport (railways and trains): Empresa de Ferrocarriles del Estado –EFE-;
- Mining: Empresa Nacional de Minería –Enami-;
- Petroleum: Empresa Nacional del Petróleo –Enap-;
- Television broadcasting,: Televisión Nacional de Chile –TVN-;
- Aeronautics and avionics,: Empresa Nacional de Aeronáutica de Chile–Enaer;

Stated owned Corporations, private entities in nature. The State either controls or participates in the corporation ownership. This is the case of, among others:

¹ TDLC, 06.17.2008, Ruling N° 67/2008, involving several actions of a nonprofits public entity in the market for fire fighting services by aircrafts in forests, detailed below.

- Most of the Chilean ports. The corresponding corporations' function is to grant concessions to private parties for the management and operation of port facilities;
- Santiago's subway, Metro S.A.;
- A public owned lottery, Polla Chilena de Beneficencia S.A., also follows this regime;

Any anti-competitive action initiated by or against these public enterprises (both (i) and (ii)) would be subject to the Competition Act and the competition authorities, as if they were private companies.

In addition, it is worth remembering that private parties can submit complaints not only before the FNE but also directly before the TDLC².

Apart from the two types of public enterprises described above, entrepreneurial activities developed by non-profit government or state entities may also be examined by the TDLC.

A brief overview of recent case law where public entities have been accused of anticompetitive conducts may illustrate the above description:

In a pending procedure before the TDLC, the Government was sued in its role of regulator of a concessionaire of a land port, jointly with the concessionaire.

- The "*Consejo de Defensa del Estado*" (the public entity in charge of the judicial defence of fiscal patrimonial interests), claimed lack of competence of the TDLC, arguing that the Government was not an economic actor in the sense of the Competition Act and that, in this case, it was not performing an economic activity. Conversely –it argued–, the Government, by the intermediation of the regulatory agency (*Dirección General de Obras Públicas*), was performing its duties of public provision of public utilities;
- In an intermediate decision dismissing the claim of lack of competence, the TDLC held that, according to the Competition Act: it has jurisdiction on any situation that could violate free competition or tend to such effects, and that there are no exemptions or limits for public entities involved in the violation. The offender does not require any special quality and may either be an individual person or a legal entity, whether private or public. Moreover, the Competition Act rules any type of economic activity, whether it consists in the public supplying of public utilities or not, and irrespectively of whether this supplying is made available directly by the Government or public entities, or by the intermediation of a concessionaire. Given the public interest character of the Competition Act, an explicit exemption would be required to exclude the Government or public entities from its scope, and this exemption does not exist.³

In a 2008 decision, several complaints submitted before the TDLC by small mining companies against a public entity in the mining market (ENAMI), were dismissed.⁴ The claimed violations were abuse of dominance which consisted of abusive purchasing prices and predation. The TDLC dismissal was grounded on competition analysis and no consideration was given to the nature of the defendant.

² Complaints before the FNE may or may not result in an administrative investigation by the agency. Conversely, claims before the TDLC usually give place to a judicial procedure, adversarial or non adversarial, unless the presentation lacks significant grounds.

³ TDLC, 12.20.2007, Intermediate Decision in file C N° 127-07.

⁴ TDLC, 07.02.2008, Ruling N° 70/2008.

Another interesting decision was issued, also in 2008, in the market for fire fighting services by aircrafts in forests.⁵ The defendant in the case was CONAF,⁶ a non-profit public entity which is in charge of several duties related to the administration of public woodlands and national parks.

- In this case, the TDLC stated that: It is the nature of the activity and not the nature of its executor which determines whether an 'economic activity' is subject to the Competition Act. Every economic actor, i.e., any natural person or legal entity, whether for profit or non-profit entity, who individually or collectively comes into a marketplace, for offering or demanding products or services, performs activities which fall within the scope of the application of the Competition Act. The Statute does not make any distinctions based on entities aims or capacities. The Tribunal has issued several decisions in cases where the defendants were non-profit persons or public entities (9° and 10° Grounds);
- The plaintiff, a private company which leases helicopters for fire fighting, submitted a claim before the TDLC. The plaintiff argued that CONAF had incurred in predation and unfair competition practices (i) by developing remunerated economic activities without legal authorization and in more favourable conditions than private companies and (ii) by misusing confidential information of market competitors;
- Even though the TDLC dismissed the predation claim, the unfair competition accusation was upheld and an injunction ordered against CONAF directing it to refrain from developing remunerated activities related to fire fighting services by aircrafts in forests other than those under its supervision, until a legal authorization by qualified quorum was passed in Congress;⁷
- The fact that the defendant, CONAF, was a public entity was not an obstacle for the TDLC to issue injunctions against it.

In another case, ENAP, the State petroleum company, was accused of abuse of dominance before the TDLC by an intermediary reseller, arguing refusal to deal, discrimination and exclusionary practices.⁸ The action was dismissed, giving no consideration to the public nature of the defendant's ownership for the dismissal. The case was on vertical contracts between the parties where the claimant did not satisfy the common technical and financial standards required by the defendant for this sort of contracts.

State owned lottery, *Polla Chilena de Beneficencia*, was involved in two processes before the Tribunal, one adversarial and one non adversarial. In these cases, while analysing tendering conditions⁹ and the terms of contract for distributing agencies,¹⁰ the Tribunal did not regard the public character of the State Lottery as a motive to apply any special consideration to the case and its decisions. The cases was

⁵ TDLC, 06.17.2008, Ruling N° 67/2008.

⁶ Corporación Nacional Forestal.

⁷ This statement may support those who argue that the TDLC should also guarantee constitutional principles such as subsidiarity of the State in economic activities and the private parties' right to of economic freedom.

⁸ TDLC, 04.18.2008, Ruling N° 64/2008.

⁹ TDLC, 10.06.2005, Ruling N° 32/2005.

¹⁰ TDLC, 09.13.2006, Decision N° 17/2006.

analysed under a standard antitrust approach such as if *Polla Chilena de Beneficencia* was a private entity and, finally, no infringement or anticompetitive practice was found in either case.¹¹

Another decision (2008) involved the railway and trains company EFE¹² (*Empresa de Ferrocarriles del Estado*), a state owned Public Enterprise.

- EFE is the monopolist in train services running from Santiago to the South of Chile.
- It was accused by the Telecommunications company GTD of abusing its dominant position on an essential facility, the provision of access to pipelines for crossing railways either through underground or aerial facilities, which is used by gas, electricity and telecommunications companies. EFE was accused of excessive pricing.
- The decision explicitly stated that competition law applies to EFE, “*such rules apply to it as they do to any other economic agent*” (10th ground).
- EFE was found guilty of abusing its dominant position and fined.
- On January, 2009, the Supreme Court affirmed the ruling by the TDLC.

In conclusion, the resolute actions of the FNE, the independence of the TDLC, the right of private parties to directly submit complaints before it, and the constitutional and legal framework in which the Competition Act operates -where principles of subsidiarity, non-discrimination by public entities and economic freedom prevail- are adequate guarantees to address competition concerns that may arise in cases where public entities are involved in commercial activities.

¹¹ As an obiter dictum, one can find in N° 32/2005 Ruling, an objection against the tendering condition that required suppliers to, ex – ante, relinquish judicial actions, particularly those before the Competition Tribunal.

¹² TDLC, 10.14.2008, Ruling N° 76/2008.

CHINA

As we all know, China's *Anti-monopoly Law* (AML) was approved by the National People's Congress on August 30, 2007, and came into effect as of August 1, 2008. As one of the three agencies authorized by the State Council to enforce the AML, MOFCOM is mainly responsible for the antimonopoly review of business concentrations. MOFCOM carefully performed its duty and carried out anti-monopoly enforcement work in accordance with the AML and relevant rules. By the end of June 2009, MOFCOM had accepted 51 notifications of business concentrations, among which 44 had been concluded, including 41 cleared, 2 cleared with conditions, and 1 blocked.

For better enforcement of AML and further promotion of transparency and practicability of the anti-monopoly enforcement procedures, MOFCOM has published several guidelines, regulations and guiding instructions, such as the *Guideline on the Definition of Relevant Market*, *The Measures Concerning the Calculation of the Turnovers of the Undertakings in the Financial Sector*, *Guiding Opinion concerning Notification of Business Concentrations* and the *Guiding Opinion concerning Documents and Information Required for Notification of Business Concentrations*. So far, MOFCOM has collected public opinions on other two regulations, namely the *Measures concerning Notification of Business Concentrations*, the *Measures Concerning Review of Business Concentrations*, which will be published in time upon approval.

At present, the competing environment has been basically accomplished between the State-Owned Economy and Non-State-Owned Economy in China. From the perspective of the competition, we can say that the 30 years history of China's reform and open up, is that of the building fairly competing environment between the Non-State-Owned Economy and the State-Owned Economy. On the one hand, the State-Owned Economy has become the self-responsible business operator and not the attachments of the public agencies any longer through the continued reforms of the supervision of the State-Owned Economy. The State-owned enterprises have accomplished the transition from the planning economy to the market economy. The State-Owned Economy and the market economy realized the cohesion. On the other hand, the Non-State-Owned Economy has got more and more fairly competing environment, with the open up of the market entry, adopting relevant supporting policies, etc. Objectively speaking, the legal frame of improving and protecting fair market competition has been basically accomplished, with the promulgation of those laws, such as *the Corporation Law*, *the Property Law*, *the AML* and *the State-Owned Assets Law*. The ideal that all kinds of undertakings compete fairly in socialistic market economy has sunk deep into the hearts of the people day by day. The pattern in which State-Owned Economy and Non-State-Owned Economy can fairly compete, mutually promote and jointly develop has been basically formed.

State invested companies play an important role in China's economy. According to Clause 5 of the *State-Owned Assets Law*, the state invested companies include the solely state-owned enterprises, the solely state-owned companies, the state-owned capital holding companies and the state-owned equity participation companies. In those key industries relating the national economic lifeline and state security, such as petrol & chemistry, national defense, communication, transportation and so on, the state invested companies play a dominant role.

Both the state invested companies and the non-state invested companies equally apply the AML. The Clause 17 of the *State Owned Assets Law* provides that '*state invested companies should comply with laws and regulations when they are engaging in business activities,*'. The AML, Clause 12 provides that '*the term 'undertaking' mentioned in this Law refers to a natural person, legal person, or any other organization that engages in the production or business of commodities or provides services*'. Any undertaking, which meet the requirements mentioned above, whether it is located in China or not, whether

it is state invested or not, will be subject to the AML if it commits the monopolistic conducts. The clause 7 of the AML specially stresses that in those industries relating the national economy safety and the national safety, in which the state invested companies play an dominant role, *'the undertakings shall operate according to law, be honest, faithful and strictly self-disciplined, and accept public supervision, and shall not harm the consumer interests by taking advantage of their controlling or exclusive dealing position'*, which clearly provides that the state-owned economy shall obey the AML too, and shall not abuse its dominant position to eliminate and restrict competition.

INDIA

1. Definition and importance of SOE's*

State Owned Enterprises (SOEs) or Public Sector Undertakings/Enterprises (PSUs) as commonly referred to in India are government majority held companies, statutory corporations set up by an act of Parliament and fully owned by government. The group includes parastatals and departmental enterprises. In India they constitute an important segment of the economy and account for about 26% of the gross domestic capital formation.

India adopted a strategy of mixed economy (public and private enterprises) after independence. Market failure a major concern at that time, dominated the thinking on the appropriate economic strategy and it was but natural under those prevailing circumstances to opt for a mixed economy model assigning a major role to SoEs. "Controlling the commanding heights" was the credo that over four decades after independence saw the expansion of SoE at all levels of economic activity. With state ownership providing the mantle of a 'tool for 'social development' the expansion of SoEs gained further momentum especially at the state level.¹ Emergence and awareness of the possibility of state failures partly on account of the obfuscation of commercial and social roles of SoEs resulting in lower productivity and efficiency ushered in economic liberalization policies in 1991 with emphasis on market orientation. Economic liberalization shifted the divide between private and public in favor of a greater role for the private sector through removal of entry barriers erected through the mechanism of licensing. Markets as the mechanism for resource allocation have replaced licensing.²

The presence of SOEs is however still large and they continue to occupy critical sectors of the economy and play a significant role. There are as many as 244 central public sector enterprises. There are probably a few thousand at the state and municipal levels SOEs are present. But a significant difference is that now SOEs co-exist with corporate houses in most industrial activities and are open to market forces even in areas where they have a monopoly position on account of earlier entry barriers. To the extent that these enterprises engage in commercial economic activities, the issue is whether competition in the market is affected by the existence of these SOEs. References to the Commission on anti-competitive behavior of SOEs have been few and largely advisory under Section 49 of the Act.

Public sector in India refers to all government activities including administration, running utilities, financial system of the government and commercial enterprises.³ It is therefore vast and SoEs constitute a subset of the public sector. There are many economic entities which do not come under a strict definition of SoEs⁴ but are part of the public sector, involved in commercial activities and impact on competition.

* This paper was prepared by Dr. Geeta Gouri, Member, Competition Commission of India. The views expressed are personal and not of the Commission. Any errors or omissions are entirely of the author.

¹ As a federal country there are SoE's of the central Government of India and SoE's of each state. The state level SoEs normally go by the nomenclature of state-level public enterprises (SLPES).

² See Geeta Gouri., "Privatization and Public Sector Enterprises In India: Analysis of an Impact of a Non-policy" *Economic and political Weekly.*, November 30, 1996., Y.Venugopal Reddy., **Privatisation Approaches, Processes and Issues**, Galgotia Publications, New Delhi, 1992. The process of redivide has been mainly through delicensing, relaxing entry restriction and through equity funding of SoEs.

³ Ibid.

⁴ SoE specifically relate to majority equity holding by the Government.

Distinction is drawn between departmental enterprises (DE) and non-departmental enterprises (NDE). Departmental enterprises are part of government financial system with funding coming from the general budget but under separate accounts of income and expenditure. Highways, construction of houses, educational and health services, postal services all constitute departmental enterprise. Railways is the largest departmental enterprise in this category but with a separate budget. Non-departmental enterprises are legally separated from the government and maintain a separate set of accounts as under the Company Law. These enterprises were set up either under the Companies Act or under special statutory provisions.

2. Rules

Perhaps taking a cue from the definition of public enterprise, the Indian Competition Act, 2002, defines the term “enterprise” in section 2 (h) as

“a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space”

From the above definition it is clear that all the commercial activities of the government, excluding the sovereign one, come under the provisions of Competition Act. No antitrust exemptions are applicable to SoEs including price or purchase preferences.

There are two major features of SoEs in India that however provoke interest. Firstly, many SoEs are in capital intensive industries where even with removal of entry barriers competition tends to be limited. Secondly, in areas of ‘natural monopoly’ predominantly in utilities where reforms and market orientation has been introduced. Reforms is on unbundling the SoE utility but retained for the present in the natural monopoly component such as wires in the telecom sector or power sector with the public sector but with no entry barriers.

3. Framework for anti-trust analysis of SoEs

A tabular format has been developed which helps to identify areas of economic activity where the presence of SOE could restrict competition. Modalities of introducing competition are suggested as also identifying the relevant sections of the Competition Act, 2002 of India that become operative.

The basic framework used in the table follows the licensing policies laid out in the Industries (Development and Regulation) Act 1948. Under this Act, industries were classified into three categories. Schedule A: reserved exclusively for SoEs; Schedule B: largely reserved for SoEs but existing private sector enterprises permitted to continue; Schedule C; largely for the private sector but SoEs were not debarred. In the case of departmental enterprises the above schedules were not applicable as no licenses were involved. Economic liberalization policies removed boundaries of all three categories but as incumbents. As stated we look at two categories namely, ‘natural monopoly’ and ‘legally created monopoly sectors’, as issues of competition are critical therein.

Market Structure of SoEs in India and Anti-trust law

Sector	Market Structure	Anti-trust Law –Competition Concerns
Natural Monopoly --- Public Utilities: Telecom, Power, Ports (Air and Sea), Railways, gas and oil pipelines	Market reforms in this segment stemmed from the division of product from the carriage where carriage is the natural monopoly segment Unbundling has facilitated greater private participation except in those segments which display natural monopoly characteristics. These are mainly networks of former public utilities where the predominant characteristic is that of sunk cost. SoE in most instances are still retained in the network segment.	<p>The dominant feature of natural monopoly is the existence of sunk costs. Sunk costs can act as barriers at a point of time to entry.</p> <p>If unbundling retains the vertically integrated framework by way of agreements then the analysis of contravention of Competition Law will be with respect to Sec 3(4) ; if the natural monopoly leads to horizontal mergers then Section 3(3) become operative. And in determining Sec 3 the Commission will examine Sec 19(3) and (4).</p> <p>In this segment of economic activity, competition is <i>'for the field'</i>. The modality for introducing competition is by way of auctioning the network for entry of new players.</p>
Legally created monopolies where entry to private sector was not allowed except in instances where they already existed and were not nationalized. Mainly Capital-intensive Heavy Industries e.g. steel, generation equipment, transformers etc.	Open to private sector with the removal of entry barriers. Large capital investment lead to monopolistic competition.	<p>Given their dominant position SoEs are liable to contravene Section 4 of the Act.</p> <p>Trade liberalization and removal of trade barriers is the best mechanism for ensuring competition. The Commission role is more of a facilitator.</p>

Section 3 of the Competition Act, 2002 deals with Anti-competitive Agreements; Section 4 with Abuse of Dominant Position. Sec. 19(3) and (4) set out the parameters which will have due effect on appreciable adverse effect on competition and on whether an enterprise enjoys a dominant position.

From the above table it is clear that the difficult area as regards anti-trust law is with regard to SoE in public utilities providing essential services. Services are non-tradeable and involve high sunk costs as in wires and bandwidth in the case of telecommunications and transmission networks in the case of the electricity segment.⁵ Networks are capital intensive and the sunk costs can be entry barriers. With well developed financial markets sunk costs are no longer associated with entry barriers. Instead user charges can emerge as entry barriers. In a public utility where social costs often override other considerations especially in the essential services category such as electricity and telephony, user charges are often kept

⁵

Grid networks electrical and band waves are normally referred to as carriage and are natural monopolies.

low making investment a non-viable proposition. Briefly the telecom and electricity are examined as SOE's still retain a presence in the natural market segment.

In India reforms in the telecom sector have seen the establishment of market conditions both in the access and service segments. A separate Regulatory Authority, Telecom Regulatory Authority (TRAI) is in place. Advice was sought from the Commission by Government under Sec 49 of the Act and given as regards awarding of bandwidth to private players.⁶ The suggested mechanism was that of bidding process and the bandwidth be auctioned to the highest bidder while duly ensuring transparency in the mechanism. In this sector the initial entry of private sector was in the mobile phones segment. The different models of business associated with the telephony business have attracted a lot of attention and the benefits of competition are the common man are well accepted without a squeeze on profitability of these companies have not been squeezed.⁷ But the basic advantage was the low level of teledensity existing at the time of entry of private players which enabled charging lower user charges but with increased volumes.

The electricity or power sector is more complex in India as it is a concurrent subject and all state governments have their own state regulatory authorities. It is also a sector where reforms are relatively new as compared to the telecom sector. The stages of reforms which involve unbundling, introducing private players spans an entire spectrum from complete government monopoly to fully unbundled and private players in the competitive segments. But largely, the transmission networks at the state level are still with the SoEs and so are the distribution networks. The Electricity Act, 2003 and the establishment of regulatory authorities in each state is responsible for regulating the sector. Consumer choice is the focus of reforms and under the Electricity Act Open Access where consumers are free to choose their source of supply with non-discriminatory access to the networks is the modality.

4. Observations

In both these two utilities on account of sunk costs there are initial entry barriers on account of low user charges. The incumbent has the advantage in the first round. Expansion of networks may not see this advantage.

In the telecom sector mobile operators could maintain lower charges on account of untapped markets. As long as there is unsatisfied demand expansion with lower user costs recovery of network charges is not a constraint. In the electricity sector expansion of the transmission network, the prevailing unsatisfied demand for electricity will sustain new networks even at relatively higher user charges.

⁶ Under sub-section 3 of section 49 of the Competition Act, CCI is responsible for and has the mandate to undertake measures for the promotion of Competition Advocacy, creating Awareness and imparting training about competition issues. The Commission has been engaged in undertaking Competition Advocacy with government ministries, regulators, state governments and other authorities. From time to time it has given its views on proposed economic laws and policies of the government and regulatory policies and practices of sector regulators, where these impact competition in the markets. Accordingly, the Commission had communicated its opinions *inter alia* on the draft Indian Post Office (Amendment) Bill, 2007, the Warehousing (Development and Regulation) Bill, 2006, the Shipping Trade Practices Bill, 2007 and the Petroleum and Natural Gas Regulatory Bill, 2005. The Commission has also given its views on regulatory policies and practices in the fields of banking, telecommunications, and intellectual property rights such as patents and copyrights.

⁷ The Indian model as it is known has allowed for low costs and high profitability. The average revenue per customer (APRU) is among the lowest in the world. As per *Economist* issue of Sept 26-Oct.2,2009 survey of telephony markets titled 'Mobile miracles' APRU in India is \$6.50 and call charges of 0.02 per minute as compared to APRU of \$51 in USA, \$51 in Japan and \$36 in Europe.

The problem of such costs in public utility as regards entry barriers come from user charges. High user charges may not be sustainable where consumers are concerned while low user charges depend on market. Ownership is not an issue.

INDONESIA

The Government begins Indonesian state-owned enterprise's era with several undertaking or nationalization of foreign (Dutch) companies during centralized democracy. The companies are mostly agricultures, land transportations, mining, banking, and hotels. While stipulated by Article 33 of the Indonesian Constitution 1945, the economy shall be organized as a common endeavor based upon the principles of the family system. Sectors of production, which are important for the country and affect the life of the people, shall be under the powers of the State. Therefore, the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people. Moreover, the organization of the national economy shall be conducted based on economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.

The Constitution addresses that vital business activities for state and controlling people way of life, should be controlled by the State. Thus, therefore, the state-owned enterprises are need for their public service obligation (PSO) and commercial activities to contribute for state income. Moreover, based on the Law No. 19/2003 on State-Owned Enterprises, the SOE gain several major roles for Indonesian economic development, such as:

- to contribute to national economic development and state income;
- to gain profit;
- to conduct public benefit through high quality product and service;
- to create new business opportunity; and
- to assist micro, small, and medium enterprises and cooperative.

Economic crisis on 1997-1998 has elevated social crisis which burdening the government's budget and resulting an overdue foreign loan, vulnerable monetary stability, unstable politic, and some losses SOE in financial service and industries. The SOE that expected to contribute national income through dividends and taxes is not yet optimum. Privatization through strategic sale that hopes to assist the SOE is creating and potency for economic and political losses.

The development of SOE in Indonesia is marked by the enactment of the Law no. 19/2003 on State-Owned Enterprises. The law is aimed to provide direction, program, and policy for the government on the SOE, thus could create guidance for relevant parties. The SOE is treated as commercial unit with public service or non-commercial requirement. Implementation of two-sided function of the SOE creates unprofitable SOE, especially those in electricity and transportation sector. Moreover, some SOE's still gain monopoly right by regulation and or concession. Despite their monopolization, the SOE is not yet significantly contributed to economic development and thus the enhancement of social welfare. There are some opinions that the SOE shall treated similar to other business entity or unequipped with special rights that could breach fair business competition principles. This strengthens the need for reorganization of the SOE in contributing to national economic.

1. Development of SOE

State-owned Enterprises according to the Law No. 19/2003 is defines as business entity that entirely or partially owned by the State through a direct share-ownership that funded by a separate state's asset. This SOE is divided into several types, namely public company (listed on the stock exchange), corporation (limited liability company), limited company (complete liability company), and service company (public service company).

Number of SOE today in Indonesia is relatively large. Based on the Ministry of SOE, there is 139 SOEs in Indonesia, which categorize as 13 limited companies, 114 corporation, and 12 public companies. There are also 21 companies that the Government's owned as minority shareholder. These companies involves 38 sectors vary from infrastructure (electricity, water, telecommunication, etc), financial services (banking and insurance), and general trading. Nevertheless, some of the SOE is not always inline with the concept as stipulated by Article 33 of the Constitution 1945.

**Number of SOE in Indonesia
For year 2002 – 2006**

No	Types of SOE	Number of SOE				
		2002	2003	2004	2005	2006
1.	Public company	8	11	12	12	12
2.	Corporation	124	119	119	114	114
3.	Limited company	11	13	13	13	13
4.	Service company	15	14	14	0	0
Number		158	157	158	139	139
Companies with less than 51% state ownership		20	21	21	21	21

Source; Ministry of SOE, 2006

Number of SOE is significantly decrease in 2005, due to conversion on several Service Companies into Public Service Agencies, mergers by four SOE's in fishery, and a liquidation. This number will continuously decline in 2009 along with the government's objective to limit the SOE to only 89 companies in order to increase efficiency, competitiveness, public service, and performance of SOE. This is also inline with the President's Instruction No. 5/2008, which aimed to reduce the SOE from 139 to 87 companies. Of 139 companies, only 22 largest companies able to provide 80% net profit. Failure companies will be merger or liquidate through public offering. In 2009 itself, there will be several SOE that listed to be privatized.

The development of SOE is quite high for the last six years, with average growth on balance for 12.5%/year. In term of asset, only ten SOEs are having asset up to 86.5% of all SOE's asset collectively.

2. Performance of the SOE

Until today, there is conceptual correlation between Article 33 of the Constitution 1945 and the existence of SOE in Indonesian economic. Empirically, the implementation of economic policy is contradictory, while some strategic economic sector is deregulated and open for foreign investment. This is resulting irrelevant concept for state control on vital business activities.

The Law No. 19 /2003 on State-Owned Enterprises regulates the role of SOE in national economic. The law put SOE as commercial unit that may bear non-commercial public service function. Some SOE also received special right by the government as sole operator on several sectors by monopolization and concession. Nevertheless, there also finding showed that some SOE's found to breach the Indonesian competition law.

As aforementioned, one of the objectives of SOE is to contribute for state income. Statistic shows that SOE's contribution for state income from Rp 5.43 trillion in 1999 to Rp 29.21 trillion in 2009 (with average growth of 24.3%/year). The SOE as business entity also a potential tax payer with Rp 23.4 trillion contribution in 2002 and Rp 45.3 trillion in 2006 (with average growth of 93.6%).

3. Antitrust Enforcement on SOE

The Law No. 5/1999 (Indonesian competition law) apply to any business actor that doing business in Indonesia, including the state-owned enterprises. However, competition law also taking account on other laws in the implementation, such the law on private enterprises and the law on state-owned enterprises. In order to cope with other laws and jurisdiction, Indonesian competition law also provide exemptions on any behavior exist as the implementation of certain law and exclusions on the natural monopoly implemented by the SOE. The exclusion only applies on the market structure and not on the business behaviors.

Our statistic showed there are 28 decisions (of more than 132 decisions) involving anti-competitive behaviors of the SOE. These decisions accounted for 38 SOEs ranging from several industries such insurance, transportation, telecommunication, agro industry, and oil and gas. The biggest case is involving bid rigging violation by six SOEs on construction sector.

In order to provide better and clear understanding as well as increase transparency on competition law enforcement, thus the Commission issues a guideline on providing on exclusion for SOE. This guideline is aimed to avoid miss-interpretation by public administrative leading to abuse of their administrative power, thus will result on consumer loss.

4. Guideline on SOE

Article 51 of Indonesian competition law stipulate that;

“Monopoly and or concentration of activities related to the production and or marketing of goods and or services affecting the livelihood of society at large and branches of production of a strategic nature for the state shall be stipulated in a law and shall be implemented by State-Owned Enterprises and or institutions formed or appointed by the Government”

The article clearly highlights that monopoly and or concentration of activities could be apply for industry/sector that affecting the livelihood of society and branches of production of a strategic nature. This monopoly should determined by a Law and implemented by the SOE.

There are two major points need to be highlighted on this article, first is the livelihood of society and other is stipulated in a Law. According to the basic theory, good and service that affect the livelihood of society is those that indicates several conditions, such as

- allocation (the good or service that come from natural resource control by the State for the benefit of society);
- distribution (the good or service that basically needed by the society); and
- stabilization (the good or service that should be made available to public).

There also the need for a Law that stipulates certain SOE as the sole provider of mentioned good or service. Other regulation other than a Law is not applicable for this exclusion.

The SOE or business institution forms by the Government as monopolist also shall made several criteria as follows:

- the management and organization of activities shall controlled, supervised, and reported to the government;
- should not mainly search for profit; and
- should not transfer partial or entire monopolistic authority to other business entity.

4.1 Case example

One of the case example involving the SOE is the monopoly by certain SOE in gas distribution (let us call it the X Company). The X Company is a monopolist in gas distribution that through its affiliation distribute gases nation wide. In this distribution process, the X Company appointed the Y Company, its subsidiary, as the sole distributor and limit entry by other potential distributor, resulting a higher price with lower service which put down dissatisfied the consumer.

KPPU in its opinion argued that the monopoly structure is well accepted, but the behavior in limiting distribution in certain area only to its subsidiary will limit entry to other competing business actors, thus will lessen competition in those areas. This is proving to breach Article 19 on Market Control of the Law No. 5/1999. Instead, the monopolist shall efficient in managing its business activities and provide lower price with higher quality to the consumer. An excessive pricing by a monopolist is treated as monopolistic practices prohibit by Article No. 17 of the Law.

LITHUANIA

1. The definition and importance of SOEs

In the Republic of Lithuania the Civil Code provides with the provision concerning the definition of public and private persons. Art. 2.34 establishes, that legal persons shall be divided into public and private persons. Further on it states that public legal persons shall be legal persons established by the state or municipalities, their institutions or other non-profit-seeking persons whose goal is to meet public interests (state and municipality enterprises, state or municipality institutions, public institutions, religious communities, etc.).

The Civil Code is applicable for the regulation of public persons only in a subsidiary manner, i.e. specialized laws take precedence here. One of such laws is the Law on State and Municipality Enterprises of the Republic of Lithuania, which provides for with the procedures of establishment, management, business, reorganization and dissolution of public legal persons, as well as more precise definition of the state owned enterprise.

SOE, according to the abovementioned law, is an enterprise established from the capital of state (or municipality) or transferred to state (municipality) pursuant to order established by the laws, and the ownership of which belongs to the state (municipality), and property of which is administered, used and disposed of on a basis of the right of trust. A SOE is a legal person of limited civil liability. The law on SOEs also establishes that the goal of SOE is to provide public services, produce production and engage in other type of activity in pursuance of meeting public interest.

Due to the law, the civil legal capacity of SOEs is defined as the following: enterprise can be in possession of or achieve such civil rights and obligations that are not contrary to its statute/bylaws and goals of business.

The main sectors in the Republic of Lithuania in which SOEs are particularly important are mostly the standard ones: gas transmission and distribution, nuclear sector, railways, airport, electricity transmission and distribution, postal services, state seaport and others.

2. Rules applicable to SOEs

In the Republic of Lithuania the rules applicable to private enterprises and state owned enterprises *may* differ to a certain extent – it depends on a case and its peculiarities, i.e. whether traditional competition rules (prohibition of restrictive agreements and abuse of dominance) or imposition upon public authorities a duty not to discriminate separate undertakings are applicable, whether there are special laws providing with more detailed and prevailing provisions that should be applicable to a particular sector or economic activity, etc. Therefore, if special laws applicable to a particular economic sector or activity of the state owned enterprise establish different conditions for business activities, special treatment in such cases can be granted. The outcome of the case in such situations depends on the type of sector in which relevant enterprises engage in their business activities and on existence of special laws the provisions of which prevail over the requirements of the Law on Competition. On the other hand, in the absence of such special laws the same treatment is granted to SOEs as to private enterprises. It is important to mention that in the past the Law on State and Municipality Enterprises provided a right for the founder of the SOE to determine for the enterprise prices and tariffs of merchandise (services) and regulations for calculating

them (this right had to be explicitly established in the statute/bylaws of the SOE). However, this provision is no longer applicable since 2003.

The Law on Competition provides for with a general purpose to protect freedom of fair competition in the Republic of Lithuania which is applicable to both private and public enterprises. Moreover, the Law also outlines that it shall regulate the actions of the public administration subjects and undertakings, which restrict or may restrict competition <...>, shall establish the rights, duties and liabilities of the said institutions and undertakings and the legal basis for the control of competition restriction <...> in the Republic of Lithuania.

However, Art. 2 of the Law on Competition provides for that it shall prohibit undertakings from performing actions which restrict or may restrict competition, regardless of the character of their activity, *except* in cases where this Law or laws governing individual areas of economic activity provide for with exemptions and permit certain actions prohibited under this Law.

In this context Art. 4 of the Law on Competition is relevant in an indirect way. The provisions of the Law foresee that when carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, public administration subjects shall ensure freedom of fair competition. Public administration subjects shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which bring about or may bring about differences in the conditions of competition for competitors in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with.

The Competition Council of the Republic of Lithuania during numerous cases concerning infringement of Art. 4 has developed a scheme for application of this rule, which requires to ascertain of the entirety of the following circumstances:

- the act or decision of institution privileges or discriminates different undertakings or their groups;
- due to such act or decision differences in the conditions of competition for competitors are created or may be created in the relevant market;
- different conditions for competition are not determined by the requirements of the laws of the Republic of Lithuania.

3. Antitrust enforcement and SOE

The Competition Council basically deals with two types of enforcement procedures concerning SOEs – one regarding Art. 4 and obligation upon public institutions to ensure fair competition in the market therein, and Art. 5 and 9 of the Law on Competition, regarding traditional prohibitions of entering into prohibited agreements and abuse of dominant position.

3.1 *Enforcement of Article 4 of the Law on Competition*

During one year the Competition Council investigates approximately 4-5 cases regarding infringement of Art. 4 of the Law on Competition, with the exception during 2008, as 9 resolutions pertinent to it have been adopted. Having analyzed the resolutions, a conclusion can be drawn that mostly often infringements of this provision concern unlawful procedure of public procurement organized by municipality institutions.

In several cases the Competition Council recognized the infringement when public procurement procedure according to the provisions of the Law on Public Procurement should have been organized, but the municipality administration failed to fulfill such obligation.

For example, in a recent case No. 2S-7 of 2009, concerning organization and administration of cleaning works of public territories in Lentvaris town, municipality administration unilaterally signed a contract with one undertaking, "Trakų paslaugos", UAB which is owned by this municipality without organizing public procurement, i.e. the undertaking was privileged, whereas other possible competitors discriminated thereby. Discrimination by which different conditions for the competition are created is explicitly prohibited by the Law on Competition. Public procurement which could have created possibilities for other undertakings to compete was not organized, and such omission of municipality institution could not be justified by provisions of specialized laws, therefore a commission of infringement was recognized.

A similar case with the same outcome, i.e. a failure of municipality institutions to organize public procurement procedure and unilateral grant of privilege to provide services of waste administration (administrative function) as well as waste utilization (economic function) to particular undertakings (at the same time depriving other possible competitors from a possibility to compete in a relevant market) was decided in 2008, case No. 2S-27. The Association of public utilities and waste administration undertakings lodged a complaint against several municipalities, because they unilaterally granted rights for local regional waste administration centers (owned by municipalities) to not only administer this function, but also engage in economic activities. Such unilateral conduct and heavy restriction of competition (the agreement with undertaking was open-ended) was not proven to be prescribed by any special law, therefore rendering the grant of municipalities unlawful. It is important to underline that municipality had a right to grant a right to organize the system of waste administration, however, waste utilization business according to the laws was regarded as economic activity and competitive procedure had to be provided and ensured for it. The focus, when deciding such cases, has to be on the nature of activity that undertakings or institutions are engaged in, with no difference as regards legal status of the undertaking or the way it is financed. This resolution of the Competition Council was appealed to the courts, but the court of first instance has dismissed the complaint.

3.2. *Enforcement of Art. 5 (Art. 81) and 9 (Art. 82) of the Law on Competition and EC Treaty*

The application of traditional competition law rules, i.e. prohibition of entering into prohibited agreements, as well as abuse of dominant position, to activities of SOEs is based on principle of competitive neutrality – that publicly owned enterprises compete fairly in the market without having any privileges in comparison to other undertakings due to their legal status and ownership of property.

In the practice of the Competition Council there had been a number of cases that concerned investigations of SOEs and their activities. Principally sectors of railways, airport and postal services were investigated.

The most recent case in this context was the adoption of the final decision by the Supreme Administrative Court of the Republic of Lithuania (the SACL). The decision of the Court overruled the appeal filed by the Lithuanian post company AB Lietuvos paštas – a state owned enterprise. By its ruling the SACL acknowledged the validity of the conclusion in the Resolution of 27 September 2007 of the Competition Council to the effect that AB Lietuvos paštas had infringed the requirements of Art. 9 of the Law on Competition by having abused its dominant position in the relevant market by establishing different prices for the mail delivery. The SACL concluded that AB Lietuvos paštas was holding a dominant position in the market for reserved (universal) mail services. In this position the company has been abusing its dominant position and was seeking to oust its two competitors from a closely related

market – that of invoice printing, binding and enveloping. The investigation was conducted to assess the results of the tender announced by UAB Vilniaus energija to procure combined invoice printing-enveloping and delivery services. The prices of all three competitors for the service of invoice printing, folding and enveloping were to a large extent comparable; thus the companies could compete in terms of their prices. AB Lietuvos paštas, however, was in an advantageous position to offer much more attractive mail delivery prices being aware in advance of the prices offered by competing companies, since in order to submit a competitive tender the latter had to use the mailing services and fixed the rates set up specifically by AB Lietuvos paštas.

Another case regarding SOEs was the examination of actions of the state enterprise Vilnius International Airport by the Competition Council in 2007 as concerns the compatibility of its behaviour with the requirements of Art. 9 of the Law on Competition (prohibition of abuse of dominance). The investigation was performed in response to the application filed by UAB RSS Motors seeking to determine a possibility of abuse of a dominant position by the Vilnius International airport in the provision of airplanes with fuels in the Vilnius International airport. UAB RSS Motors lodged a complaint against the actions of the Vilnius International Airport, as it firstly required submitting the fuel supply agreements with the customers and other related instructions, and secondly – refused to allow a second fuel vehicle to the airport, which in the opinion of the applicant was contradictory to the provisions of the Law on Competition. While operating in the management and organisation market in the Vilnius airport the SE Vilnius International Airport was also competing with the applicant RSS Motors in the market for the provision of airplanes with fuels in the airport in question, i.e. performed commercial activity.

Having regard to the findings of the investigation the Competition Council concluded that the requirement of the SE Vilnius International Airport to UAB RSS Motors to submit the contracts with the customers, as well as refusal to allow entry for a second vehicle, would not be justifiable even for the purpose of the administration of the Vilnius international airport, therefore such actions were recognised to constitute an infringement of Art. 9 of the Law on Competition since the possibility to learn the contents of the contracts concluded with the customers of the competitors and refusal of granting entry for additional vehicle reduced competition.

ROMANIA

1. SOEs in Romania - definition, ownership, importance

In Romania the enterprise reform started after the revolution, in 1990. The commercialization of SOEs resulted initially into two types of enterprises: *commercial companies* and *regies autonomes* (autonomous holdings/administrations).

The *regies autonomes* were legal entities entirely state-owned. In 1993 the government established clear policies limiting the range of activities appropriate for the *regies*; the status of “*regies*” was limited to state enterprises that were “natural monopolies or essential for national defense and security”. Lately in 1997 a new regulation imposed the transformation of all non-essential *regies* or ancillary operations into joint-stock commercial companies/national companies, in the end open for privatization.

Commercial companies were the 6300 joint-stock companies corporatized in 1990-1991. Their capital was split between the State Ownership Fund¹ (SOF) which owned 70%, and five Private Ownership Funds (POFs), under a scheme where each POF held the remaining 30% of the shares of approx. one-fifth of the companies. Every adult citizen received a certificate of ownership in one of the POFs. These companies were slated for privatization.

The gradual reduction of the state’s presence in the economy was a crucial element of the reform package associated with Romania’s EU pre-accession commitments. With the assistance of the World Bank, European Union, and International Monetary Fund (IMF), Romania succeeded in privatizing most industrial state-owned enterprises, including some large state-owned energy companies. Romania completed the privatization of the largest commercial bank (BCR) in 2006. The privatization of the last state-owned bank - the National Savings Bank (CEC) - was stopped in 2006 and has been indefinitely postponed.

The energy sector was unbundled and important privatizations took place in electricity and gas distribution. The national oil company was also privatized, although the government retains a minority share in Petrom. Five of the country's eight regional electricity distributors have now been privatized. Privatization of natural gas distribution companies also progressed with the sale of Romania's two regional gas distributors, Distrigaz Nord (to E.ON Ruhrgas of Germany) and Distrigaz Sud (to Gaz de France). Further progress in energy sector privatization, however, has been delayed as the government reconsidered its strategy on the Rovinari, Turceni, and Craiova energy complexes, contemplating merging them into an integrated, state-owned energy producer. This merger would be part of a more ample process of restructuring the entire electricity production sector into two large national companies that would congregate assets from all SOEs in the sector. This restructuring process intends also to stimulate the involvement of private operators in the energy production sector.

In parallel, price liberalization in many sectors and the adjustment of energy tariffs reduced direct state involvement in services and improved the efficiency of resources allocation. Nevertheless, public enterprises still represent a substantial part of the economy and important energy generation companies, whose governance requires further improvement, continue to be managed by the state.

¹ Later on, SOF was transferred to the portfolio of the Authority for State Assets Recovery (AVAS).

At present, the state, through AVAS, controls majority stakes in 35 commercial companies, that are all currently under privatization proceedings. AVAS intends to include the other 376 companies in its portfolio where the state holds minority shares in a listed state-owned investment company; the project is currently under public debate. The other SOEs (national companies, regies, joint stock companies etc) are under the authority of various line ministries or local public administration bodies, such as the Ministry of Economy, Ministry of Transports, Bucharest City Council etc.

For example, the Ministry of Economy has under its authority 65 undertakings, out of which 14 joint-stock national companies, 1 regie autonome, 47 joint-stock commercial companies and 9 R&D national institutes.

2. Antitrust enforcement and SOEs.

In an economy in transition, anti-competitive practices involve the State represented at different levels (ministries, local administrations or SOEs), as it sometimes plays a double role, one as regulator establishing the rules of the game and another one as market player. Scaling down the role of the State as a market player in the economy may contribute to normalize such a situation; an independent and autonomous competition authority may be another important factor that can ensure competitive neutrality is maintained.

Given the fact that many major Romanian players were either SOEs or former SOEs that underwent privatization, compliance with competition rules and regulations was a constant concern that was reflected all throughout the enforcement and advocacy activity of the RCC.

In many cases involving SOEs and public authorities, the SOE had a dominant position on the market either by inheriting such a strategic position (e.g. SNTR case) or by virtue of special or exclusive rights conferred upon it under special enactments.

2.1 SNTR/TDG (2003)

The case started following a complaint submitted to RCC by TOTAL DISTRIBUTION GROUP SRL („TDG”) in 1999 regarding a possible abuse of dominant position by Societatea Nationala TUTUNUL ROMANESC” SA (“SNTR”)

SNTR, at that time a national company entirely state-owned, represented the most important tobacco producer on the Romanian market, its products being distributed on the entire territory of Romania through 42 exclusive distributors (one distributor for each county). TDG was one of the distributors of SNTR’s products.

RCC sanctioned SNTR for its abusive conduct, namely for: imposing resale prices on all the levels of the distribution chain; applying dissimilar conditions to equivalent transactions with trading partners, thereby placing some of them at a competitive disadvantage; applying non-transparent selection procedures of distributors in 1999; SNTR could not prove the criteria on the basis of which the distributors were selected.

Where the exclusive rights were exercised in a manner contrary to Article 6 of the Competition Law, RCC asked the competent public authority to amend the enactment so as to provide equal opportunities to all private operators active on the market (e.g. CFR Marfa case, Tuingdor case or RNP case).

2.2 CFR Marfa (2006)

In a 2006 decision of the authority, the national railway freight carrier was sanctioned for refusing to grant access to the round houses in its property to other private carriers. In this case, the analyzed market included services of exploitation, maintenance, and repairs of locomotives, specific services for locomotives personnel (access of locomotives personnel to sleeping rooms in the locomotives depots), and all the other activities required for the proper functioning of railway freight transportation. The geographical product market was defined as regional, given by the location of regional units owned by CFR Marfa where it performs these services. As far as the entry barriers were concerned, the access on the relevant market is regulated, in the sense that it requires getting a license from Romanian Railway Authority. In addition, the locomotive shedding requires a depot; the same requirement was applied for the provision of locomotive staff access to sleeping rooms, as staff accommodation in other types of spaces would have contravened the specific legal framework.

RCC's investigation showed that, initially, the current depots were under the possession of the two State-owned railway operators, namely CFR Marfa and CFR Calatori (passengers transport). For that reason, the market had the structure of a duopoly and the clients had the possibility to opt for the services provided by one of two operators, with mention being made that CFR Calatori was charging tariffs much lower than CFR Marfa. Subsequently, the Ministry of Transports issued an order whereby the depots was passed either under CFR Marfa's patrimony, or under CFR Calatori possession; as a result of that decision, the market was very much shaped as a monopoly, since there was only one depot in the end-of-line stations, except for Bucharest and Ploiesti, where each of two companies held a depot.

Examining the behaviour of the two undertakings acting on the same product market – CFR Marfa and CFR Calatori, RCC found that the tariffs charged by CFR Calatori were the same for all its beneficiaries, while CFR Marfa was charging differentiated tariffs laid down in an internal order, based on the beneficiary's ownership (State-owned or private railway operators). The non-discriminatory tariffs charged by CFR Calatori were considered by RCC as a benchmark on the relevant market. In comparison with this benchmark, the tariffs charged by CFR Marfa for private operators were, until contracts expired, from 5 up to 20 times higher. By incurring differentiated charges, much higher than those applied to spin-offs from the former SNCFR², the private operators, as competitors of CFR Marfa, were disadvantaged on the market and determined to compete less aggressively.

Based on all the evidence, RCC's Plenum decided that CFR Marfa infringed the provisions of art. 6 lit. a) and c) of the Competition Law, abusing of its dominant position on the relevant market and resorting to anticompetitive deeds consisting in:

application, towards private operators, of unequal conditions on similar services, namely the application of distinctive charges as compared to the same services provided to companies split from the former SNCFR;

refusal to deal with certain business partners, namely privately-owned railway freight operators.

In order to ensure a normal competition environment for freight railway transport, RCC decided to recommend to the Ministry of Transportation to guarantee equal conditions for all undertakings, irrespective of their nature.

² The state-owned national railway carrier, until 1990.

2.3 *RNP Romsilva (1999)*

In 1999 Regia Națională a Pădurilor Romsilva (RNP, the National Administration of Forests, a regie autonome) was fined for repeatedly and unilaterally modifying contracts with undertakings processing and marketing forest mushrooms. RCC found in its Decision that RNP had imposed severe obligations, which would not have been accepted by the purchasing undertakings had they had a viable alternative. The list of obligations included annulment of all contracts between mushroom acquirers and local councils or private forest owners, threefold increase of tariffs for harvesting mushrooms etc. Such obligations were imposed under threat of unilateral dissolution of contracts and exclusion from the market.

2.4 *Ministry of Internal Affairs/RASP/Tuingdor/Mitsubishi (2005)*

This case came into the attention of RCC following a large number of complaints accusing infringements of the competition law on the market of driving license photos.

The investigation undertaken showed that a contract regarding photos for driving licenses had been concluded between the Ministry of Internal Affairs and RASP- Regie for the Administration of the State Protocol - on the one hand, and Tuingdor SRL (Tuingdor) and Mitsubishi Electric Europe GmbH (Mitsubishi), on the other hand. According to this contract, Tuingdor, exclusive distributor of Mitsubishi in Romania, had been granted exclusive rights regarding the establishment of a network of photographers on the entire national territory, exclusively using Mitsubishi equipment and supplies. The Ministry of Internal Affairs obliged itself to refuse photos not using Mitsubishi supplies. Moreover, the contract set a maximum price for the photos.

In its decision, the Competition Council found that Tuingdor, Mitsubishi and RASP infringed the provisions of article 5(1) of the Competition Law by concluding and implementing an anticompetitive agreement, having as purpose to: eliminate competition from other photographers; force photographers to acquire only a certain type of equipment and supplies; limit the access of other distributors on the market as well as to limit parallel imports.

RCC also found that Tuingdor infringed article 6 of the Competition Law by abusing its dominant position on the relevant market, by: indirectly setting retail prices; tied sales, forcing photographers to acquire service and maintenance, beside equipment and supplies; exploiting the dependency of its clients, as it had the right to unilaterally extend or denounce the contract, whereas photographers did not have similar contractual rights.

The Competition Council decided that the Ministry of Internal Affairs had infringed article 9 of the Competition Law, as it unnecessarily limited the liberty of commerce and introduced discriminatory rules related to the activity of undertakings by awarding exclusivities with regard to the photo equipment and supplies used for the driving licenses photos.

Faced with the pressure exerted by the incumbent SOE, the players from the relevant or downstream markets either reacted with a complaint to the RCC in an effort to get the dominant company to discontinue the abusive practice or decided to match the negotiating power of the dominant firm by associating themselves; such negotiations usually resulted into either a vertical or a horizontal anticompetitive agreement. (e.g. NAMR/NCMW case or ARSCPRU/Port and Navigable Canals Administrations case)

2.5 *National Agency of Mineral Resources/National Company of Mineral Waters/APEMIN 2000)*

The case came into the attention of the Romanian Competition Council upon receiving, almost simultaneously, a request from the Ministry of Industry and Commerce (MIC) and a complaint from the

National Company of Mineral Waters (NCMW). Both MIC and NCMW requested the intervention of the Romanian competition authorities because all 19 companies bottling mineral water, members of APEMIN, refused to accept the price increase for mineral water proposed by NCMW. Since such complaints showed a potential anticompetitive agreement between APEMIN members, the Competition Office³ started an investigation.

In defining the relevant market, due account was taken of the following characteristics:

- price, quality and taste differentiate natural mineral water from other types of bottled water, especially from the consumers' perspective. Thus, a product market of mineral water can easily be defined. The same characteristics segregate the product market of mineral water from the product market of sodas;
- market regulation and organization in Romania shows that NCMW holds a quasi-monopoly for the activity of extracting mineral water; the water is subsequently sold to the bottling companies;
- under Romanian legislation, the mineral water is considered a mineral resource, its extraction being controlled by the National Agency of Mineral Resources (NAMR)⁴. NAMR is the authority entrusted with licensing the companies extracting mineral water;
- as raw material, mineral water cannot be substituted by bottling companies with any other product.

As a result, RCC found that the relevant product market is the market of extracted mineral water, traded as raw material between NCMW and the bottling companies.

With regard to the geographical market, both supply and demand are located near each mineral water source, with only one existent supplier and one buyer. The mineral water extracted from a specific source can only be used by a single bottling company. It can therefore be argued that each mineral water source could be defined as a separate geographical market. Yet, the Competition Council found that all those alleged local markets have common features, such as the same selling company, similar exploitation technology and similar products. Based on those facts RCC defined the geographical market at national level.

Following the investigation, RCC found that an anticompetitive agreement setting the price of the mineral water had been signed in August 1997, by NCMW and 19 bottling companies, members of APEMIN. This infringement of the provisions of article 5(1) of the Competition Law has been proved by a "Negotiation Note" concluded between NCMW and APEMIN. The agreement lasted until the spring of 1999, when NCMW invited the bottling companies individually for price negotiations. Following this invitation, part of the APEMIN members decided, within a series of general extraordinary assemblies, not to accept the increase in price proposed by NCMW. Moreover, they have empowered the APEMIN chairman to negotiate a different price. RCC decided that those agreements infringed the provisions of article 5(1) of the Competition Law, ordered the cessation of the practices and sanctioned with fines NCMW and of the 19 bottling undertakings members of APEMIN.

³ The competition legislation in force at the time of the infringement provided for two competition authorities, namely the Competition Council as the autonomous investigation and decision making authority and the Competition Office, governmental body entrusted only with investigative powers.

⁴ Under Romanian law, mineral resources are public property of the State. Such property cannot be sold, but only concessioned.

RCC also found that NAMR infringed the provisions of article 9(1) of the Competition Law by directly entitling the concession of mineral water sources to NCMW (with no tender being held) and establishing discriminatory conditions for the undertakings involved in the concession of sources on aspects concerning the payment of royalties. This is because the royalty was calculated as a percentage of the price of the water sold. Therefore NCMW had been advantaged as it had to pay a royalty calculated on the basis of the price of the mineral water sold as raw material, while the few bottling companies that were licensed to extract the mineral water had to pay a royalty calculated on the basis of the bottled mineral water sold.

2.6 ARSCPRU/Port and Navigable Canals Administrations (2005)

RCC investigated the negotiations between Association of Romanian Shipping Companies and Port-River Undertakings (ARSCPRU), on behalf of its members, with administrations of ports and navigable canals. The negotiation regarded contractual clauses and tariffs charged for services provided to ARSCPRU members.

In 2004, the Association of Romanian Shipping Companies and Port-River Undertakings had 39 members, companies which were mainly providing services such as river and maritime freight transportation, cabotage and maneuvering, dredging, ship repairs, inland carriage of cargo and passengers, ships, ferry passage of Danube, international goods' shipping, agency services, etc. The Competition Council investigated also the National Administration of ports and navigable channels and several local administrations from Constanta, Galati and Giurgiu. In accordance with the specific legal framework, these national companies are undertakings which mainly carry out activities of national public interest and cover their expenditures from tariffs charged for the works and services provided. The tariffs' level must be set to ensure a responsible management of the foreseen financial means and a profitable activity for the company. In addition, national companies are bound to provide third parties with free and non discriminatory use of the naval transport infrastructure that was leased to them; according to their statutory provisions, the national companies set the level of their tariffs for all facilities and services framed within their object of activity with the approval of their Board of Directors that also comprises several representatives of the Ministry of Transport.

On an activity basis, ARSCPRU members – shipping companies and port and inland water operators – compete with each other, either on the market of the port or inland water operators, or on the shipping companies market.

The investigation conducted by the Competition Council revealed that the practice of negotiation with port and navigable canals administrations covered a ten years period. The negotiations were concluded by signing services contracts or minutes with attached annexes including tariffs for services of port administrations.

In supporting their defence, ARSCPRU members stated that, in the absence of a “regulatory authority” in this field, the association might represent a “countervailing part for eventual unilateral measures, of any nature, taken by any administration”, therefore they empowered the association to “represent the viewpoints of all operators and fluvial shipping companies. ARSCPRU and the above-mentioned administrations were sanctioned for having infringed the provisions of the art. 5(1) a) of the Competition Law.

3. Antitrust exemptions applicable to SOEs

Competition Law no.21/1996 is applied to acts and deeds having an effect on the territory of Romania (Article 3), perpetrated in Romania or abroad, by Romanian or foreign natural or legal persons or by a

public administration authority (Article 2). Article 2 refers to both private and public undertakings, as do Articles 81 and 82 of the EC Treaty.

Article 2(1) (b) provides for possible exemption of public administration authorities if they took measures “to enforce other laws or protect a major public interest”. The notion of “major public interest” was not further defined here, but Article 9⁵ again excludes from the exemption those actions “having as object or potential effect the restriction, distortion or prevention of competition”. In particular, “decisions that restrict the freedom of trade or an undertaking’s autonomy” and the setting of “discriminating terms for the operation of undertakings” are not capable of exemption. This meant that those measures taken by public authorities contrary to Articles 5 and 6, corresponding with Articles 81 and 82 of the EC Treaty, are not allowed.

Transition to a non-exemption policy for SOEs was made gradually in the Romanian competition law. When first issued, Law no.21/1996 on competition included several more exemptions that were lately eliminated.

According to Article 4, prices are to be “determined freely, through competition”. In the former version of the Law, prices set by the *régies autonomes* and those charged with natural-monopoly activities were the exception and “shall be set with the advice from the Competition Office”⁶. In the current version, only prices from natural monopolies are set and adjusted by the Ministry of Public Finances. Paragraphs 2 and 3 of Article 4 provide for the possibility of the government instituting temporary limited price controls in sectors where competition is substantially restricted or in crisis situations respectively. These measures, however, require binding opinion from the Competition Council.

If measures and sanctions applied by the Competition Council, in compliance with to an undertaking abusing its dominant position do not remedy the situation and prevent the abuse from repeating, Art. 7 of the Competition Law instructs the RCC to ask the competent court (Bucharest Court of Appeal) to order adequate measures that remove the incumbent from its dominant position. Before 2004, par.(4) of same article allowed the competent administrative body a 30 day period to take a decision and remedy the situation and prevent the abuse from repeating, in cases where *régies*, other SOEs or public bodies performing economic activities were concerned. After the 30 days period was up, the Competition Council could refer the matter to the courts. In 2004, art.7 par.4 was abolished.

When restructuring *régies autonomes* or companies with prevailing state capital, the government and the State Ownership Fund were obliged to seek the advice of the Competition Council (Article 10). In the current version of the Law, article 10 was abolished.

Romania’s merger regime uses the concept of “control” to define a reviewable transaction; therefore SOE mergers & acquisitions can be reviewed only if they result in a “change of control”. This may create

⁵ “Any actions by the central or local public administrative body are prohibited which have as an object or may have as an effect the restriction, prevention or distortion of competition, especially:

- a) making decisions which limit the freedom of trade or the undertakings’ autonomy which are being exercised under the law;
- b) setting discriminatory business conditions to undertakings.

(2) The provisions in par. (1) are not subject to the exemption under Art. 2 par. 1 b.

(3) In case central or local public administration authorities do not abide by the Competition Council’s decision, the latter may challenge the action before the Bucharest Court of Appeal”.

an enforcement gap with respect to SOE mergers that do not affect control but may nevertheless have negative effects on competition.

Art. 77 of Romania's *Regulation concerning the authorization of economic concentrations* states that in case a merger or acquisition of joint control between two state owned undertakings takes place, it will be analyzed as:

- internal reorganization if the two parties involved were previously parts of the same state owned undertaking;
- an economic concentration if the two undertakings involved were previously parts of different state owned undertakings, with independent power of decision.

Does this mean that potential anti-competitive effects of SOE mergers can in some cases fall short of any antitrust review? The short answer is no, although reviewing the effects on competition of these transactions can be more complex and ultimately remedies less effective. Competition law provisions concerning restrictive agreements and unilateral conduct can also be applied to review the competitive effects of SOE mergers. However, there are important differences in so far as:

- Merger control allows antitrust review and intervention ex-ante, preventing anti-competitive effects from arising in the first place, while rules on anti-competitive agreements and abuse of dominance can only be applied ex-post; and
- The application of cartels and dominance rules may not be straightforward in these cases. The application of rules on restrictive agreements has limited reach because they apply only if an "agreement" and anticompetitive effects can be established. In a similar way, rules on unilateral conduct require the agency to show substantial market power and unlawful conduct.

For these reasons, the main approach that RCC took in these circumstances is to use its power to issue binding opinions on all normative acts that may prove to have anticompetitive effects. Since all mergers between SOEs are put into effect through a Government decision, such a normative act is usually bound to obtain an opinion from the national competition authority. Therefore RCC may intervene ex-ante, express its concerns regarding the potential anticompetitive effects that such an operation may have on the market and propose amendments that remove such concerns. In the end, however, the notion of major public interest may prevail.

Finally, the Romanian Competition Act provides for the possibility, albeit restricted, of a Government-authorized merger. Article 48 gives the government the power to overrule the Council's decision on a merger should a *régie autonome* be involved. According to art.48 (2) of the Competition Law, "the Government, on the proposal of the relevant ministry, could, at its own risk, adopt a different decision than the one issued by the Competition Council, for reasons of public interest. Such decision shall be enforceable and published in the Official Gazette together with the Competition Council's decision". While the wording used: "reasons of general public interest", may be somewhat vague, the fact that régies autonomes are declining in number reduces the scope of this article. In practice, such a situation has never occurred.

RUSSIA

Nowadays there are two types of SOEs in Russia that are as follows:

- state corporations (SCs);
- state-owned unitary enterprises (SOUEs) and municipally-owned enterprises (MOUEs).

1. State corporations (SCs)

1.1 *Definition and basic characteristics of SCs*

The state corporation (SC) is defined by Article 7.1. of the Law No. 7-FZ of January 12th, 1996 “On non-commercial organizations” as “a non-commercial organization, with having no membership, established by the Russian Federation on the basis of property contribution with the purpose to carry out social, managerial or other socially useful functions”.

Formation of each new SC (as its possible subsequent liquidation) is followed up by adoption of a separate Federal Law (see the list of all existing State Corporations in Russia in Annex 1).

In his speech of 2007 to the Federal Assembly of the Russian Federation the President of the Russian Federation formulated the following characteristics of state corporations:

- implementation of large investment projects;
- solution of tasks to ensure state interests in defense sphere;
- transformation to the important element of innovative economy;
- gaining of adequate niche on the global market;
- receiving of necessary resources allocated by state for material, staff and organizational support of the relevant activities.

1.2 *State corporations and antimonopoly legislation*

SCs are not exempted from the antimonopoly legislation.

State corporations are most likely to conduct anti-competitive practices that can be seen on the example of natural monopolies and economic entities occupying dominant position: conduction of transactions on higher/lower prices, exaggeration of costs, investing to nominal capital of their branches and dependant enterprises conducting non-profile types of activity, takeover of relevant markets.

Firstly, some state functions are delegated to state corporations, including functions on determination of state policy, statutory regulation and control whereas the Law on protection of competition generally prohibits combining functions of state authorities and function of economic entities.

For example, the non-commercial organization state corporation Rosatom, according to the legislation, executes a function of the federal executive authority in the sphere of protection of State secret, renders state services, manages state property, protects state secret, elaborates federal regulations and rules, conducts state records and controls safety when using atomic energy and etc. With adoption of law on Rosatom on 01.12.2007 the regulation of the Law on protection of competition was added by the exclusion: “unless otherwise is stated by the Federal Law “On State corporation on atomic energy “Rosatom””.

In fact, state corporations are organizations determining state policy in the relevant spheres. Every state corporation actually has attributes of state authorities.

Secondly, state corporations act under exclusive terms for economic activity. The preferences giving to state corporations make it impossible for private companies to compete with them.

For every state corporation there is an exemption from majority of laws compulsory for other companies:

- proceeds of state corporations is not subject to distribution, and rules for information disclosure are less severe than for joint-stock companies;
- the structure of annual report was simplified for state corporations, they are not obliged to submit the relevant authority documents containing report on financial and economic activity;
- special laws on state corporations contain renvoi to presently non-existent statutory acts that creates legal uncertainty of their functioning.

Thirdly, inclusion to state corporations of whole sectors of the Russian economy leads to them occupying monopolistic position, and the guaranteed state support means lack of stimulation to increase effectiveness, reduce costs that will result in incurring of debts and termination of innovative development.

Presence of monopolistic status is contradicting with the President’s goals to enhance effectiveness and innovative development.

1.3 Measures to be taken to prevent negative effect of state-corporations’ activity on competition

The FAS Russia considers the following measures as appropriate in the present situation:

- *Enhancement of competition control over state corporations.* Despite that state corporations are created as non-commercial organizations they conduct economic activity and get profit, this is why they are fully applicable to the competition law. The competition authority has a right to get access to any information of state corporations.
- *Return of powers* (bill drafting, supervising, control and enforcement) from all the state corporations back to state and setting of legal prohibition for such delegation of functions.
- Expansion of using tender mechanisms by state corporations under purchase of goods, works, services from private Russian companies. Practice of holding auctions for public procurement has shown high effectiveness of these market mechanisms.
- *Ensuring transparent functioning of state corporations* for which is necessary to: determine clear criteria of assessment of their activity, introduce the system of indicators of their work, according

to the principles of the administrative reform, toughen requirements to report, modernize system of state statistic supervision over state corporations and companies controlled by them..

- *Introduction of moratorium on creation of new state corporations* until organizing effective system of monitoring and control over activity of already existing entities, as well as the demonstration of their results.
- *Adoption of regulation* envisaging fixed amount of the state financial resources given to the state corporation to eliminate opportunity of permanent state financial support to the state corporations. (Presently the Federal Law “On Fund for promotion of public utilities reform” contains such regulation setting the size of the given property).

2. State-and Municipality-Owned Unitary Enterprises (SOUEs and MOUEs)

2.1 *Definition and basic characteristics of state-owned enterprises*

An organizational-and-legal form of a state-owned unitary enterprise (SOUE) is defined in the Federal Law No. 161-FZ of November 14th, 1996 “On state and municipality unitary enterprises” according to which the state- or municipality-owned unitary enterprise is recognized as a commercial enterprise with no right of ownership on property settled to the enterprise by the owner. The form of a unitary enterprise can be applied only to state and municipal enterprises. Property of a unitary enterprise belongs, as of right of ownership, to the Russian Federation, a subject of the Russian Federation or a municipality.

The activity of state-owned unitary enterprises (SOUEs), municipality-owned unitary enterprises (MOUEs) and budget institutions (BIs), which are state and municipal ones (SIs and MIs), may have a negative effect on competition.

2.2 *Negative effect of SOUEs and MOUEs’ activity on competition*

Negative effect of SOUEs and MOUEs’ activity on competition is that these enterprises often combine somecontrol-supervisory functions, run property and render paid consumer service on the competitive market. These organizations are given such preferences as property sets and budgetary funds. Sometimes SOUEs and MOUEs are tools to carry off budgets funds due to lack of transparency of its use, which could promote corruption and prevent market competition.

2.3 *Examples of negative effects of SOUEs and MOUEs’ activity on competition*

Market participants face periodically with intention of SOUEs and MOUEs to substitute by themselves for activity of private business enterprises and participate in redivision of market. For instance, the SOUE “Urban Service of Paid Parking Places” is authorized to provide land to be operated by the market participants of parking places in Moscow. Doing this, the SOUE carries out illegally inspections by the Method of Control Purchases that is a prerogative of law enforcement agencies. Using its powers this SOUE also tries to throw participants off the market, which is followed by redivision of the market.

Unitary enterprises are the great problem in the sphere of housing and communal services. In most cases they monopolize the sphere of administration of apartment houses, which results in decrease in quality of services rendered and increase in their cost. In so doing this market is absolutely competitive (according to market analyze conducted by the FAS Russia, the quantity of unitary enterprises in the sphere of administration of apartment houses makes 25% with serving more that 80% of dwelling houses.

Unitary enterprises in the sphere of water-, heating- and electric supply deserve a particular attention. In most cases, having shown their ineffectiveness they went bankrupt and their property was leased without any tender. Besides, rental charge is built into the final tariff for customers, which inevitably leads to rise in costs of public services. Yet an effective mechanism of concession agreements or direct lease from the authorities on investment conditions (in this case lease is equal to depreciation charge and charged to cost price or in accordance with an agreement it goes to offsetting investments), which proved their effectiveness (Rostov-on-Don, Perm etc.), actually is not applied.

In the sphere of public health there are also similar mechanisms of competition distortion. The cost of medicine aid in state and municipal medicine organizations in the framework of state guaranties is formed in accordance with tariff rates without taking into account all actual costs of the state and municipalities. So the cost-based part is underestimated that means that the rent price of premises, payment for public utilities and communications, allowance of administrative machine and associated services on premise maintenance, cleaning etc. are not taken into account. So when placing public or municipal procurement, private medicine organizations prove to be uncompetitive.

In connection with the mentioned above the FAS Russia considers the following measures as appropriate in the present situation:

- creation of equal competition environment for SOUEs and MOUEs with private companies, first of all on the market of social services and in the sphere of housing and communal services;
- widely using of concession agreements on use of property owned by state municipality on competition markets;
- privatization of the main part of SOUEs and MOUEs.

ANNEX 1

LIST OF EXISTING STATE CORPORATIONS

There are seven such laws adopted as yet.

- State corporation “Bank of development and foreign economic activity (Vnesheconombank)”.
(The Federal Law of May 17th, 2007 No. 82-FZ “On Bank of development”)
- "Russian Corporation of Nanotechnologies" ("RCNT")
(The Federal Law of July 19, 2007 No. 139-FZ "On Russian Corporation of Nanotechnologies")
- State corporation “Fund of promoting public utilities reform” (FSR JKH)
(The Federal Law of July 2007 No. 185-FZ "On Fund of promoting public utilities reform”)
- "State Corporation on Construction of Olympic Venues and Development of Sochi as Mountain Climatic Resort" ("SC Olimpstroy").
(The Federal Law of October 30th, 2007 No. 238-FZ "On State Corporation o construction of Olympic Venues and Development of Sochi as Mountain Climatic Resort”)
- “State Corporation for Assistance to Development, Production and Export of Advanced Technology Industrial Product "Rostekhnologii” (State Corporation "Rostekhnologii").
(The federal Law of November 23rd, 2007 No. 27-FZ)
- State Atomic Energy Corporation "Rosatom" (ROSATOM).
(The Federal law of December 1st, 2007 No. 317-FZ.) (see detailed information below)
- State corporation “Agency on insurance of deposits” (AID)
(The federal Law of December 23rd, 2003 No. 177-FZ)

CHINESE TAIPEI

This submission explains the definition and importance of state-owned enterprises, as well as antitrust enforcement for state-owned enterprises in Chinese Taipei, taking some examples from the telecommunications industry, liquefied petroleum gas industry, and petroleum products industry for illustration. In addition, Chinese Taipei will explain the antitrust exemptions applicable to the state-owned enterprises.

1. The definition and importance of SOEs

1.1 The definition of SOEs

Pursuant to the definition of state-owned enterprises (SOEs), as provided for in Article 3 of the Statute for the Privatization of State-owned Enterprises:

The term “state-owned enterprise” shall refer to:

- Any enterprise either solely owned by any government or jointly operated by governments at various levels;
- Any enterprise jointly invested in and operated by the government and private individuals where the capital of the government exceeds fifty percent (50%); or
- Any enterprise jointly invested in by the government and government-owned enterprises of the preceding two sub-paragraphs, or by government-owned enterprises of the preceding two sub-paragraphs, where the aggregate invested capital exceeds fifty percent (50%) of the capital of the invested enterprise.

This law stipulates that where the government does not hold over 50% of the capital, the enterprise is not state-owned, and its budget is not subject to Parliamentary supervision. The truth is that there remain many enterprises where the government, though not holding more than 50% of the capital, is still the largest shareholder and, hence, exerts substantive control over their operations.

1.2 The importance of SOEs to economic development

SOEs play an important role in the economic development of Chinese Taipei. Pursuant to the Administrative Law of State-Owned Enterprises, the purpose in establishing SOEs has been to develop national capital, promote economic development, and improve the livelihood of the people.

The 1950s to the 1960s marked the beginning stages of Chinese Taipei’s economic development, when the most important economic activities were conducted by the SOEs. At that time, on account of a shortage of qualified workers, insufficient capital and a weak industrial base, the government tended to intervene a great deal to protect the interests of enterprises and provide them with optimal guidance. The contribution of SOEs to GDP increased from 14.7% in 1950 to 15.9% in 1960 in Chinese Taipei.

From the late 1970s into the 1980s, Chinese Taipei redirected its economic policy towards adopting measures that were focused on increasing domestic demand and promoting technology-oriented industries. During this stage, the average national income increased substantially, and no longer was there a shortage

of private capital for investment. The SOEs played significant role in the 1970s and the contribution of SOEs to GDP substantially increased to 16.7% in 1970.

In 1984, the government announced its adoption of the “Liberalisation, Internationalisation, and Institutionalisation of the Economy” policy which outlined the guiding principles for future economic development. Then in 1989, the government implemented a policy to promote the privatisation of SOEs. Gradually, the private sector was replacing the public sector as the major player in Chinese Taipei’s economic development. Thus, the contribution of SOEs to GDP slowly declined to 9.5% of GDP at the end of 2000, and in the following seven years, it further dropped to 5.29% of GDP at the end of 2007.

2. Antitrust enforcement and SOEs

Chinese Taipei used to rely heavily on state-owned enterprises to engage in many important economic activities involving either high commercial risk or enormous amounts of capital. Since then, the philosophy has changed considerably, however. We now prefer a competitive market coupled with less government intervention. To put it simply, government policy has come to allow and even encourage the private sector to engage in a full range of business activities, so much so that a privatization initiative was undertaken to reduce inefficiency.

During the drafting of the Fair Trade Act, there was little consensus as to whether to apply competition policy to state-owned enterprises right from the time that the Act was passed or whether to grant them a certain transition period. Many strongly held the view that some transitional arrangements were necessary. Paragraph 2, Article 46 of the Fair Trade Act thus provided a five-year grace period for specific state-owned enterprises’ activities on the condition that such activities were approved by the highest administrative authority. However, the types of conducts entitled to that exemption were rather few in number.

The Chinese Petroleum Corporation’s provision of diesel oil to the Taiwan Railway Administration and its provision of gasoline to military units at preferential prices are two examples of the exempted activities. The Taiwan Sugar Corporation which provided sugar to military units and honeybee farmers at preferential prices was also exempted.

It is worth noting that since the expiry of the transition period on 4 February 1996, the state-owned enterprises in question have been subject to the Fair Trade Act and are on the equal footing with private firms. This of course means that any problems that may arise from anti-competitive actions on the part of former state-owned enterprises are now regulated by competition law.

Since the 1999 amendment, Paragraph 2, Article 46 of the Fair Trade Act has been deleted. Thus Article 46 now states, “Where there is any other law governing the conducts of enterprises in respect of competition, such other law shall govern; provided that it does not conflict with the legislative purposes of this Act.” Accordingly, for other laws to have precedence over the Fair Trade Act, the current provision requires the precondition that “it does not conflict with the legislative purposes of this Act”, rather than the mere existence of the sectoral regulatory authority and other relevant laws. In other words, the Fair Trade Act still applies when other laws “conflict with the legislative purposes” of the Fair Trade Act.

Cases concerning state-owned enterprises that have required the Fair Trade Commission’s enforcement are described as follows:

2.1 Telecommunications industry

The government successively opened up the mobile communications, satellite communications and fix-line communications markets and services by reason of its commitment to introducing market

mechanisms, increasing operational efficiency, accelerating research in communications technology and enabling consumers to enjoy low-cost yet diverse telecommunications services. The Fair Trade Commission specifically enacted competition guidelines for telecommunications enterprises.

Competition was introduced into the telecommunications sector in 1996. Prior to the liberalization of that market, telecommunications services had been monopolized by the Directorate General of Telecommunications (the DGT) under the Ministry of Transportation and Communications (the MOTC). The amendments to the Telecommunications Act in 1996 provided the legal basis for opening up the sector and split the DGT into two entities, with the new DGT acting as the sector regulator and the state-owned Chunghwa Telecom Co. serving as the incumbent operator to run the telecommunications business. Prior to 12 August 2005, the government owned over 50% of shares of the state-owned Chunghwa Telecom Co. The business activities of Chunghwa Telecom Co. are subject to the Fair Trade Act.

In one particular case, the state-owned Chunghwa Telecom Co. introduced the “099 Follow-me code” service (“099” service) on 7 September 1999. This service uses telecommunications and computer technologies on telephone networks to provide so-called intelligent services. Users are able to use these services to make collect calls, manage information and check voice mail as well as to enjoy the benefits of answering and forwarding programs by virtue of the fact that information sent via telephone to a user may be forwarded to any designated terminal equipment (e.g., telephone, mobile telephone, or fax machine) in accordance with the forwarding program set by that user. Considering that the price structure of the “099” service had been granted by the MOTC on an interim basis, to avoid legal uncertainty caused by any conflict of jurisdictions, the Fair Trade Commission decided not to take formal action against Chunghwa Telecom Co. Instead, it made a formal recommendation to the MOTC.

2.2 *Liquefied petroleum gas industry (hereinafter LPG)*

Before the large-scale liberalization of the LPG industry, the supply of LPG to the downstream distribution market was monopolized by the state-owned Chinese Petroleum Corporation (hereinafter the CPC), which was in charge of the production and importation of LPG, while the LPG distribution market was monopolized by the Department of LPG Supply of the Veterans Affairs Commission.

After the first stage of the liberalization of the LPG market in 1993, the LPG distribution market changed from its original monopoly structure to a very competitive market. Eight new operators entered the market alongside the Department of LPG Supply which was reformed as Pei Yi Hsing Co., Ltd.

The second turning point was in 1999 when the energy sector regulator, the Bureau of Energy under the Ministry of Economic Affairs, further opened up the market to imports, thereby completing the liberalization process of the LPG market. At that time, the supply of LPG was no longer exclusively limited to the state-owned Chinese Petroleum Corporation (the CPC) but included two other importers and another importer serving concurrently as a producer.

In this case involving the state-owned CPC engaging in discriminatory pricing against downstream LPG dealers, it was found that a total of nine dealers around the island had entered exclusive dealership agreements with the CPC to sell the LPG for home-use. Previously, but in a consistent way, the CPC had been selling the LPG at the officially posted price to all dealers.

In early 1999, four companies, namely the CPC, Formosa Petrochemical Corp. (the CPC’s only competitor in the petroleum market at that time), Le Chung Lung and Pei Yi Hsing Co., Ltd. were given permission by the Bureau of Energy under the Ministry of Economic Affairs to import LPG. However, due to the costs of the imports being higher than the production costs, around mid-1999, the CPC still held an 89.15% share of the LPG market, meaning that most LPG dealers still had to rely on the CPC.

To interfere with competition within the LPG market, the CPC began to impose discriminatory treatment on dealers who imported the LPG by themselves or who traded with Formosa Corp. Aware that other dealers' lacked all of the necessary information, the CPC proceeded to take advantage of its superior position to access the LPG price information, the end result of which was that the CPC no longer provided LPG to all dealers at a uniform price. The affected dealers soon lost their competitiveness in the market. In addition, in September 1999 the CPC further refused to renew its dealership agreement with any dealer who traded with the Formosa group.

The Fair Trade Commission considered that the introduction of competition into the previously monopolized LPG market would have increased the choice of products available to consumers and reduced prices, and thus, should have enhanced consumer welfare. The incumbent CPC took advantage of its dominant position in the LPG market to engage in price discrimination against dealers who still had to rely on supplies from the CPC, and further, it tried to exclude competitors from the market. Obviously, its actions impeded the market competition in violation of the Fair Trade Act. In 2002, the Fair Trade Commission decided, in the interests of promoting competition, to order the CPC to cease its discriminatory practices and imposed an administrative fine of NT\$8 million on it.

2.3 *Petroleum products industry*

In this case, the Chinese Petroleum Corporation (the CPC) violated Article 10 of the Fair Trade Act by possibly barring new entrants which would have been an abuse of its monopoly position in the aviation fuel service market.

The liberalization of the domestic petroleum market started in January 1999. At that time, the CPC was still a sole authorized provider of aviation fuel. Later, in 2000, the Formosa Petrochemical Corp. was given approval to supply aviation fuel. Before the market for aviation fuel service for domestic routes at Taoyuan International Airport was opened to private enterprises on 1 July 1997, only four companies, namely, the CPC, Wen Chiu Co. Ltd., (Wen Chiu) and two other providers, competed in the aviation fuel service market for international routes. In addition, the market for aviation fuel service for domestic routes was monopolized by the CPC.

In 1997, Wen Chiu intended to enter the market for aviation fuel service for domestic routes, although at that time its business was in the market for aviation fuel service for international routes. Thus Wen Chiu requested price quotations from the CPC and tried to enter into a fuel-supply agreement with the CPC. However, the CPC delayed the process of providing the quotations to Wen Chiu. Furthermore, after drawing up the fuel-supply agreements for the year 2000 with all of the airlines operating domestic routes at Taoyuan International Airport, the CPC then replied to Wen Chiu that it was not necessary to provide the quotations since all of the airlines had already signed fuel-supply agreements with the CPC.

The Fair Trade Commission found that the refining and transportation costs of aviation fuel at Taoyuan International Airport were the same for international and domestic routes and that a uniform pricing structure had been adopted in the domestic aviation fuel service market at that time. CPC's difficulty in providing the price quotations was nothing more than an excuse for its attempt to secure promises from its competitor's trading counterparts to deal with CPC. As this case illustrated, CPC's intention to take advantage of its dominant position to refuse to deal with and exclude its competitor Wen Chiu from the aviation fuel service market was obvious. Therefore, the Fair Trade Commission imposed an administrative fine of NT\$5 million on CPC.

3. Antitrust exemptions applicable to SOEs

According to the statistics compiled by the Financial Supervisory Commission, there are more than 60 banks including local and foreign banks in Chinese Taipei. The domestic market for financial business is moderately or lowly-concentrated. Thus, this market is a very competitive market. Consequently, the business activities of the state-owned enterprises in the financial market do not give rise to any anticompetitive issues.

Although the Fair Trade Act applies to all sectors without exception in Chinese Taipei, there are statutory exclusions that are applicable to mergers in the banking and insurance industries under certain circumstances.

Article 62-4 of the Banking Act, Article 13 of the Financial Institutions Merger Act, Article 19 of the Financial Holding Company Act, and Article 149-7 of the Insurance Act provide that, if the financial competent authority deems it necessary to take emergency measures and such measures would not have any materially adverse effect on market competition in the financial market, the financial institutions are exempted from applying to the Fair Trade Commission for approval in accordance with Paragraph 1 of Article 11 of the Fair Trade Act. These Acts authorize the financial competent authority to implement necessary measures for financial institutions in a state of emergency. Mergers taking place between failing financial institutions are exempted from the provisions of the Fair Trade Act.

BIAC

1. The application of antitrust law to state owned enterprises

1.1 *State owned enterprises generally*

State Owned Enterprises (SOEs) exist for a variety of reasons. Some are historical, created in view of what were believed to be “natural monopolies” or a need to stimulate other infrastructure projects deemed at the time too big for private industry, while others, such as many of the recent government investments, reflect decisions to rescue domestic businesses faced with potential failure. Although SOEs are more common in some jurisdictions than others, most governments involve themselves to some degree in their national economies through state ownership of, investment in, or sponsorship of particular businesses. In each case, SOEs reflect an overarching governmental policy choice wherein other policy considerations are deemed paramount to the free operation of the marketplace. Thus, in making these choices, a government arguably has considered the relative costs and benefits and determined that public intervention is appropriate, inclusive of the potential adverse effects on competition.

Economists, however, generally agree that SOEs are often less efficient than privately-held firms and in many cases may actually reduce consumer welfare. Indeed, from a pure microeconomic-theory perspective, market participation by SOEs, like other forms of state intervention, should be limited to instances of market failure.¹ Absent some structural defect or systematic crisis that prevents economic forces from allocating resources, allocative efficiency is theoretically maximized by allowing the market to work.

Nevertheless, as the most recent financial crisis has demonstrated, state involvement in the marketplace is necessary in some instances, whether by regulation, incentive programs, direct market participation, or other measures. The level of state involvement is a policy decision that tends to be based on a number of factors that reach beyond considerations of effective competition. Goals such as universal service, higher employment, national defence, and the like all play an important role in shaping the decision making in this area. BIAC recognizes that in many cases SOEs reflect a conscious choice by a government to promote various policy goals above free trade and free competition.

SOEs, however, can have very different effects on the market than private enterprises. Often, the stated purpose of an SOE goes beyond simple profit maximization. Moreover, in contrast to virtually all other privately held or publicly traded enterprises, SOEs are not subject to the same rigours of valuation and the ability to raise capital or otherwise merit investment. Because of these differences and a tendency for governments to prioritize non-competition policy objectives, SOEs can create a potentially deleterious impact on free trade, free competition, and consumer welfare.

Decisions on the creation and structure of SOEs generally fall outside the realm of competition law enforcement. Indeed, it would make little sense to suggest that a state’s competition laws should be used as a tool to attack another of the state’s duly enacted legislative policies. By the same token, it would make little sense to allow SOEs to thwart the objectives of one of the state’s duly created enforcement agencies. Therefore, to the extent that the creation or maintenance of SOEs threatens competition and

¹ See, STEVEN G. BREYER, REGULATION AND ITS REFORM 15 (1982); Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COMM. L.J. 105, 106 (2006).

consumer welfare within a jurisdiction, competition enforcement agencies should take an active role, either through advocacy or enforcement measures, in an effort to limit or remedy the anticompetitive consequences of state action. BIAC strongly supports the presence of competition authorities at the SOE decision-making table, both at the initiation of state investment and in confining the potential adverse competitive effects on an ongoing basis.

Although competition laws are not designed to abrogate other state policy objectives, they do have an important role to play in protecting consumer welfare in markets where SOEs operate. Notably, while justifications may exist for creating SOEs in particular instances, it is frequently the case that SOEs harm domestic and foreign consumers, and hinder growth.² For this reason, it is important for a government to strike a balance that limits the role that SOEs play in the economy to the extent necessary to reach the policy goals the state is seeking to achieve, and for competition agencies to take an active part in meeting this objective.

Through competition law enforcement, agencies have the ability to oversee markets where SOEs compete and create a check on any distortion of competition beyond that which necessarily flows from the choice to create the SOE in the first instance. The interplay between private companies and SOEs can create a real risk of misapplication of competition laws and regulations. For instance, where potential competition to an SOE comes from abroad, a state may be incentivized to use competition laws in ways that protect the domestic SOE from private competition. Such action deprives consumers of the benefits of competition by perpetuating, and at times extending, any inefficiency associated with the SOE. At the same time, SOEs often attempt to use their market power to influence customers, competitors and joint venture partners in ways that prevent the market from becoming competitive. Thus, proper enforcement strategy involves aspects of both vigilance and restraint on the part of antitrust enforcers: vigilance in limiting the exclusionary conduct of SOEs and promoting competition; restraint in acting against rivals to the SOE in ways that foreclose competition.

For purposes of these comments, it is worth pointing out a few factual distinctions that affect the analysis. One can differentiate between instances where a state intentionally and completely occupies a field of commerce and instances where the state takes an investment position in a company that is otherwise privately controlled.³ On one hand, state ownership of universal service providers, such as power companies, telephony providers, and postal services, is generally long-term and significantly affects the competitive landscape in these markets. These situations often reflect this historical development of a marketplace, and often result in sole control of a market, or a dominant position in a market. Often, these types of investments result from a perceived need to build infrastructure, sometimes where the costs are so significant that it initially is (or was) difficult to justify private investment of a sufficient magnitude. But these investments can also reflect other objectives. For instance, some have suggested that Venezuela nationalized its oil industry in 1976 largely to increase its status in international politics.⁴ Likewise, many states have created sovereign wealth funds ostensibly as a means of securing financial stability and promoting economic development, but arguably also as a protectionist measure for domestic industry.⁵

² See, William Blumenthal, "The SOE Challenge and America's Competitiveness," Remarks Before the U.S. Chamber of Commerce (July 7, 2009); Peter Hettich, *Governance by Mutual Benchmarking in Postal Markets: How State-Owned Enterprises May Induce Private Competitors to Observe Policy Goals*, 32 U. DAYTON L. REV. 199, 210-11 (2006).

³ See generally, Andrei Baev, *Is There a Niche For the State in Corporate Governance?*, 18 Hous. J. INT'L L. 1, 12-13 (1995).

⁴ See, Daniel Hellinger, *Venezuelan Oil: Free Gift of Nature or Wealth of a Nation?*, 62 INT'L J. 55 (2006).

⁵ See, International Working Group of Sovereign Wealth Funds, "Sovereign Wealth Funds: Generally Accepted Principles and Practices" (Oct. 2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

Where these objectives exist, the risk of governmental interference with free competition – either through non-enforcement against a dominant domestic firm or targeted actions against would-be rivals to the SOE – is high.

In contrast, government intervention into markets where free competition exists and where the government does not attempt to occupy the field of commerce are less likely to create a risk of harm to competition. One arguable example is the Automotive Industry Financing Program – and its counterpart in Europe – through which the United States government provided loans and equity investments to domestic auto manufacturers to help them avoid bankruptcy. These initiatives were developed as means to provide financial support to domestic businesses that otherwise might have failed in the midst of the economic crisis. These actions were not intended to occupy the field of commerce and may be much more competition-neutral given their shorter intended duration and more limited direct involvement.⁶ Moreover, while such initiatives may skew the competitive contest of separating more efficient companies from less efficient companies, the direct harm (putting aside the burdens of taxation, etc.) is not likely to impact consumers.

Indeed, in the wake of the recent financial crisis, we have seen a wave of such examples, in the US, EC and elsewhere, including in the banking and automotive sectors. Despite the fact that these financial rescues are usually competitively neutral, in some cases, the crisis has led to state intervention that creates a potential for anticompetitive effects.⁷ Yet, such investments can be made mindful of the effect of the transaction on competition. For instance, in October 2008, PNC Financial Services Group announced its intent to acquire National City Corporation using funds from the U.S. government's \$250 billion capital initiative under the Troubled Asset Relief Program (TARP). Just seven weeks after announcement, the Department of Justice approved the acquisition in December 2008, requiring divestiture of 61 National City branch locations.⁸

1.2 *Application of competition law to SOEs*

Competition law does not normally concern itself with the creation of an SOE or in defining its fundamental objectives, as these reflect a broader public policy decision made by the government. However, given their ownership and (in some cases) governance structure, the operation of SOEs can often lead to outcomes that run counter to the objectives of competition laws. The “costs” to consumers associated with SOEs potentially come from many different sources including increased taxation, static efficiency losses, and in some cases supracompetitive prices. Importantly, they also can discourage private sector investment from both domestic and foreign enterprises. One of the most significant sources of potential harm is the reduction in, or foreclosure of, innovation. While economic theory indicates that all dominant firms have decreased incentives to innovate, the problem can be amplified where SOEs have the incentive to choose inefficient technology, as the Secretarial note aptly points out.⁹ It is well established that the dynamic efficiency gains resulting from innovation often can be the most important forces for

⁶ U.S. Treasury Dept., Automotive Industry Financing Program (Updated: Sept. 4, 2009) <http://www.financialstability.gov/roadtostability/autoprogram.html>.

⁷ For example, U.K. competition authorities approved the acquisition of HBOS plc by Lloyds TSB Group plc as a crisis measure despite significant concerns about the likely reduction in competition. See, Press Release, Office of Fair Trading, Anticipated Acquisition by Lloyds TSB plc of HBOS plc (Oct. 24, 2008), available at http://www.offt.gov.uk/shared_offt/press_release_attachments/LLloydstsb.pdf.

⁸ Press Release, U.S. Dep't of Justice, U.S. Dep't of Justice Requires Divestitures in Acquisition of National City Corporation by the PNC Financial Services Group (Dec. 11, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm.

⁹ See, Background Note ¶ 49.

increasing consumer welfare. By contrast, reduced or stagnant innovation associated with SOEs compounded with government sponsorship of the SOE can result in significant consumer harm, including by eliminating the possibility of so-called “creative destruction” that might otherwise occur where a dominant firm exists.¹⁰

Although competition law enforcement may not directly impact innovation in markets where the SOE occupies the field, it can be an essential tool for ensuring long run efficiency in markets where SOEs compete with private enterprises. In theory, less efficient SOEs should be overtaken in the long run by more efficient competitors as long as there is at least some level of innovation that can be brought to bear on the market.¹¹ However, in many cases the efforts of innovative rivals may be thwarted either by an SOE’s anticompetitive conduct or by governmental policies designed to protect an SOE from competition by private firms.¹² In other words, whether you believe in the principles of Schumpeterian economics or not, state sponsorship of SOEs, including through selective competition law enforcement, ensures that creative destruction will not occur.

To promote maximization of consumer welfare, competition policy should focus on establishing a model where innovation is permitted to have its full effect on the market. *Ex ante*, this means that competition authorities should focus efforts on advocating removal of barriers to competition, including statutory and regulatory hurdles, foreign investment restrictions, standards setting, etc. This is particularly critical where the hurdles are likely to dampen incentives to innovate by private firms. *Ex post*, authorities should recognize that while SOEs are not inherently anticompetitive, the conditions that accompany an SOE are frequently anticompetitive, and agencies should enforce the competition laws to reign in abuses. Given the importance of innovation in promoting consumer welfare, competition law enforcement against dominant SOEs is a prerequisite to achieving long run dynamic efficiency.

Indeed, the creation of “national champions” arguably has a similar impact to the creation of an SOE. Such enterprises can result in significant distortions to competition and elevate the interests of the individual enterprise above the interests of the consumer. As with SOEs, where the creation or promotion of national champions has the effect of sheltering the domestic competitor from competition, consumers are harmed and such market distortions should not be overlooked.¹³

¹⁰ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d ed. 1950).

¹¹ See, Jonathan A. Baker, *Beyond Schumpeter v. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007).

¹² See, RICHARD GEDDES, COMPETING WITH THE GOVERNMENT: ANTICOMPETITIVE BEHAVIOR AND PUBLIC ENTERPRISES 35 (2004).

¹³ See, Neelie Kroes, European Commissioner for Competition Policy, “Global Europe – competing and cooperating,” Address Before the Women in European Business” (WEB) Conference (Oct. 11, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/618&format=HTML&aged=0&language=EN&guiLanguage=en> (“The “national champion” logic, artificially sheltering European undertakings from competition, is as flawed today as it always was. I have never seen any company leap to the defence of anyone else than its shareholders. And quite rightly so: companies have to care about return on investment. We can only expect national champions to champion themselves. This is why protecting “national champions” is doomed to fail.”). See also, OECD, Global Forum on Competition, Competition Policy, Industrial Policy and National Champions, Contribution by BIAC, DAF/COMP/GF/WD(2009)24 (Feb. 12, 2009), available at <http://www.oecd.org/dataoecd/6/42/42170012.pdf>.

1.3 *Enforcement actions and policies involving SOEs*

Proper enforcement of competition laws should include direct enforcement against SOEs to maintain a level playing field for private enterprises to the greatest extent permissible under the law. Different jurisdictions have adopted enforcement strategies that accomplish this goal to differing extents. Although there are historical and political reasons for the divergence, on a going-forward basis each competition agency should focus on enforcing its antitrust laws with respect to SOEs and remedying violations by SOEs, especially those likely to diminish long term competition and innovation. At the same time, care must be taken to avoid application of antitrust laws in ways that disadvantage private firms in order to benefit SOEs.

Perhaps because US policy historically has disfavoured the creation and maintenance of SOEs, the current law in the United States has had only limited application to SOEs. In the past, U.S. courts have been deferential to other government policies, including in cases that otherwise would constitute anticompetitive conduct.¹⁴ The state action doctrine in the United States also places restrictions on the ability of antitrust enforcers to challenge certain state-authorized conduct. The doctrine is rooted in *Parker v. Brown*, in which the Supreme Court addressed the application of federal antitrust laws to a California law that sought to maintain inflated prices for raisins by restricting competition among growers. Attempting to reconcile the notion of state sovereignty with the application of the Sherman Antitrust Act, the Court stated, “[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”¹⁵

In subsequent history, the Supreme Court has also held that where the state itself is acting in an anticompetitive manner, it is immune from challenge under federal antitrust laws.¹⁶ The same principle applies to actions authorized by the states but undertaken by private companies or SOEs. For example, based on principles of federalism, the Supreme Court has held in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, that the states allow private actors to engage in anticompetitive conduct through enactment of legislation promoting such conduct. For immunity to attach for private actors, the *Midcal* Court imposed a high standard, requiring that the conduct at issue was both authorized by state law and was actively supervised by the state.¹⁷ The Court has also sought to distinguish actions taken by “persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition.”¹⁸ Application of competition laws to such individuals, even when acting in a quasi-governmental role, as in a standards-setting body, is appropriate, according to the Court.

Despite these limitations, in practice the Supreme Court has been very reluctant to strike down SOE conduct. Most commonly, this is apparent in cases dealing with municipal governments. For example, in *Town of Hallie v. City of Eau Claire*, the Supreme Court addressed a situation where Eau Claire had constructed a sewage treatment plant and sold sewage collection and disposal services.¹⁹ The city

¹⁴ See, e.g., *Hammons v. Alcan Aluminum Corp.*, 1996 WL 438605 (C.D. Cal. July 1, 1996), *aff’d* 132 F.3d 39 (9th Cir. 1997), where the court dismissed a challenge brought by an aluminum distributor against several U.S. aluminum companies alleging collusive conduct. The conduct at issue involved the Department of Justice negotiating with each of the aluminum producers to restrict output in connection with an attempt to accommodate Russian concerns about low prices. The court found that this conduct was insulated from antitrust challenge under the Political Question doctrine and the Noerr-Pennington doctrine.

¹⁵ *Parker v. Brown*, 317 U.S. 341, 350 (1943).

¹⁶ See, *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).

¹⁷ See, *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-6 (1980).

¹⁸ See, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988).

¹⁹ 471 U.S. 34, 44 (1985).

subsequently refused to provide sewage treatment to residents of nearby towns unless they agreed to use the city's collection services as well. The nearby towns, which had no other option for sewage treatment, sued the city alleging this constituted an illegal tying arrangement. The Supreme Court found that this conduct was immune from challenge. Notably, the Court held that a municipality is presumed to act in the public interest absent evidence to the contrary and will receive immunity from antitrust challenge as long as it is operating within the scope of a state policy favouring some other objective over free competition. While the Court's position follows from its earlier precedents, it is evident in this situation that a more restrictive application of the State Action Doctrine would be more conducive to curbing potentially anticompetitive activities by SOEs, despite their limited presence in U.S. markets.

The US agencies, however, have vigorously sought to ensure that the scope of immunity in the US is not extended further than required by existing precedent. In 2003, the FTC convened a State Action Task Force to re-examine Supreme Court precedent and make recommendations to "ensure that the state action exemption remains true to its doctrinal foundation of protecting the deliberate policy choices of sovereign states and is otherwise applied in a way that promotes competition and enhances consumer welfare."²⁰ The FTC fulfilled that objective, *inter alia*, testifying before state legislatures in opposition to specific exemptions that would further expand the doctrine and bringing actions against several parties that sought to use state action immunity as a shield for anticompetitive conduct.²¹

Europe, which generally encounters a larger number of SOEs than the United States, also has greater latitude in addressing competition issues relating to SOEs. Largely due to its extensive history of state ownership and the need to break down barriers to the functioning of the common market, Europe has a much more established body of law regarding "state aids". The state aids body of law is targeted at the aid itself, rather than the character of ownership. It is indifferent as to whether the recipient is a public or private enterprise.

The EC also has tools for competition law enforcement against SOEs through Articles 81 and 82. The EC Treaty specifically recognizes that SOEs can distort the common market and should be subject to competition laws. Europe has demonstrated a willingness to apply that framework to predatory SOE conduct. For example, in its *Deutsche Post Predatory Pricing Decision*, the Commission analyzed the conduct of Germany's postal monopoly, and found that Deutsche Post had abused a dominant position, in violation of Article 82 of the EC Treaty.²² Specifically, the Commission responded to a complaint by UPS that Deutsche Post was using its profits from its state-granted letter mail monopoly to subsidize its sales of parcel delivery services, where it competed with private enterprise. After investigating the situation, the Commission determined that Deutsche Post was offering its parcel delivery services at prices that were below its incremental costs, violating the predatory pricing rule laid down earlier by the European Court of Justice in *AKZO Chimie BV v. Comm'n*.²³ As a result, the Commission imposed a fine of €24 million on Deutsche Post.

²⁰ Timothy J. Muris, Chairman, Federal Trade Commission, "State Intervention/State Action – A U.S. Perspective," Comments Before the Fordham Annual Conference on International Antitrust Law and Policy (Oct. 24, 2003), available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

²¹ *Id.*; see also, *South Carolina State Board of Dentistry*, Docket No. 9311 (Sept. 12, 2003) (complaint) available at <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>; *Indiana Household Movers and Warehousemen, Inc.*, Docket No. C-4077, (Apr. 25, 2003) (consent order) available at <http://www.ftc.gov/os/2003/04/ihmwdo.htm> at ¶ II.

²² Case COMP /35.141, *Deutsche Post AG*, 2001 O.J. (L 125) 27.

²³ Case C-62/86, [1991] E.C.R. I-3359.

Canadian competition law enforcement with respect to SOEs has primarily focused on review of activities of state-owned Crown corporations which are regarded as agents of the Crown. Canada has amended its laws to more fully encompass activity by SOEs. In *R. v. Eldorado Nuclear Ltd.; R. v. Uranium Can. Ltd.*, [1983] 2 S.C.R. 551 (“*Eldorado Nuclear*”), the Supreme Court of Canada held that the Combines Investigations Act, the predecessor of the Competition Act, was not binding on an agent of the Crown when that agent was acting “within the scope of the public purposes it is statutorily empowered to pursue.” This Canadian case was part of the international proceedings in various jurisdictions related to the uranium cases of the late 1970s and early 1980s.

Three years after the *Eldorado Nuclear* judgement, the modern Canadian Competition Act came into force, including section 2.1. which states: “This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.” Section 2.1 made it clear that the Act potentially applies to Crown agents in respect of commercial activities where the agents engage in competition with private entities.

In Canada, where agents of the Crown (or private sector corporations) engage in commercial activities in competition with other persons, it is still possible to escape scrutiny from competition legislation by making use of the Regulated Conduct Defence (the “RCD”). This doctrine was introduced in *Reference Re: The Farm Products Marketing Act* [1957] 1 S.C.R. 198, which established that any marketing scheme within the authority of the provincial legislature cannot be against the public interest when the legislature is seized of the power and obligation to take care of that interest in the province.²⁴ However, it should be noted that most of the cases involving the RCD deal with allegations of joint conduct including with respect to pricing, advertising and other commercial activities; it is not yet settled whether the RCD applies in the case of unilateral conduct (e.g., abuse of dominance).

Finally, the Competition Bureau, through the Commissioner of Competition (the “Commissioner”), can also influence the activities of an SOE by advocating for pro-competitive sector specific regulation. Sections 125 and 126 of the *Competition Act* outline an advocacy role for the Commissioner in front of federal and provincial boards, commissions or other tribunals that carry on regulatory activities (which may include overseeing an SOE) and are expressly charged pursuant to an Act of Parliament or a legislative enactment of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product. Notably in Canada, Commissioners have advocated for the introduction of competition into certain segments (such as telecommunications, transportation) pursuant to the powers under these sections.

Each of these jurisdictions has sought to provide a framework that balances the need to enforce competition laws to prevent abuses by SOEs against the needs of a given state to promote policies that may impact the free market. Thus, many of the above policies are designed to avoid “underenforcement” of competition laws when SOEs are involved. However, it is often equally important to avoid overenforcement against competing enterprises. For example, in the area of merger enforcement, there are occasionally suggestions that a government may attempt to enforce its competition laws in ways that favour local companies over outsiders. While in the past, this type of overenforcement has typically involved private companies, it can just as easily raise concerns when the acquisition target is an SOE or

²⁴

The Regulated Conduct Defence has been applied more recently in a number of other case such as: *Industrial Milk Producers Association v. B.C. Milk Board* (1988), 47 D.L.R. (4th) 710; *A.G. Can. v. Law Soc. of B.C.*; *Jabour v. Law Soc. of B.C.*, [1982] 2 S.C.R. 307 and *Garland v. Consumers' Gas Co.* [2004] S.C.R. 25. See also, Canadian Competition Bureau, Technical Bulletin on Regulated Conduct (June 29, 2006), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02141.html>.

national champion. One salient example is the Spanish government's effort to block the acquisition of Endesa by the German company E.ON. This interference, which occurred despite the Commission's approval of the deal, resulted in the Commission referring Spain to the Court of Justice.²⁵ The Commission's challenge to the acquisition of McDonnell Douglas by Boeing raised similar concerns when U.S. leaders suggested that the Commission's objective was to insulate Airbus from competition.²⁶ When considering the proper application of competition laws to SOEs, regulators should be careful to avoid similar actions that are directed to favour national companies over other competitors.

An effective competition policy requires that competition agencies enforce their laws equally against SOEs and private entities. This may require a conscious effort on the part of enforcement agencies to coordinate among governmental agencies to avoid conflict in SOE and competition law policies, or instead for competition agencies to challenge what in fact may be little more than another government ministerial department acting in its own interests rather than in the interests of consumers. In some countries, this process is already underway and should continue.²⁷

Likewise, enforcers should maintain vigilance in areas of formerly state-owned or heavily regulated industries, which tend to face large challenges when moving to a competitive world. Historically, for example, the airline and telephone industries have witnessed numerous antitrust actions brought by both states and private parties as these firms move from a state-controlled world to what should be a free market. Some of this may be due to a corporate culture or other holdover from the days when these companies operated in a world without antitrust scrutiny. Enforcement in this context is often appropriate, especially when the conduct involves horizontal agreements.

2. Corporate governance and the principle of competitive neutrality for state-owned enterprises

The potential inefficiencies of SOEs, especially with respect to the reduction in or foreclosure of innovation, can often be traced back to corporate governance problems. In fact, the defects in an SOE's corporate governance structure often play a greater role in producing inefficiency than the state's regulatory intervention in a given industry. This issue was identified well before the current economic crisis, which has shed a new light on the proper role of SOEs.

In 2005, the OECD issued its "Guidelines on Corporate Governance of State-Owned Enterprises" (the Guidelines). This document was meant as a complement to the OECD Principles of Corporate Governance (the Principles), which were first issued in 1999 and revised extensively in 2004. Closely following the Principles, the Guidelines set forth a number of recommendations to address the specific challenges faced by SOEs. The main challenges were recognized to be:

- the sometimes passive attitude of the state in the exercise of its ownership responsibilities and/or undue political interference with company management;

²⁵ Press Release, European Commission, Mergers: Commission Refers Spain to Court for Not Lifting Unlawful Conditions Imposed on E.ON's Bid for Endesa (Mar. 28, 2007), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/427>.

²⁶ See, Allison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, NEW YORK TIMES, July 18, 1997, *available at* <http://www.nytimes.com/1997/07/18/business/clinton-warns-europeans-of-trade-complaint-on-boeing-deal.html?scp=2&sq=clinton%20boeing%20mcdonnell%20douglas&st=cse>.

²⁷ For instance, in Brazil, recent enforcement with respect to Petrobras signals a change in policy in favor of enforcement. See, Global Competition Review, "Brazil Stalls Energy Merger," (Apr. 23, 2007), *available at* <http://www.globalcompetitionreview.com/news/article/7888/brazil-stalls-energy-merger/>.

- the softness of budget constraints resulting, in particular, from SOEs being spared the risk of bankruptcy and the threat of takeovers; and
- the complex chain of accountability.

These characteristics were perceived as having significant negative consequences. As shown by the proceedings of the June 2004 Competition Committee Roundtable on Regulation Market Activities by the Public Sector, corporate governance specificities may directly result in distortions of competition. Acknowledging this, several national authorities have based their policy for the administration of SOEs on the principle of competitive neutrality. With its “Commonwealth Competitive Neutrality Policy Statement” of 1996,²⁸ Australia is one of the earliest and most accomplished examples. There was also a strong concern as to the sheer economic inefficiency of SOEs due to the specificities of their corporate governance set-up. In several countries this had prompted reports exposing the inadequacy of the model to the globalization of the economy.²⁹ In other words, faulty corporate governance of SOEs could harm the citizen both as a consumer and as a taxpayer.

As explained by the OECD staff,³⁰ the issuance of the Guidelines was prompted by the pressure deriving from globalization and liberalization, accompanied by a strong demand from non-OECD economies. Indeed, while SOE issues were important in several OECD countries, the Guidelines were also, and perhaps mainly, directed at Central and Eastern Europe and Latin America. This direction is hinted at by the choice of languages other than the Organization’s official languages into which the Guidelines were translated.³¹

The Guidelines identified three priorities:

- reinforcing the exercise by governmental (or local) authorities of their ownership functions (this had been facilitated in the previous years in several OECD countries by the formation of dedicated agencies);
- strengthening and empowering the boards of directors, so that they operate as in “normal” companies; and
- imposing transparency on the SOEs’ objectives and performance.

²⁸ Australian Government, *Commonwealth Competitive Neutrality Policy Statement* (June 1996), available at <http://www.treasury.gov.au/documents/275/PDF/cnps.pdf>. This followed the adoption of the *Competition Principles Agreement* between the Australian States in 1995 (Australian Government, *Competition Principles Agreement* (Apr. 11, 1995, amended Apr. 13, 2007), available at <http://ncp.ncc.gov.au/docs/cpa%20amended%202007.pdf>; see also, Australian Government, The Treasury, Dept. of Finance & Administration, *Australian Government Competitive Neutrality Guidelines for Managers* (Feb. 2004), available at http://www.finance.gov.au/publications/finance-circulars/2004/docs/AGCN_guide_v4.pdf.

²⁹ For instance, the French government report on “*L’Etat actionnaire et le gouvernement des entreprises publiques*” (Barbier de La Serre Report, 24 Feb. 2004) and parliamentary report on “*La gestion des entreprises publiques afin d’améliorer le système de prise de décision*” (Dousté-Blazy Report, 3 July 2003).

³⁰ Mathilde Mesnard, Administrator, Corporate Affairs Division, Directorate for Financial and Enterprise Affairs, OECD, “The OECD Guidelines on Corporate Governance of State-Owned Enterprises,” (July 6, 2005), available at http://www.icps.com.ua/doc/RT_stateprop_OECD_eng.ppt.

³¹ Bosnian-Croatian-Serbian, Polish, Slovenian and Portuguese.

Today, this subject, like many others, deserves to be revisited in light of the financial and economic crisis. Recognizing that failures in corporate governance played a clear role in some of the larger financial firms at the centre of the crisis, the OECD undertook to review its general policy on corporate governance. Its Steering Group on Corporate Governance analyzed weaknesses in the fields of executive remuneration, risk management, board practices and the exercise of shareholder rights, and it concluded that “at this stage, there is no immediate call for a revision of the OECD Principles. In general, the Principles provide for a good basis to adequately address the key concerns that have been raised. A more urgent challenge for the Steering Group is to encourage and support effective implementation of already agreed standards.”³²

The OECD’s position with respect corporate governance on SOEs in the context of the financial and economic crisis is similar, “[M]any firms have received public funds or are owned by governments, and important conflicts of interest may arise. During this period, they should be run in line with the OECD Guidelines on Corporate Governance of State Owned Enterprises. Before governments exit from their role as owners, it would be desirable to strengthen the implementation by financial institutions of the OECD Principles of Corporate Governance”.³³

The Guidelines were initially established with a view to promoting competitive neutrality and economic efficiency in respect of companies which were state-owned either because of public service requirements or for historic legacy reasons (in a general context where privatization was encouraged). Given this, some may question whether they are still applicable to newly-acquired ownership positions motivated by a specific “service of general interest”, that of rescuing failing industries. However, BIAC believes that the sets of recommendations to be found in the Guidelines are indeed fully applicable in the new circumstances.

The Guidelines’ first recommendation is “ensuring an effective legal and regulatory framework for SOEs”. The injection of capital by public authorities has been a necessity and in many cases has deterred the disastrous systemic effects of the failure of strategically positioned firms, but the requirement not to distort competition with the healthier companies which did not call for assistance remains fully relevant. This means in particular avoiding confusion between the state’s ownership responsibilities and its market regulation functions (which have taken a paramount importance in financial markets), not providing any form of immunity from the jurisdiction of courts and regulatory authorities (including with respect to the rights of creditors to initiate insolvency procedures) and ensuring that there is no competitive distortion as to the further access to finance (even though the sheer presence of the state as a shareholder is in itself a strong factor of confidence for lenders and investors). As discussed above, in Europe the regulation of state aid provides a valuable safeguard on some of these issues.

The recommendations applying to the state acting as an owner are also relevant to the handling of interests taken for rescue purposes. It is more important than ever that the state acts as a responsible shareholder, since the whole purpose of the government’s stake is to drive the companies back to economic health. This implies in particular a well structured and transparent process for the nomination of state-appointed directors, allowing the selection of candidates on the basis of competencies and strict ethical standards rather than political reward or administrative rank criteria. Exercise of the ownership responsibility by a co-coordinating agency facilitates transparency and accountability. A particular concern may arise in the case where the shareholder is a municipal or local government, which is likely to have less competencies and technical support at its disposal.

³² OECD, “Corporate Governance and the Financial Crisis: Key Findings and Main Messages” (June 2009), available at <http://www.oecd.org/dataoecd/3/10/43056196.pdf> at 7.

³³ OECD, “The Road to Recovery - Update on the OECD’s Strategic Response to the Financial and Economic Crisis” (Mar. 27, 2009), available at <http://www.oecd.org/dataoecd/40/14/42528786.pdf>.

It is legitimate that financial aid by the state is conditioned upon the restoration of adequate corporate governance where it is clear that past governance has failed, especially with respect to risk control.³⁴ But letting the boards of directors fully exercise their responsibilities first implies non-interference by the legislator or regulator, even in politically sensitive areas. For instance, while it is clear that the excesses in executive compensation that played a part in the formation of the crisis are even more unacceptable in companies where taxpayer money has been injected, this subject cannot be dealt with by decree. It should remain the responsibility of the boards, which are indisputably best placed to appraise the specificities of each company's situation on its market, and are accountable to the shareholders and other stakeholders in this now highly-scrutinized matter.

Preserving the independence and empowerment of the boards also implies that the mandate of the state-appointed directors should remain to act in the best interest of the company. Again, this may pose difficult issues where politically sensitive situations are at stake, especially the preservation of employment in certain sectors or geographic areas. While the companies have a clear responsibility to their employees who are not only prime stakeholders but often also their prime resource, the boards should not be forced to take positions which encourage the preservation of non-viable situations.

The Guidelines' recommendations relating to transparency are also fully transposable to post-crisis situations. Preserving the rights of other shareholders (whether minority or not) and ensuring impeccable disclosure of financial information are essential, especially in listed companies because of the urgent need to restore and maintain the stability of financial markets.

3. Conclusion

BIAC does not favour heavy-handed regulation of SOEs. Rather, BIAC supports a level playing field between SOEs and private companies, including with respect to the enforcement of competition laws. Thus, BIAC favours the regulation of SOEs on the same terms as regulation of private industries. In addition, BIAC opposes the use of antitrust laws as a shield by governments seeking to protect domestic SOEs (or other "national champions"). BIAC also acknowledges that in some instances, it may be appropriate to deal with alleged unfair practices of SOEs through the use of trade laws, including state aid analysis and the WTO dispute resolution mechanism.

BIAC further believes that the OECD's Guidelines should continue to apply in the wake of the recent financial crisis. The Guidelines provide appropriate criteria for running SOEs, and they seek to promote adequate oversight without unnecessarily hindering the management of SOEs in ways that will reduce efficiency.

³⁴ See, OECD, "Finance, Competition and Governance: Priorities for Reform and Strategies to Phase-Out Emergency Measures" (June 2009), at 52-54.

SUMMARY OF DISCUSSION

1. Introduction

The Chair opened the roundtable discussion on the application of antitrust law to state- owned enterprises, which attracted significant interest among the delegations and drew a high number of contributions.

Before opening the floor for discussion with the delegates, the Chair introduced the three experts who were invited to give initial presentations: the Honourable Diane Wood, judge at the Federal Court of Appeals for the 7th Circuit, Mrs. Sandra Lagumina, General Counsel at GDF Suez Group and Prof. Damien Geradin, professor of competition law and economics at Tilburg University in the Netherlands.

The Chair invited the three speakers to make their initial presentations.

2. Presentations of the panellists

Judge Wood began her presentation by stressing the significance of the subject of this roundtable in view of the actions that many governments around the world have taken in response to the financial crisis. State control over an enterprise can take various forms and can be identified in terms of trade, public property, public grant of exclusive rights to a private enterprise and state ownership. One of the very important questions when thinking about SOEs is how, if at all, the existence of an SOE affects competition in an appropriately defined market. For example in the case of Amtrak, which is mentioned in the Issues Paper prepared by the OECD Secretariat, its overall significance in the market for intercity transportation is not too great. It is thus very important to keep in mind what the effects are of an SOE within a properly defined market.

In the US, due to its federal organisation, there are many levels of government at which SOEs can exist, namely federal, state and municipal/local, and the consequences for competition policy vary depending on which level is involved.

At the federal level, an enterprise, which is part of the US itself is not covered by the antitrust laws because under a 1941 US Supreme Court case the US is not a "person" within the meaning of § 4 of the Clayton Act. Concerning corporations owned by the US, such as Amtrak, the Postal Service and the Tennessee Valley Authority, each has a governing statute whose content determines whether these entities are subject to the antitrust laws or not. The Tennessee Valley Authority was found to be distinct enough from the federal government that it can be sued and held liable for treble damages under antitrust laws. In contrast, the Postal Service is subject to antitrust laws only since a 2007 act of Congress, which overruled a 2004 US Supreme Court decision that found the Postal Service to be exempt from antitrust regulation. The 2007 act adopts a rule, which is rather common in the context of regulated industries that in the areas where the Postal Service performs functions in competition with private enterprises it can be sued under antitrust laws. However, it cannot be sued in areas where it does not compete with private enterprises.

The situation is similar at the state level, where the US Supreme Court has held that Congress never intended to subject the state when acting as sovereign entity to the federal antitrust laws. For example, in *Hoover v. Ronwyn* (466 U.S. 558 (1984)), the US Supreme Court held that a *numerus clausus* rule for admission to the Arizona bar was outside the scope of federal antitrust laws since it is the Supreme Court of Arizona, as one of the sovereign bodies of the state of Arizona, that decides who gets admitted to the

bar. This shows that the rule essentially is that where the state acts as a sovereign, it cannot be sued under antitrust laws (state action immunity). Whether an action qualifies for immunity under the state action doctrine is determined under the *Parker v. Brown* test (US 317 U.S. 341 (1943)), which is closely looked at in the case of state-owned corporations or private corporations that operate under a delegated authority from the state. Another aspect to mention in connection with state action is that of the Dormant Commerce Clause doctrine. Under this doctrine, states are not permitted to enact legislation that would harm trade or competition among states and hence be inconsistent with the Commerce Clause in the US Constitution. However, where the state acts as a market participant, for example by operating a state-owned cement plant, there is no violation of the Dormant Commerce Clause if such a plant favours in-state purchasers for its output.

Local governments (cities, municipalities, water districts) generally do not enjoy state action immunity and are thus subject to antitrust laws, although, with certain limitations as regards remedies, because they cannot be sued for treble damages but only for injunctive relief. However, where the state has clearly delegated the authority to act in a particular area to a local government, there may be scope for invoking the state action immunity.

As regards foreign governments, those are generally immune from suit under the Foreign Sovereign Immunities Act (FSIA). However, the FSIA contains a commercial activity exception, which would most likely apply to foreign governments' SOEs.

From this short overview it can be seen that under US law there are various ways in which antitrust principles may apply to SOEs. Judge Wood concluded by listing four areas in which competition policy, as opposed to antitrust laws, can play a very important role:

- During the legislative process
- In administrative rule making, for example as regards regulations in the telecom sector
- Licensing and authorizations for doing business
- When deciding on remedies in enforcement proceedings

The Chair thanked Judge Wood for her presentation and turned to Mrs. Lagumina.

Mrs Lagumina opened her presentation by observing that events such as this roundtable are relevant for addressing the following key question: how, with all its particularities, a SOE can operate as a competitive, profit-maximising market participant.

Concerning how competition law affects the conduct of SOEs, Mrs Lagumina noted that post-liberalisation the public service imperative has been broadened to apply to private sector entrants as well as to SOEs. Post-liberalisation, an SOE that retains public service obligations next to other commercial activities will face the issue of how to separate those activities. The organizational impact may be significant, as in *EdF/GdF* for example, where 60.000 employees were suddenly forced to adopt commercial principles, to apply Chinese walls, to move physically to other locations, etc. The potential for sub-optimal performance should not be underestimated.

However, once the organizational hurdles are overcome, the introduction of competition should be seen as creating value for the SOE. Mrs Lagumina cited the example of gas storage in France. Originally integrated into the overall business model of the incumbent operator, liberalisation demonstrated to GdF that there was potential to generate revenue solely from this activity. Broadly speaking, the business

model for a historical incumbent faced with competition in liberalised markets should be to accept the loss of market share in its core market but to diversify into neighbouring and related markets. The role of competition and regulation is to manage the way in which it does so, both regarding the exploitation of historic 'sympathy capital' and privileged access to infrastructure.

As regards the ways in which competition law shapes the environment in which SOEs operate, Mrs Lagumina noted that in the US, regulation and competition law enforcement operate concurrently, whilst in Europe, historically, regulation precedes and makes way for competition in the former state monopolies. Mrs Lagumina noted, however, that in recent years competition law played an increasing role as a driver of liberalisation. She made two examples. First, the case of lignite in Greece, where the historical incumbent maintained a de facto monopoly over Greek supplies of lignite (essential raw material for electricity generation). The European Commission, relying on abuse of dominance and state aid rules, required Greece to open access to lignite supplies to competitors. Second, the case of nuclear energy in France, where following the Champsaur Commission the issue of providing access to France's nuclear energy resources to other electricity supplies was debated. A similar result to the Greek example was achieved in discussions with the European Commission, though no commitments were given in this case.

Mrs Lagumina also noted a trend towards the increased use of commitments as an instrument to engineer structural liberalisation indirectly, with the duty falling as much on companies as on the state (for example the commitments by GdF/Suez regarding the opening of the French energy market). This technique has enabled the European Commission to obtain results that would have been much more difficult to achieve by other means, avoiding the question of essential facilities. In this way, competition is forcing structural changes in liberalising markets, a role which was previously reserved to regulation.

With respect to corporate governance issues Mrs Lagumina noted that for an SOE to operate like any other company on a market, it is necessary that its corporate governance structures allow it. This is not necessarily simple. Mrs Lagumina took the recent example of GdF gas tariffs in France. Prices are regulated by the State. In a climate where the cost of gas was consistently rising, prices should have risen. But the state was, for a number of reasons, unwilling to countenance a price rise. As a result, the company was not only losing money, but also exposed itself to allegations of breach of the competition rules, since it was selling gas at a price competitors could not match. This situation was exacerbated by the State representation at board level and highlighted an inherent tension between the company requiring the Board to take decisions in its commercial interest, and certain Board members being subject to a wider set of priorities and demands. This tension can be resolved, most radically, by privatisation, but also by partial share offerings. Anything that brings external scrutiny and 'normal' shareholder expectations is vital to balance out the State involvement in the company's governance.

Ms Lagumina concluded her presentation noting that for an SOE in 2009, competition law is a vital driver of change and that understanding that and enforcing a culture of competition compliance is a key element. SOEs perceive the benefits of competition law when they start viewing it as an instrument of diversification and a way to open new sources of revenue.

The Chair thanked Mrs Lagumina for her presentation and turned to Prof. Geradin.

Prof. Geradin began his presentation by discussing whether SOEs fall, or should fall, under the scope of competition rules. In his opinion, they certainly should because an SOE can, just like a private company, act anticompetitively and hurt consumer welfare. EU competition law applies to "undertakings", which the European Court of Justice has defined as "any entity engaged in an economic activity regardless of its legal status and the way it is financed". It is irrelevant whether a company is private or public because this is a functional definition. As to whether natural monopolies should be automatically excluded from this definition, Prof. Geradin argued that the answer should be no, as a company that has a natural monopoly in

one segment of its activity may be in fact in competition with other actors in other segments of its activity. Moreover, technological progress may gradually relieve a natural monopoly of its status, for example in the area of telecom infrastructure where former natural monopolies face competition from wireless providers and so on. Therefore, in Prof. Geradin's view the principle that all undertakings are subject to EU competition rules should extend to SOEs as well.

Prof. Geradin submitted that SOEs are not more likely than private enterprises to violate competition rules. It may appear to be the case only because they often are present in liberalising markets, and as any incumbent, be it private or public, they do try to maintain their dominant position through a range of measures, some of which may be in violation of competition rules.

Concerning the question of whether SOEs raise specific difficulties for competition agencies with respect to enforcement, Prof. Geradin mentioned that the challenges may be three-fold. First, governments may try to interfere with the investigations and although, as Prof. Geradin noted, most agencies he has come into contact with are highly independent, there still may be a risk of interference. Second, when an SOE does not have a corporate form but is a part of the state, particular challenges may arise in connection with the lack of proper accounting structures and so on. Last, in contrast to private companies, SOEs may have goals other than maximizing profit. For example, maximizing revenue and size of the workforce can also be very important objectives for an SOE. In those cases, the utility of traditional competition law tests, such as recoupment, may be limited.

It is not only the conduct of an SOE that may be problematic. States themselves can distort markets through adopting measures that favor their SOEs or granting them advantages to compensate for the duty to provide unprofitable public services. In contrast to the US, the EU has legal means to challenge such measures thanks to Articles 86 and 87 of the EC Treaty.

Prof. Geradin explained that Article 86 EC prohibits state measures that discriminate in favor of an SOE or of firms that benefit from special or exclusive rights in violation of the Treaty. He referred to the lignite case example given by Mrs. Lagumina, in which the Greek government granted a monopoly-like position to a Greek public lignite mining company.

Article 87 EC, prohibits state aids that distort or threaten to distort competition in the common market. Under this provision, any aid that gives a competitive advantage to a particular company is prohibited. The fact that the EU is a supranational organization makes such a provision easier to apply since the European Commission is better sheltered from possible government pressures.

Prof. Geradin explained that SOEs can legitimately benefit from advantages in cases where they are also subject to public service obligations, such as the duty of a postal operator to carry out postal deliveries at a uniform price throughout a whole country. The second paragraph of Article 86 EC contains an exemption from this general prohibition. However, as even in these cases there is scope for possible anticompetitive distortions on the market, the European Court of Justice developed a test in the Altmark case (C-280/00) to ensure that any compensation given to a firm providing a public service obligation is not disproportionate to its cost.

Lastly, drawing on his past experience working in a program focused on market opening reforms in the Middle East-North Africa region, Prof. Geradin pointed out the tension between liberalisation and privatisation. While states may prefer privatisation of state-owned monopolies as a way of obtaining large revenue and also to increase efficiencies at such firms, it is market liberalisation that may lead to greater long-term gains and increased consumer welfare. It is therefore important, in Prof. Geradin's view, to find the proper balance between the policies of liberalisation and privatisation.

The Chair asked each panelist to comment on the various presentations.

Judge Wood observed that there appears to be a common approach in thinking about each of the functions an organization has and judging them appropriately. However, there may be efficiencies in bundling different activities together in one entity and one should not, in the interest of maximizing competition, put such great restraints on firms so they are forced to behave inefficiently. Further, she added that an SOE is a rather blurry concept as it may encompass both state-owned enterprises and private utilities, which operate under heavy regulatory schemes. There is a continuum between a private enterprise and a pure SOE, and competition concerns vary according to where an entity sits on this continuum. Mrs Lagumina agreed with Prof. Geradin that companies now pay great attention to competition law, both at European and national level. She further noted with interest the distinctions US law draws between companies on federal and municipal/local level with respect to competition law that had been described by Judge Wood. In reaction to Judge Wood's presentation Prof. Geradin noted that, in his view, the fact that there are no means in US law to control state subsidies is a serious limitation, for example in attracting foreign investment. He wondered what the reason behind this may be. Following up on Mrs. Lagumina's presentation, Prof. Geradin observed that competition law has in recent years become a prominent part of the legal considerations of any major corporation.

3. General discussion

The Chair thanked the panelists and opened the discussion on issues raised by the Secretariat background paper and the panelists' presentations: (i) definition of an SOE and its effect on the modern economy, (ii) possible special competition rules applicable to SOEs, (iii) experiences with the enforcement of competition rules vis-à-vis SOEs, and (iv) possible antitrust exemptions for SOEs. He invited the delegates to discuss each topic in turn.

4. Definition of an SOE and its effect on the modern economy

To start this part of the discussion, the Chair turned to Finland whose contribution showed how diversified the spectrum of state ownership can be.

The Finnish delegation noted that in Finland there is a long history of state-owned enterprises. There are large SOEs, in particular in the market for natural resources, which have a strong and somewhat sheltered market position. Competition policy has been successful in positively influencing various aspects of their activities, such as distribution, and the state has also improved their governance principles. However, many competitive problems remain due to the strong market position of these companies. The municipal sector, for example, is a very strong player in Finland particularly with respect to the provision of public welfare services. These have been organized through municipal and state enterprise models, which are a mix between a commercial corporation and a political agency. However, the European Commission has decided that such a model constitutes state aid in contravention of Article 87 EC due to beneficial tax conditions and special bankruptcy rules. There is therefore an ongoing reform in Finland whereby municipal and state activities of a commercial character will be carried out through limited liability corporations. In summary, in Finland there are SOEs of nearly private character with respect to which some competitive problems remain. As regards municipal limited liability corporations, they will be gradually gaining in importance due to the ongoing reform and will undoubtedly compete against private actors in the markets for services which they provide.

The Chair thanked the Finnish delegation for their contribution and invited Brazil, which has SOEs in a number of sectors, to explain its public policy on SOEs.

The Brazilian delegation noted the principle in Brazilian competition law that the public objectives of SOEs and competition rules must both be respected and that the principle of the level playing field is key. A number of SOE financial institutions have started a policy of offering exceptional loans on preferential terms for the poorer sections of Brazilian society resulting in a range of economic and social benefits. This was compatible with the competition rules which allowed public policy considerations to be taken into account in the same manner as other benefits.

The Chair turned to Korea, which has a legal definition of an SOE to explain the conditions that must be fulfilled for a company to qualify as an SOE and what its obligations are.

The Korean delegation described that to qualify as a public institution a company must meet two conditions. First, it has to be established and operated through shareholding or financial aid by the government. Second, it has to be designated so by the Ministry of Strategy and Finance under the Act on Management of Public Institutions, which was adopted in 2007 in order to reform the management system of public institutions and improve transparency and accountability. The Act regulates corporate governance, accounting disclosure and management assessment by the government.

The Chair noted the presence of two special guests to the roundtable, India and China, and invited China to discuss the approach to SOEs taken by its recent antimonopoly law.

The Chinese delegate explained that the antimonopoly law applies to undertakings, which is a definition encompassing legal persons or any other organizations that engage in selling products or providing services, whether they are state owned or not. Clause 7 of the antimonopoly law, which applies specifically to SOEs, states that they should conduct their business in a way that does not harm consumer interest and should not abuse their dominant position and restrict competition.

The Chair thanked the Chinese delegate and noted that there is a wide interest in the evolution of antimonopoly law in China. He asked India to comment on its approach to SOEs and the policy issues that have arisen in relation to them.

The Indian delegation described that in India there is a large number of SOEs operating at different levels of government: federal, state and municipal. In fact, the federal public enterprises comprise about 26% of the national GDP. Interestingly, competition law applies to all SOEs regardless of whether they are incorporated under government ownership or departmental enterprises, such as highways, construction of houses, educational and health services, the postal service and the railways. The definition of an enterprise subject to the competition act is thus very broad and exempts only activities relating to sovereign duties of the government like defense, space and nuclear energy. In India, there has been more liberalisation than privatisation, however enforcement has been slow and hence competition in the market, irrespective whether between SOEs and private companies, has been gradual.

Advocacy was stressed by the Indian delegation as an important part of its current work. Concerning enforcement, the authority has been careful in areas of natural monopolies, where despite recent unbundling, the problem of large sunk costs remains. Liberalisation has also taken place in areas of legally created monopolies where licensing systems have been removed and therefore any private enterprise can enter the market. The process of liberalization has affected even the postal service, which is a governmental department entity. However, with respect to railways the process has been somewhat slower.

Finally, the Indian delegation pointed at the important role played by sectoral regulators following the unbundling and liberalisation that has taken place in various markets. However, their role is narrowly defined by the relevant sectoral regulatory acts, which do not specifically deal with competition. In this area there is therefore a lot to be done from a competition policy perspective.

The Chair thanked the Indian delegation and noted that a tension between competition enforcement agencies and sectoral regulators is probably a common theme among many delegations. He turned to the Czech Republic to describe its experience with transition from a centrally planned economy to the free market and the effect that SOEs had on the market during this transition and the competition concerns involved.

The transition from a centrally planned to a market economy presented the Czech Republic with challenges in particular with respect to ensuring that former state monopolies would not simply be transformed to private monopolies through privatisation. The Ministry of Economic Competition, which played an important role in the privatisation process, was entrusted with the role of ensuring that public monopolies were transformed to private monopolies to the least extent possible. Privatisation was thus seen as a unique opportunity to break up large state monopolies, which had little incentive to innovate but were preventing market entry of private enterprises due to the low prices they were charging. As a consequence, development in areas such as telecoms was slowed down significantly.

5. Possible special competition rules applicable to SOEs

The Chair asked the delegates to discuss the issue of special competition rules that may apply to SOEs when compared with private enterprises. In many cases SOEs enjoy privileges and immunities unavailable to the private sector, which are due to government ownership rather than to better business acumen and may significantly distort competition in the market. He asked the Netherlands to comment on a bill on markets and governments that is currently being discussed in the Dutch Parliament, and how, if approved, it may impact competition rules.

The Dutch delegation explained that the goal of the new bill is to level the playing field between private enterprises and SOEs engaged in commercial activities in the market. The bill covers all areas where the government or SOEs sell products or provide services to the market. It includes local governments, water councils and so on. However, certain activities such as public education, research, public broadcasting and sheltered workshops are excluded from its scope. In addition, certain activities may be excluded *ad hoc* following a decision by a relevant government entity (including the Competition authority) that a particular activity is of public interest. The bill in effect shifts the emphasis from an *ex-post* to *ex-ante* regulatory approach and gives the Dutch Competition Agency (NMA) the authority to ensure that SOEs comply with their obligations, although it cannot impose fines on them.

Concerning the obligations that the bill would impose. For example, SOEs would have to include in their prices all costs associated with providing a particular service and they will have to ensure that they share the information gathered in their role as a public body with private parties or refrain from using it in their commercial activities. With respect to the relationship between competition law and the pending bill, the Dutch delegation explained that while predatory pricing is prohibited under competition law, if an SOE complies with the obligation to include all costs mentioned earlier, it cannot be held liable for predatory pricing. However, that does not mean that it could not be held liable for other competition infringements.

The Chair invited Russia, whose contribution listed a number of measures that can be taken to prevent negative effects of SOEs on competition, to comment on how Russian competition rules apply to SOEs and what other measures the Federal Antimonopoly Service (FAS) considers appropriate to reduce the negative impact of SOEs on competition.

The Russian delegation explained that there are two types of SOEs in Russia, state corporations and municipal-owned enterprises. The Russian written contribution focused on state corporations, which are non-commercial organizations established by law whose purpose is to carry out socially useful functions,

for example implementation of large scale investment and innovative projects to ensure state interest in defense and other fields.

The FAS is concerned with the effect SOEs have on competition on the market. Although they are subject to competition laws, they can negatively affect competition on the market. Therefore, the FAS has suggested a number of measures to mitigate the potentially negative effects of SOEs on the market. Some of the suggestions concern the expansion of tendering procedures by SOEs and the use of auctioning of tenders, which would reduce costs and increase transparency. Moreover, the FAS actively opposes the creation of new SOEs and lobbies for a moratorium on their creation until an effective system to monitor their activities is established.

Turning to the United Kingdom, the Chair invited its delegation to comment on the BetterCare case, which highlighted some of the differences between the UK and EU laws when it comes to enforcing competition rules to SOEs.

The UK delegation described that the UK Competition Act follows Articles 81 and 82 of the EC Treaty in that it applies to undertakings that engage in an economic activity regardless of the way they are financed. Therefore, its coverage extends to SOEs. The issue raised by the question from the Chair is that the outcome reached by the Competition Appeals Tribunal (CAT) in the BetterCare case in 2002 may appear to a certain extent inconsistent with a subsequent case decided by the European Commission in relation to the system of purchasing used by the Spanish health care system.

The BetterCare case concerned the provision of nursing services by a local authority health trust. The trust was using third party contractors to provide the services and the costs were covered through taxes and direct contributions from the patients. The Office of Fair Trading (OFT) considered that the trust was not an undertaking in the sense of the Competition Act, however the CAT reversed this decision, holding that the trust was acting as an economic entity in the purchasing as well as in the direct provision of care services. The CAT's decision focused on whether the trust was engaged in an activity that the Competition Act seeks to cover.

The Spanish case, which was assessed by the European Commission also involved an alleged abuse of dominant position related to purchasing. It was based on a complaint that the Spanish national health system was allegedly abusing its dominant position in making purchases on the market for health products. The complaint was dismissed and both the Court of First Instance and the European Court of Justice held that making purchases in itself does not constitute economic activity. Purchasing could be an economic activity only where the goods are used subsequently in offering products or services. As a result of this case, the situation in the UK is less clear than after the CAT ruling in BetterCare. The health system continues to evolve and it remains to be seen how a case of purchasing by a centrally funded health body would be assessed in light of the case law of the European Courts.

6. Experiences with the enforcement of competition rules vis-à-vis SOEs

The Chair noted that as a number of OECD countries provide for enforcement of competition rules against SOEs it would be interesting to discuss the particular challenges enforcers face, especially with respect to the difficulties in calculating the appropriate measure of cost. He invited Norway to comment on this issue, since its contribution discussed a predatory pricing case involving an SOE.

The Norwegian delegation explained that since May 2004 Norwegian law has a provision very similar to Article 82 EC and this provision was the basis of the SAS case, described in detail on page 9 of its contribution. So far there have been two cases of abuse of dominance in Norway and it has been very difficult to convince courts that a wrongdoing has occurred. In particular in the SAS case, the court went

with SAS, which is 50% owned by the three Scandinavian governments, in holding that its conduct did not constitute abuse. In the end due to resource considerations the competition authority settled with SAS, finding a breach of the law but not imposing a fine. The conclusion is that these cases are more resource intensive than anticipated prior to the adoption of the 2004 law. Another observation is that it was the dawn raids carried out at SAS which appear to have brought real change in the company's behavior with respect to pricing on the domestic market. This actually enabled a smaller competitor to survive.

Another issue discussed is that of cross-subsidization and the Chair invited France, whose contribution touched upon it to comment.

The French delegate from the Conseil de la Concurrence explained that cross-subsidy is not considered *per se* illegal by the French Competition authorities, who look rather at the end result of the cross-subsidy, e.g. if it enables predatory pricing. The test is that there must be a 'lasting distortion' of the market. This was demonstrated in the Française des Jeux case where a subsidiary was able to lower prices below variable costs thus affecting opportunities for competitors on that market. The authorities (and the courts on appeal) concluded that there had been a lasting distortion of competition given the weight and influence on the market enjoyed by the Française des Jeux subsidiary. As regards sanctions, the factors taken into account in penalizing illegal cross-subsidies include the *damage* to the economy, the gravity of the conduct, the situation of the company in question and any recidivism.

Another French delegate reinforced the points made by the representative of the Conseil de la Concurrence that two main difficulties may arise in penalizing cross-subsidies. First, it is not always possible to identify distinct 'public' and 'commercial' activities. For example, in the Ile d'Yeu ferry case, where the ferry service was held to be a commercial operation in high season and a public service the remainder of the year. Issues of cross-subsidy are almost impossible to identify and treat in these circumstances. Second, there are problems in calculating incremental costs accurately.

The Chair thanked the French delegation and opened the floor for possible interventions.

The Greek delegation reported on the approach to SOEs in Greece and highlighted a few recent cases. Both private enterprises and SOEs are treated alike in Greece, as it is expressly stipulated in the National Competition Act. The Hellenic Competition Commission (HCC) examined the competitive behavior of SOEs in a number of cases in various sectors of the economy. Moreover, the Hellenic Telecom and Post Commission, which is responsible for the application of antitrust laws in the Telecom area, recently fined the Hellenic Telecom company for abuse of dominance in the form of margin squeeze in the market for broadband internet access. The Greek delegation further highlighted some cases dealt with by the HCC, including price fixing between the two major refineries in Greece; restrictive vertical agreements between the Hellenic Port Authority, operator of the Piraeus port, and the liner company MSC; and exclusive supply clauses in contracts between the state-owned electricity supplier and high voltage users.

The Australian delegation described the situation in Australia, where the government enjoys immunity from competition law. Until recently there was also a doctrine of "derivative crown immunity" under which companies that contract with the government enjoyed immunity from competition law as well. This was however changed in a case involving a health service purchasing authority, which was contracting for the purchase of sterile fluids with a seller, who was bundling products in which it had a monopoly with others where it did not. The competition authority found this to be a violation and litigated the case all the way to the High Court, which rejected the application of derivative crown immunity doctrine in these circumstances.

The delegation from Chinese Taipei posed a question to Judge Wood concerning the criteria in applying the function test to determine whether a particular activity of an SOE falls under the antitrust laws

or not. Judge Wood described that the function test has been introduced with respect to the Postal Service by Congress in 2007, following a ruling by the Supreme Court in 2004, which held that the Postal Service is too close to the government to be a person within the meaning of antitrust laws. There is currently a debate about which of its functions are in fact in competitive markets and which are not. The function test is widely known to US courts in the context of the Foreign Sovereign Immunities Act where the courts have grappled extensively with what constitutes commercial activity.

The Canadian delegation raised the issue of the treatment of foreign SOEs, which had not been discussed so far. In Canada, domestic and foreign SOEs are treated equally under the Competition Act when they are engaged in commercial activities in the public marketplace. Domestic SOEs are not afforded preferential treatment in this regard.

The Chair thanked the Canadian delegation for its contribution and noted that the issues of treatment of foreign SOEs could be taken up in the afternoon section of the roundtable.

BIAC stressed that in its opinion competition law should be applied to all market actors, irrespective of whether they are SOEs or private enterprises. This approach is necessary to ensure a level playing field and it is particularly important that all countries adopt it in view of increasing global trade. The BIAC delegation hence welcomes the developments in so many countries that bring SOEs under the umbrella of competition law.

7. Panellists' closing remarks

Prof. Geradin noted that most of the presentations somehow related to liberalisation of network industries, which is where most SOEs operate in OECD countries. When looking at liberalisation there are in fact three issues to consider. First, liberalisation has to be mandated by law, which in itself is a rather political issue. Second, it is important to devise a proper regulatory scheme that allows for development of competition in the liberalised industries. Last but not least, competition rules have to be enforced in the newly liberalised markets.

Mrs Lagumina observed that this discussion emphasized the challenges in reconciling the competition rules and economic policy, but it also shows clear convergence, in that no one seems to be suggesting there should be 'separate' competition rules for SOEs. Mrs Lagumina also noted that it should be conceivable to give some consideration to elements of public policy and obligation to which SOEs are subject. This would make the whole debate more credible.

In Judge Wood's view there are three broad questions that countries have to tackle with regard to SOEs. First, the philosophical question of whether SOEs should be subject to competition law in the same way private enterprises are appears to be well answered. Second, the real challenge appears to be in the area of enforcement because of the complexity that SOEs present due to the variety of their activities. There it is very difficult to analyze whether an SOE is cross-subsidizing, pricing below competitive levels or engaging in other forms of anticompetitive conduct. This will require a lot of work and international cooperation, and knowledge sharing has a lot to offer in this respect. Last, it is important to determine which creates the more significant competition problems between SOEs that have a monopoly and those that compete with other actors in the market.

The Chair thanked the panelists and the participants and invited everyone for the afternoon session on corporate governance and the principle of competitive neutrality for SOEs where some of these philosophical enforcement challenges will be discussed.

COMPTE RENDU DE LA DISCUSSION

1. Introduction

Le Président ouvre la table ronde sur l'application du droit de la concurrence aux entreprises publiques, sujet jugé spécialement intéressant par les délégués et à l'origine d'un grand nombre de contributions.

Avant de donner la parole aux délégués, le Président présente les trois experts invités à introduire le débat: Mme Diane Wood, juge à la Cour d'appel fédérale des États-Unis (7^{ème} circuit), Mme Sandra Lagumina, Directeur juridique du groupe GDF-Suez et M. Damien Geradin, Professeur d'économie et de droit de la concurrence à l'Université de Tilburg aux Pays-Bas.

Le Président invite les trois intervenants à faire leur exposé.

2. Présentations des intervenants

Le juge Wood introduit sa présentation en soulignant l'importance du thème de la présente table ronde, au vu des mesures adoptées par de nombreux gouvernements à travers le monde en réponse à la crise financière. Le contrôle exercé par l'État sur une entreprise peut prendre différentes formes et peut se définir en termes d'échanges, de propriété publique, d'octroi par l'État de droits exclusifs à une entreprise privée et d'engagement capitalistique de l'État. L'une des principales questions qu'on est amené à se poser à propos des entreprises publiques est de savoir comment, à supposer que ce soit le cas, l'existence d'une entreprise publique affecte la concurrence dans un marché correctement défini. Par exemple, dans le cas d'Amtrak, qui est mentionné dans le document de réflexion préparé par le Secrétariat de l'OCDE, son importance globale sur le marché du transport interurbain n'est pas très grande. Il est donc essentiel de garder à l'esprit l'impact qu'une entreprise publique peut avoir sur un marché correctement défini.

Aux États-Unis, en raison de l'organisation fédérale du pays, les entreprises publiques peuvent être créées à différents niveaux d'administration, à savoir aux niveaux fédéral, étatique et municipal/local, et les conséquences pour la politique de concurrence varient selon le niveau concerné.

À l'échelon fédéral, une entreprise qui fait partie intégrante du « gouvernement » des États-Unis, n'est pas soumise à la législation de la concurrence puisque, en vertu d'un arrêt de la Cour suprême des États-Unis de 1941, les États-Unis ne sont pas une « personne » au sens de l'article 4 de la loi Clayton. S'agissant des entreprises publiques américaines comme Amtrak, Postal Service et la Tennessee Valley Authority, elles relèvent toutes d'une loi dont le contenu détermine si elles sont soumises au droit de la concurrence ou non. Il a été jugé que la Tennessee Valley Authority se distinguait suffisamment du gouvernement fédéral pour pouvoir être poursuivie et être passible de dommages et intérêts triples en vertu du droit de la concurrence. En revanche, Postal Service n'est soumise au droit de la concurrence que depuis une loi du Congrès de 2007 allant à l'encontre d'une décision de la Cour suprême des États-Unis de 2004 aux termes de laquelle Postal Service n'était pas sujette à la réglementation de la concurrence. La loi de 2007 retient la règle, assez fréquente dans le contexte des secteurs réglementés, selon laquelle Postal Service peut être poursuivie sur la base du droit de la concurrence lorsqu'elle exerce des fonctions en concurrence avec des entreprises privées, mais ne peut pas l'être dans le cas contraire.

La situation est identique au niveau des États, la Cour suprême des États-Unis ayant jugé que le Congrès n'avait jamais entendu soumettre les États aux lois fédérales en matière de concurrence lorsqu'ils

agissaient en tant qu'entité souveraine. Par exemple, dans l'affaire Hoover contre Ronwyn (466 U.S. 558 (1984)), la Cour suprême des États-Unis a considéré que le *numerus clausus* imposé aux avocats inscrits au barreau de l'Arizona n'entraînait pas dans le champ d'application du droit fédéral de la concurrence, dans la mesure où les règles d'admission au barreau étaient fixées par la Cour suprême de l'Arizona, l'un des organes souverains de l'État d'Arizona. On voit donc que la règle est fondamentalement que l'État agissant souverainement ne peut être poursuivi sur la base du droit de la concurrence (immunité des actes de gouvernement). Pour déterminer si une mesure peut ou non bénéficier de l'immunité au titre de la doctrine de l'acte de gouvernement (*state action doctrine*), il convient de se référer à la décision de principe Parker contre Brown (US 317 U.S. 341 (1943)), qui intéresse tout particulièrement les cas concernant des entreprises publiques ou des sociétés privées qui agissent sous l'autorité déléguée de l'État. Un autre aspect à mentionner concernant les actes de gouvernement est la doctrine concernant la clause du commerce entre les États (« Dormant Commerce Clause »). En application de cette doctrine, les États ne sont pas autorisés à adopter des lois qui nuiraient au commerce ou à la concurrence entre les États et partant, seraient incompatibles avec la clause relative au commerce qui figure dans la Constitution des États-Unis. Cela étant, lorsque l'État est un acteur du marché, par exemple lorsqu'il exploite une cimenterie à capitaux publics, il n'y a pas violation de la Dormant Commerce Clause si la cimenterie en question favorise les acheteurs résidents de l'État dans sa production.

D'une manière générale, les collectivités locales (villes, municipalités, districts d'approvisionnement en eau) ne jouissent pas de l'immunité au titre des actes de gouvernement et sont donc assujetties au droit de la concurrence, quoique dans certaines limites s'agissant des voies de recours, étant donné qu'elles ne peuvent pas faire l'objet de poursuites pour dommages et intérêts triples mais seulement d'injonctions. En revanche, lorsque l'État a clairement délégué son pouvoir d'agir dans un domaine particulier à une collectivité locale, il est possible d'invoquer l'immunité pour acte de gouvernement.

Les pouvoirs publics étrangers échappent dans la plupart des cas aux poursuites, du fait du Foreign Sovereign Immunities Act (FSIA). Le FSIA contient cependant une exception d'activité commerciale, qui s'appliquerait très probablement aux entreprises publiques étrangères.

De ce bref aperçu général, on peut observer qu'en vertu du droit américain les principes du droit de la concurrence peuvent s'appliquer de différentes manières aux entreprises publiques. Le juge Wood conclut en citant les quatre domaines dans lesquels la politique de concurrence, par opposition au droit de la concurrence, peut jouer un rôle très important:

- Au cours du processus législatif
- Dans l'élaboration des règles administratives, s'agissant par exemple des réglementations applicables dans le secteur des télécommunications
- Lors de la délivrance des licences et autorisations d'exercice
- Lors du choix des voies de recours et mesures correctrices pour l'application des lois.

Le Président remercie le juge Wood pour sa présentation et se tourne vers Mme Lagumina.

Mme Lagumina introduit sa présentation en observant que des manifestations telles que la présente table ronde offrent un cadre qui convient tout à fait pour aborder la question centrale suivante : comment, avec toutes ses particularités, une entreprise publique peut-elle être un acteur du marché agissant dans des conditions de concurrence et maximisant ses bénéfices ?

Sur la manière dont le droit de la concurrence influence la conduite des entreprises publiques, Mme Lagumina note que, dans la période post-libéralisation, l'obligation de service public a été étendue aux nouveaux entrants du secteur privé de même qu'aux entreprises publiques. Une entreprise publique qui conserve des obligations de service public en plus d'autres activités commerciales devra alors s'interroger sur la manière de séparer ces activités. L'impact organisationnel peut être important, comme dans le cas d'EdF/GdF, où 60 000 salariés ont soudain été contraints d'adopter des principes commerciaux, de pratiquer le cloisonnement de l'information, de déménager vers d'autres sites, etc. Il ne faut donc pas sous-estimer les risques de performance sous-optimale.

En revanche, une fois surmontés les obstacles organisationnels, la mise en place de la concurrence devrait être considérée comme créatrice de valeur pour l'entreprise publique. Mme Lagumina cite l'exemple de du stockage du gaz en France. Cette activité était initialement intégrée au modèle global d'entreprise de l'opérateur historique ; or, la libéralisation a démontré à GdF qu'il était possible de créer des revenus à partir de cette seule activité. D'une façon générale, un opérateur historique confronté à la concurrence sur des marchés libéralisés doit adopter le modèle d'entreprise qui consiste à accepter la perte de parts de marché sur son marché principal et à se diversifier sur des marchés voisins et connexes. Le rôle de la concurrence et de la régulation est de gérer cette transformation, à la fois en termes d'exploitation du « capital de sympathie » historique et d'accès privilégié aux infrastructures.

Quant à la manière dont le droit de la concurrence façonne le cadre dans lequel les entreprises publiques agissent, Mme Lagumina relève qu'aux États-Unis la régulation et l'application du droit de la concurrence opèrent concurremment, alors qu'en Europe, historiquement, la régulation précède la concurrence et lui ouvre la voie dans les anciens monopoles d'État. Mme Lagumina souligne cependant que, ces dernières années, le droit de la concurrence a joué un rôle grandissant dans la conduite de la libéralisation. Elle en rapporte deux exemples. Le premier concerne le cas du lignite en Grèce, où l'opérateur historique détenait un monopole de fait sur les approvisionnements en lignite du pays (matière première essentielle à la production d'électricité). La Commission européenne, invoquant l'abus de position dominante et les règles en matière d'aides d'État, a imposé à la Grèce l'ouverture de l'accès à l'approvisionnement de lignite à la concurrence. Le deuxième exemple est celui de l'énergie nucléaire en France où, suite aux travaux de la commission Champsaur, la question de l'ouverture de l'accès aux ressources nucléaires françaises à d'autres fournisseurs d'électricité a fait débat. Un résultat similaire à celui de l'exemple grec est ressorti des discussions avec la Commission européenne, bien qu'aucun engagement n'ait été pris dans le second cas.

Mme Lagumina note par ailleurs une tendance de plus en plus marquée à recourir aux engagements comme instrument indirect de la mise en place d'une libéralisation structurelle, la charge en incombant autant aux entreprises qu'à l'État (c'est le cas des engagements pris par GdF/Suez relativement à l'ouverture du marché français de l'énergie). Cette technique a permis à la Commission européenne d'obtenir des résultats qu'il aurait été autrement beaucoup plus difficile d'atteindre, en éludant la question des installations essentielles. Ainsi, la concurrence impose des changements structurels pour la libéralisation des marchés, rôle précédemment réservé à la régulation.

Pour ce qui est des questions de gouvernement d'entreprise, Mme Lagumina fait remarquer que, pour qu'une entreprise publique puisse agir comme n'importe quelle autre entreprise sur un marché, il faut que ses structures de gouvernement d'entreprise le lui permettent. Or, ce n'est pas forcément simple. Mme Lagumina prend l'exemple récent des tarifs de Gaz de France régulés par l'État. Dans une conjoncture où le coût du gaz augmente en permanence, les prix auraient dû augmenter. Or, l'État, pour un certain nombre de raisons, refusait l'idée d'une hausse. Par conséquent, non seulement l'entreprise perdait de l'argent, mais elle s'exposait en outre à des allégations de violation des règles de concurrence, dans la mesure où elle vendait le gaz à un prix que les concurrents ne pouvaient pas égaler. Cette situation a été aggravée par la représentation de l'État au conseil d'administration et a mis en évidence la tension inhérente

qui existe entre d'un côté l'entreprise, qui demande au conseil d'administration de prendre des décisions allant dans le sens de son intérêt commercial, et certains membres du conseil d'administration de l'autre, qui sont soumis à un ensemble plus vaste de priorités et de contraintes. Pour dissiper cette tension de manière radicale, on peut recourir à la privatisation mais aussi à l'offre publique d'une partie des actions de l'entreprise. Tout ce qui permet la surveillance externe et répond aux attentes « naturelles » des actionnaires est indispensable pour compenser la participation de l'État à la gouvernance de l'entreprise.

Mme Lagumina conclut sa présentation en observant que pour une entreprise publique en 2009, le droit de la concurrence est un moteur essentiel du changement et que la compréhension et l'application d'une culture de la conformité aux règles de concurrence constituent un élément clé. Les entreprises publiques perçoivent les avantages du droit de la concurrence lorsqu'elles commencent à l'envisager comme un instrument de diversification et comme un moyen d'exploiter de nouvelles sources de revenus.

Le Président remercie Mme Lagumina pour sa présentation et se tourne vers M. Geradin.

M. Geradin introduit sa présentation en abordant la question de savoir si les entreprises publiques relèvent, ou devraient relever, du champ d'application des règles de concurrence. À son avis, elles le devraient assurément puisqu'une entreprise publique peut, tout comme une entreprise privée, adopter un comportement anticoncurrentiel et porter préjudice au bien-être des consommateurs. Le droit de la concurrence de l'Union européenne s'applique à l'« entreprise », que la Cour de justice européenne a définie comme « toute entité exerçant une activité économique, indépendamment de son statut légal et de son mode de financement ». Cette définition étant fonctionnelle, il importe peu que l'entreprise soit privée ou publique. Quant à savoir si les monopoles naturels devraient être exclus d'office de cette définition, M. Geradin pense que non, du fait qu'une entreprise qui jouit d'un monopole naturel sur un des segments de son activité peut très bien être en pratique en concurrence avec d'autres acteurs sur d'autres segments. Qui plus est, les avancées technologiques peuvent progressivement appauvrir la position des monopoles naturels, par exemple dans le domaine des infrastructures de télécommunications, où d'anciens monopoles naturels subissent la concurrence de fournisseurs sans-fil, et ainsi de suite. Il estime donc que le principe en vertu duquel toutes les entreprises sont soumises aux règles de concurrence de l'Union européenne devrait également s'étendre aux entreprises publiques.

M. Geradin considère que les entreprises publiques ne sont pas plus susceptibles d'enfreindre les règles de concurrence que les entreprises privées. Cela peut paraître le cas uniquement en raison du fait qu'elles sont souvent présentes sur des marchés en voie de libéralisation et que, comme toute entreprise en place, qu'elle soit privée ou publique, elles tentent de conserver leur position dominante grâce à tout un éventail de mesures, dont certaines peuvent constituer une infraction aux règles de concurrence.

Concernant la question de savoir si les entreprises publiques posent des difficultés particulières aux autorités de la concurrence pour l'application des lois, M. Geradin indique que les défis à relever peuvent être de trois ordres. Tout d'abord, les pouvoirs publics peuvent être tentés d'interférer avec les enquêtes et il peut y avoir un risque d'ingérence, même si, comme le note M. Geradin, la plupart des autorités avec lesquelles il a pu être en contact sont parfaitement indépendantes. Ensuite, lorsqu'une entreprise publique n'est pas constituée en société mais fait partie intégrante de l'État, des difficultés particulières peuvent se présenter, liées au manque de structures comptables adaptées, etc. Enfin, contrairement aux sociétés privées, les entreprises publiques peuvent avoir d'autres objectifs que la maximisation des bénéfices. Par exemple, la maximisation des revenus et le niveau des effectifs peuvent constituer un objectif tout aussi important pour une entreprise publique. Dans ce cas, l'utilité des critères traditionnels du droit de la concurrence, tels que la récupération des coûts, peut s'en trouver limitée.

Il n'y a pas que la conduite d'une entreprise publique qui pose problème. Les États eux-mêmes peuvent fausser le marché en adoptant des mesures qui privilégient leurs entreprises publiques ou leur

accordent des avantages en vue de compenser l'obligation de fournir des services publics qui ne sont pas rentables. Contrairement aux États-Unis, l'Union européenne dispose de moyens juridiques pour contester ces mesures grâce aux articles 86 et 87 du traité instituant la Communauté européenne.

M. Geradin explique que l'article 86 CE interdit les mesures prises par l'État qui favorisent des entreprises publiques ou des entreprises auxquelles l'État accorde des droits spéciaux ou exclusifs en violation du traité. Il cite l'exemple du lignite, donné par Mme Lagumina, dans lequel les pouvoirs publics grecs ont accordé une position monopolistique à une entreprise publique grecque d'exploitation du lignite.

L'article 87 CE interdit les aides d'État qui faussent ou menacent de fausser la concurrence sur le marché commun. Aux termes de cet article, toute aide qui confère un avantage concurrentiel à une entreprise particulière est interdite. Le fait que l'Union européenne soit une organisation supranationale rend cette disposition plus facile à appliquer dans la mesure où la Commission européenne est mieux protégée contre d'éventuelles pressions gouvernementales.

M. Geradin explique que les entreprises publiques peuvent légitimement bénéficier d'avantages lorsqu'elles doivent aussi remplir certaines obligations de service public, par exemple l'obligation pour un opérateur de services postaux d'assurer les distributions postales à un prix uniforme sur l'ensemble du territoire d'un pays. Le deuxième paragraphe de l'article 86 CE prévoit une exception à cette interdiction générale. Cela étant, comme des distorsions anticoncurrentielles restent malgré tout possibles dans ces cas sur le marché, la Cour de justice européenne a mis au point, dans l'arrêt *Altmark* (C-280/00), un critère garantissant que toute compensation accordée à une entreprise qui exécute des obligations de service public n'est pas disproportionnée en termes de coût.

Enfin, à la lumière de son expérience professionnelle, dans le cadre d'un programme axé sur les réformes relatives à l'ouverture des marchés de la région du Moyen-Orient et de l'Afrique du Nord, M. Geradin fait état de la tension qui existe entre la libéralisation et la privatisation. S'il est vrai que les États peuvent préférer la privatisation des monopoles publics pour en tirer d'importantes recettes et, également, pour accroître l'efficacité de ces entreprises, il reste que c'est la libéralisation du marché qui peut contribuer à augmenter les gains sur le long terme et améliorer le bien-être des consommateurs. Il est donc important, selon M. Geradin, de trouver le bon équilibre entre les mesures de libéralisation et les mesures de privatisation.

Le Président demande à chaque intervenant de formuler des observations sur les différentes présentations.

Le juge Wood note que les présentations semblent adopter une démarche commune quant à la manière de considérer et d'évaluer correctement chacune des fonctions d'une organisation. Cela étant, il peut être efficient de regrouper plusieurs activités en une seule entité et, pour maximiser la concurrence, on devrait éviter de soumettre les entreprises à des restrictions telles qu'elles perdent en efficacité. De plus, l'intervenante ajoute que le concept d'entreprise publique est plutôt flou, puisqu'il peut englober à la fois des entreprises à capitaux publics et des entités privées d'utilité publique, qui sont soumises à des programmes de réglementation très denses. Il existe de nombreuses formules entre l'entreprise privée et la véritable entreprise publique; dès lors, les considérations de concurrence pour chaque entité sont variables. Mme Lagumina convient avec M. Geradin que les entreprises prêtent aujourd'hui une grande attention au droit de la concurrence, tant au niveau européen que national. Elle note par ailleurs avec intérêt les distinctions que la législation américaine établit entre les entreprises à l'échelon fédéral et municipal/local en matière de droit de la concurrence, décrites par le juge Wood. En réponse à la présentation de cette dernière, M. Geradin indique que le fait que la loi américaine ne prévoit aucun moyen de contrôler les aides des États constitue selon lui un frein important, notamment à l'attraction des investissements étrangers. Il se demande quelles sont les raisons qui sous-tendent ce choix. En ce qui concerne la

présentation de Mme Lagumina, M. Geradin observe que le droit de la concurrence a pris ces dernières années une grande place dans les considérations juridiques des grandes entreprises.

3. Débat général

Le Président remercie les intervenants et lance les discussions sur les questions soulevées dans le document d'information du Secrétariat et dans les présentations des intervenants, à savoir : i) la définition de l'entreprise publique et ses effets sur l'économie moderne, ii) les éventuelles règles de concurrence spéciales applicables aux entreprises publiques, iii) l'expérience de l'application des règles de concurrence aux entreprises publiques, et iv) les éventuelles exemptions du droit de la concurrence applicables aux entreprises publiques. Il invite les délégués à aborder chaque thème successivement.

4. La définition de l'entreprise publique et ses effets sur l'économie moderne

Pour engager cette partie des débats, le Président se tourne vers la Finlande, dont la contribution montre à quel point les types de participation de l'État peuvent être diversifiés.

La délégation finlandaise indique que son pays a une longue expérience des entreprises publiques. La Finlande en compte de très importantes, en particulier sur le marché des ressources naturelles, qui occupent une position forte et assez protégée sur le marché. La politique de la concurrence a pu influencer de manière positive divers aspects de leurs activités, comme la distribution, et l'État a également amélioré leurs principes de gouvernance. Il subsiste toutefois de nombreux problèmes de concurrence, qui s'expliquent par la forte position qu'occupent ces entreprises sur le marché. Le secteur des collectivités locales, par exemple, est un acteur majeur en Finlande, en ce qui concerne particulièrement la fourniture des services relatifs au bien-être public. Ces services ont été organisés à travers des modèles d'entreprises municipales et d'entreprises d'État, qui associent les formes de société commerciale et d'organisme politique. Or, la Commission européenne a jugé que ce type de modèle constituait une aide d'État en violation de l'article 87 CE, compte tenu des conditions fiscales avantageuses et du régime des faillites particulier qu'il prévoit. Des réformes sont par conséquent en cours en Finlande, aux termes desquelles les activités municipales et les activités de l'État de nature commerciale seront exercées par des sociétés de capitaux. En résumé, il existe en Finlande des entreprises publiques de nature quasiment privée, pour lesquels certains problèmes de concurrence subsistent. Concernant les sociétés de capitaux municipales, elles gagneront progressivement en importance grâce à la réforme en cours et rivaliseront à coup sûr avec les acteurs privés sur les marchés des services qu'elles fournissent.

Le Président remercie la délégation finlandaise pour sa contribution et invite le Brésil, qui compte des entreprises publiques dans de nombreux secteurs, à expliquer sa politique en matière d'entreprises publiques.

La délégation brésilienne note le principe du droit brésilien de la concurrence selon lequel les objectifs publics des entreprises publiques et les règles de concurrence doivent tous deux être respectés et le principe de l'égalité des chances est déterminant. Un certain nombre d'institutions financières publiques ont lancé des offres de prêt exceptionnelles à des conditions préférentielles au bénéfice des groupes les plus pauvres de la société brésilienne, avec toute une série d'avantages économiques et sociaux. Cette offre est compatible avec les règles de concurrence, qui permettent la prise en compte d'éléments de politique publique de la même manière que d'autres avantages.

Le Président se tourne ensuite vers la Corée, dont la définition légale de l'entreprise publique détaille les conditions et les obligations qu'une entreprise doit respecter pour être qualifiée d'entreprise publique.

La délégation coréenne explique que pour avoir le statut d'institution publique, une entreprise doit satisfaire à deux conditions. Tout d'abord, elle doit être établie et gérée grâce à une participation publique

au capital ou à l'aide financière des pouvoirs publics. Ensuite, elle doit être désignée en tant que telle par le Ministère de la stratégie et des finances conformément à la loi relative à la gestion des institutions publiques, adoptée en 2007 en vue de réformer le système de gestion des institutions publiques et d'améliorer la transparence et la responsabilité. La loi régit le gouvernement d'entreprise, la communication des informations comptables et l'évaluation de la gestion par les pouvoirs publics.

Le Président signale la présence de deux invités spéciaux à la table ronde, à savoir l'Inde et la Chine, et invite la Chine à s'exprimer sur la conception de l'entreprise publique retenue par sa récente loi anti-monopole.

Le délégué chinois explique que la loi anti-monopole s'applique aux entreprises, dont la définition englobe les personnes morales et toutes les autres organisations qui ont des activités de vente de produits ou de prestation de services, qu'elles soient publiques ou non. L'article 7 de la loi anti-monopole, qui s'applique spécifiquement aux entreprises publiques, dispose que celles-ci doivent exercer leurs activités de manière à ne pas porter atteinte aux intérêts des consommateurs et à ne pas se rendre coupables d'abus de position dominante ou d'entrave à la concurrence.

Le Président remercie le délégué chinois et constate que l'évolution de la loi anti-monopole en Chine suscite un grand intérêt. Il demande à la délégation indienne de formuler des observations sur l'approche adoptée par son pays concernant les entreprises publiques et sur les principales questions qui y sont liées.

La délégation indienne explique qu'il existe en Inde un grand nombre d'entreprises publiques opérant à différents niveaux d'administration : fédéral, national et municipal. Les entreprises publiques fédérales représentent par exemple environ 26 % du PIB national. Chose intéressante, le droit de la concurrence s'applique à toutes les entreprises publiques, qu'elles soient contrôlées par l'État ou par le gouvernement fédéral, telles que les sociétés d'autoroutes, de construction de logements, de services d'éducation et de santé, de services des postes et de chemin de fer. La définition de l'entreprise soumise au droit de la concurrence est donc très large et n'exclut que les activités relevant des prérogatives souveraines de l'État tels que la défense, l'espace et l'énergie nucléaire. L'Inde a connu plus de libéralisations que de privatisations ; pour autant, l'application de la loi a pris du temps et de ce fait, la concurrence sur les marchés a été progressive, que ce soit entre les entreprises publiques ou privées.

La délégation indienne insiste sur le fait qu'elle consacre une part importante de ses travaux actuels à la promotion de la concurrence. Concernant l'application de la loi, les autorités ont fait preuve de prudence dans les secteurs faisant l'objet de monopoles naturels, où le problème des coûts irrécupérables reste important, malgré les séparations récentes. La libéralisation a également touché les secteurs en situation de monopole de droit dans lesquels les régimes d'octroi de licences ont été supprimés, permettant ainsi à toute entreprise privée d'entrer sur le marché. Le processus de libéralisation a même atteint le service des postes, qui est une entité publique fédérale. En revanche, s'agissant des chemins de fer, le processus a été plus lent.

Enfin, la délégation indienne pointe du doigt le rôle important joué par les organismes de régulation sectorielle suite aux séparations et à la libéralisation réalisées sur différents marchés. Toutefois, leur rôle est strictement encadré par les lois de régulation sectorielle applicables, qui ne traitent pas expressément de la concurrence. Il reste donc beaucoup à faire du point de vue de la politique de concurrence.

Le Président remercie la délégation indienne et remarque que la tension entre les autorités chargées de la mise en œuvre de la concurrence et les organismes de régulation sectorielle constitue probablement un thème commun à de nombreuses délégations. Il se tourne ensuite vers la délégation de la République tchèque afin qu'elle décrive son expérience du passage d'une économie centralement planifiée au marché libre, l'impact que les entreprises publiques ont eu sur le marché pendant la période de transition et les considérations de concurrence qui en ont découlé.

Le passage d'une économie centralement planifiée à une économie de marché a posé des difficultés à la République tchèque, concernant notamment la façon de s'assurer que la privatisation ne transformerait pas simplement les anciens monopoles d'État en monopoles privés. Le Ministère de la concurrence économique, qui a joué un grand rôle dans le processus de privatisation, s'est vu confier la mission de veiller à ce que les monopoles publics soient le moins possible remplacés par des monopoles privés. La privatisation a ainsi été considérée comme une occasion exceptionnelle de briser les grands monopoles d'État, qui encourageaient peu l'innovation et empêchaient l'entrée sur le marché des entreprises privées en raison des prix bas qu'ils pratiquaient. Pour cette raison, le développement de secteurs tels que les télécommunications avait été grandement ralenti.

5. Les éventuelles règles de concurrence spéciales applicables aux entreprises publiques

Le Président invite les délégués à débattre de la question des règles de concurrence spéciales qui peuvent s'appliquer aux entreprises publiques par rapport aux entreprises privées. Dans de nombreux cas, les entreprises publiques jouissent de privilèges et d'immunités dont ne dispose pas le secteur privé, qui tiennent plus de la propriété de l'État que d'un meilleur sens des affaires et qui peuvent sérieusement fausser la concurrence sur le marché. Le Président demande aux Pays-Bas de commenter un projet de loi sur les marchés et les autorités publiques qui est actuellement à l'examen au Parlement néerlandais et, s'il est adopté, les effets qu'il pourrait avoir sur les règles de concurrence.

La délégation néerlandaise explique que le nouveau projet de loi a pour but de garantir des conditions égales aux entreprises privées et aux entreprises publiques qui exercent des activités commerciales sur le marché. Le projet de loi couvre l'ensemble des secteurs dans lesquels les autorités publiques ou les entreprises publiques proposent leurs produits ou services. Cela comprend les collectivités locales, les conseils de l'eau, et ainsi de suite. Toutefois, certaines activités comme l'enseignement public, la recherche, la radiodiffusion publique et les ateliers protégés n'entrent pas dans son champ d'application. Certaines activités peuvent en outre être exclues au coup par coup sur décision d'une entité gouvernementale compétente (y compris l'autorité de la concurrence) désignant une activité particulière comme d'intérêt public. En fait, le projet de loi accorde moins d'importance à la méthode de régulation *ex-post* au profit de la méthode *ex-ante* et donne mandat à l'autorité de la concurrence néerlandaise (NMA) de veiller à ce que les entreprises publiques respectent leurs obligations, sans toutefois disposer du pouvoir de leur infliger des amendes.

Quant aux obligations imposées par le projet de loi, les entreprises publiques seraient par exemple tenues de prendre en compte dans leurs prix l'ensemble des coûts relatifs à la prestation d'un service particulier et devraient veiller à partager les informations recueillies dans le cadre de leur mission de service public avec les personnes privées ou s'interdire de les utiliser dans leurs activités commerciales. En ce qui concerne la relation entre le droit de la concurrence et le projet de loi en instance, la délégation néerlandaise explique que, bien que les prix d'éviction soient interdits en vertu du droit de la concurrence, si une entreprise publique se conforme à l'obligation d'inclure tous les coûts mentionnés précédemment, sa responsabilité ne pourra pas être mise en cause en cas de prix d'éviction. Cela ne signifie pas pour autant qu'on ne pourrait pas faire jouer sa responsabilité pour d'autres infractions à la concurrence.

Le Président invite la Russie, dont la contribution énumère un certain nombre de mesures à prendre pour empêcher que les entreprises publiques aient un impact préjudiciable sur la concurrence, à commenter la façon dont les règles de concurrence russes s'appliquent aux entreprises publiques et quelles autres mesures le Service fédéral antimonopoles juge utiles pour réduire l'incidence négative des entreprises publiques sur la concurrence.

La délégation russe explique qu'il existe deux types d'entreprises publiques en Russie : les sociétés d'État et les entreprises appartenant à des collectivités locales. La contribution écrite de la Russie met

l'accent sur les sociétés d'État, qui sont des organisations non commerciales établies par la loi et qui ont pour objet d'exercer des fonctions d'utilité sociale, par exemple la mise en œuvre de grands projets d'investissement et d'investissement novateurs destinés à préserver l'intérêt de l'État en matière de défense et dans d'autres domaines.

Le Service antimonopoles porte toute son attention à l'influence que les entreprises publiques exercent sur la concurrence ; bien que soumises au droit de la concurrence, elles peuvent avoir des effets préjudiciables sur le marché. Il a donc suggéré un certain nombre de mesures destinées à atténuer les effets potentiellement négatifs des entreprises publiques sur le marché. Certaines de ces suggestions concernent le développement des procédures d'appel d'offres des entreprises publiques et le recours à des mécanismes d'enchères, ce qui permettrait une réduction des coûts et une plus grande transparence. Par ailleurs, le Service antimonopoles s'oppose vivement à la création de nouvelles entreprises publiques et aux lobbies réclamant un moratoire sur leur création tant qu'un système de contrôle efficace de leurs activités n'est pas mis en place.

Le Président s'adresse ensuite à la délégation du Royaume-Uni et l'invite à formuler des observations sur l'affaire BetterCare, qui met en évidence certaines divergences entre la législation du Royaume-Uni et de l'Union européenne lorsqu'il s'agit d'appliquer les règles de concurrence aux entreprises publiques.

La délégation du Royaume-Uni explique que la loi sur la concurrence de son pays découle des articles 81 et 82 du traité CE dans la mesure où elle s'applique aux entreprises exerçant des activités économiques, indépendamment de leur financement. Son champ d'application s'étend donc aux entreprises publiques. Le problème soulevé par la question du Président tient à ce que la solution retenue par la Cour d'appel de la concurrence (Competition Appeals Tribunal, ou CAT) dans l'affaire BetterCare de 2002 peut sembler, dans une certaine mesure, incompatible avec une décision ultérieure rendue par la Commission européenne relative au système d'achat utilisé par le système de santé espagnol.

L'affaire BetterCare portait sur la prestation de soins infirmiers par un organisme de soins local. L'organisme de soins faisait appel à des prestataires tiers pour fournir ces services, dont les coûts étaient couverts par les impôts et les contributions directement versées par les patients. L'Office of Fair Trading (OFT) a considéré que l'organisme de soins n'était pas une entreprise au sens de la loi sur la concurrence, mais la CAT a annulé cette décision, au motif que l'organisme de soins agissait en qualité d'entité économique, tant en ce qui concerne l'achat que la prestation directe des services de soins. La décision de la CAT était centrée sur la question de savoir si l'organisme de soins exerçait une activité que la loi sur la concurrence entendait couvrir.

L'affaire espagnole, portée à l'appréciation de la Commission européenne, concernait également un cas présumé d'abus de position dominante en matière d'achat. Il était reproché au système national de santé espagnol d'abuser de sa position dominante à l'occasion de ses achats sur le marché des produits de santé. L'action a été rejetée et le Tribunal de première instance et la Cour de justice européenne ont tous deux jugé que le fait d'effectuer des achats ne constituait pas en soi une activité économique. L'achat pourrait constituer une activité économique uniquement si les biens servaient par la suite à l'offre de produits ou de services. Depuis cette affaire, la situation au Royaume-Uni est plus floue qu'après la décision de la CAT dans l'affaire BetterCare. Le système de santé continue à évoluer et il reste à savoir comment une affaire d'achat par un organisme de santé financé par l'État serait appréciée à la lumière de la jurisprudence des tribunaux européens.

6. Expérience de l'application des règles de concurrence aux entreprises publiques

Le Président note qu'un certain nombre de pays de l'OCDE prévoient l'application des règles de concurrence aux entreprises publiques et qu'il serait intéressant de débattre des difficultés particulières que

les instances en charge de l'application de ces règles rencontrent, notamment en ce qui concerne les problèmes que pose le calcul du niveau de coût approprié. Il invite la Norvège à formuler ses observations sur cette question, sa contribution traitant d'un cas de prix d'éviction impliquant une entreprise publique.

La délégation norvégienne explique que depuis mai 2004, le droit norvégien s'est doté d'une disposition très similaire à l'article 82 CE, qui a servi de fondement à l'affaire SAS, décrite en détail à la page 9 de sa contribution. Jusqu'ici, la Norvège n'a connu que deux affaires d'abus de position dominante et il a été très difficile de convaincre les tribunaux du caractère illicite des agissements. Tout particulièrement dans l'affaire SAS, le tribunal est allé dans le sens de SAS, société détenue à 50 % par les trois États scandinaves, en jugeant que sa conduite n'était pas constitutive d'un abus. Pour finir, pour des considérations de ressources, l'autorité de la concurrence a transigé avec SAS, retenant le non-respect de la loi sans toutefois infliger d'amende. En conclusion, ces affaires ont mobilisé plus de ressources que ce qu'on pouvait prévoir avant l'adoption de la loi de 2004. La délégation norvégienne observe encore que ce sont les perquisitions des locaux de SAS qui semblent être à l'origine du véritable changement de comportement de l'entreprise en matière de fixation des prix sur le marché national. Cela a en effet permis la survie sur le marché d'un concurrent plus petit.

Une autre question est celle du subventionnement croisé, et le Président invite la France, pour l'avoir évoquée dans sa contribution, à formuler ses observations.

Le délégué français, membre du Conseil de la concurrence, explique que les subventions croisées ne sont pas considérées comme illégales en soi par les autorités françaises de la concurrence, qui s'intéressent plutôt à leurs conséquences et se demandent par exemple si elles ne sont pas de nature à favoriser des prix d'éviction. Le critère est la « distorsion durable » du marché. Une telle distorsion a été établie dans l'affaire de la Française des Jeux, dans laquelle une filiale de l'entreprise avait pu baisser les prix en deçà des frais variables, contrariant ainsi les perspectives des concurrents sur le marché. Les autorités (et les tribunaux en appel) ont conclu qu'il y avait eu distorsion durable de la concurrence, étant donné le poids et l'influence de la filiale de la Française des Jeux sur le marché. Quant aux sanctions, les facteurs pris en compte pour sanctionner les subventions croisées illégales comprennent le *dommage* à l'économie, la gravité des pratiques, la situation de l'entreprise en question et toute éventuelle récidive.

Un autre membre de la délégation française confirme les éléments avancés par le représentant du Conseil de la concurrence, selon lesquels la sanction des subventions croisées peut poser deux difficultés majeures. Premièrement, il n'est pas toujours possible de distinguer les activités « publiques » des activités « commerciales ». C'était par exemple le cas dans l'affaire du ferry de l'Ile d'Yeu, dans laquelle le service de transport par transbordeur a été considéré comme une opération commerciale en haute saison et comme un service public le reste de l'année. Le problème des subventions croisées est presque impossible à identifier et à traiter dans ces circonstances. Deuxièmement, il est difficile de calculer les coûts marginaux avec précision.

Le Président remercie la délégation française et donne la parole à d'éventuels intervenants.

La délégation grecque expose la stratégie de son pays en matière d'entreprises publiques et cite quelques affaires récentes. En Grèce, les entreprises privées et les entreprises publiques sont considérées de la même façon, comme le stipule expressément la loi nationale sur la concurrence. La Commission grecque de la concurrence a examiné le comportement anticoncurrentiel des entreprises publiques dans un certain nombre de cas et dans divers secteurs de l'économie. La Commission grecque des postes et télécommunications, qui est chargée de l'application du droit de la concurrence dans le secteur des télécommunications, a par ailleurs récemment condamné l'opérateur des télécommunications grec à une amende pour abus de position dominante, sous la forme d'un ciseau tarifaire sur le marché de l'accès à l'internet à haut débit. La délégation grecque attire également l'attention sur quelques affaires traitées par la

Commission grecque de la concurrence, parmi lesquels : un cas de fixation de prix entre les deux principales raffineries grecques ; des accords verticaux restrictifs, conclus entre l'Autorité portuaire grecque, qui exploite le port du Pirée, et la compagnie de navigation maritime MSC ; et des clauses de fourniture exclusive contenues dans des contrats conclus entre le fournisseur public d'électricité et des usagers desservis en haute tension.

La délégation australienne décrit la situation de son pays, où les autorités publiques bénéficient d'une immunité vis-à-vis du droit de la concurrence. Jusqu'à une date récente prévalait la théorie de l'« immunité de l'État par ricochet » (*derivative crown immunity*), au titre de laquelle les entreprises qui contractaient avec les pouvoirs publics bénéficiaient eux aussi d'une immunité vis-à-vis du droit de la concurrence. Cette doctrine a cependant été modifiée dans une affaire impliquant l'adjudicateur d'un service de santé, qui contractait pour l'achat de liquide stérile avec un vendeur qui liait la vente de produits pour lesquels il jouissait d'un monopole à celle d'autres produits. L'autorité de la concurrence a estimé que cela constituait une violation du droit de la concurrence et a porté l'affaire devant la Haute Cour, laquelle a écarté la théorie de l'immunité de l'État par ricochet dans les circonstances de l'espèce.

La délégation du Taipei chinois interroge le juge Wood sur les critères d'application du « test de fonction » servant à déterminer si une activité particulière d'une entreprise publique relève ou non du droit de la concurrence. Le juge Wood explique que le test de fonction a été utilisé pour la première fois par le Congrès en 2007 à l'égard de Postal Service, suite à une décision de la Cour suprême de 2004, qui avait jugé que Postal Service était trop proche des pouvoirs publics pour être une personne au sens du droit de la concurrence. Le débat se poursuit actuellement pour déterminer lesquelles de ses fonctions concernent en effet les marchés concurrentiels. Le test de fonction est très connu des tribunaux américains, qui ont eu à des nombreuses reprises dans le cadre du Foreign Sovereign Immunities Act (FSIA), à déterminer ce que constitue une activité commerciale.

La délégation canadienne soulève la question du traitement des entreprises publiques étrangères, qui n'a pas encore été abordée. Au Canada, la loi sur la concurrence traite les entreprises publiques nationales et étrangères de manière égale lorsqu'elles exercent des activités commerciales sur le marché. Les entreprises publiques nationales ne bénéficient d'aucun traitement préférentiel à cet égard.

Le Président remercie la délégation canadienne pour sa contribution et indique que la question du traitement des entreprises publiques étrangères pourrait être discutée au cours de la séance de l'après-midi de la table ronde.

Le BIAC attire l'attention sur le fait que, selon lui, le droit de la concurrence devrait être appliqué à l'ensemble des acteurs du marché, indépendamment du fait qu'ils soient des entreprises publiques ou des entreprises privées. Cette démarche est indispensable pour assurer l'égalité des chances et il est particulièrement important que tous les pays l'adoptent en vue d'accroître les échanges mondiaux. Aussi la délégation du BIAC se félicite-t-elle des évolutions observées dans de si nombreux pays pour soumettre les entreprises publiques au droit de la concurrence.

7. Remarques conclusives des intervenants

M. Geradin relève que la plupart des présentations se rapportent d'une manière ou d'une autre à la libéralisation des industries de réseau, secteur dans lequel la plus grande part des entreprises publiques exercent leurs activités dans les pays de l'OCDE. Si l'on se penche sur la libéralisation, trois problématiques sont en fait à prendre en considération. Premièrement, la libéralisation doit être prescrite par la loi, ce qui en soi est une question plutôt politique. Deuxièmement, il est important de concevoir une réglementation qui tienne compte du développement de la concurrence dans les industries libéralisées. Enfin, les règles de concurrence doivent être appliquées sur les marchés nouvellement libéralisés.

Mme Lagumina observe que ce débat met en évidence qu'il est difficile de concilier les règles de concurrence avec la politique économique, mais il montre également qu'il existe une convergence claire, en ce que personne ne semble suggérer que des règles de concurrence « particulières » devraient s'appliquer aux entreprises publiques. Mme Lagumina relève en outre qu'il devrait être possible de prendre en compte les éléments de politique publique et les obligations auxquelles sont soumises les entreprises publiques, ce qui rendrait l'ensemble du débat plus crédible.

De l'avis du juge Wood, trois grandes questions doivent être traitées s'agissant des entreprises publiques. La première question, philosophique, celle de savoir si les entreprises publiques doivent être soumises au droit de la concurrence de la même manière que les entreprises privées, semble avoir parfaitement trouvé une réponse. La seconde porte sur le véritable défi que semble poser l'application de la loi, compte tenu de la diversité des activités des entreprises publiques, qui rend la situation complexe. Il est très difficile de distinguer si une entreprise publique pratique le subventionnement croisé, fixe ses prix en deçà des niveaux concurrentiels ou adopte d'autres formes de comportement anticoncurrentiel. Cela exige beaucoup de travail ainsi qu'une coopération internationale, et le partage des connaissances peut apporter beaucoup à cet égard. Enfin, il est important de déterminer ce qui crée les problèmes de concurrence les plus sensibles entre les entreprises publiques qui disposent d'un monopole et celles qui entrent en concurrence avec d'autres acteurs du marché.

Le Président remercie les intervenants et les participants et invite chacun à la séance de l'après-midi consacrée au gouvernement d'entreprise et au principe de neutralité concurrentielle pour les entreprises publiques, au cours de laquelle quelques-unes de ces questions philosophiques d'application des lois seront abordées.

II.

CORPORATE GOVERNANCE AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY

ISSUES PAPER

By the Secretariat

1. Introduction

This issues paper identifies some of the key issues concerning corporate governance and the principle of competitive neutrality for state owned enterprises ('SOEs') for the purposes of discussion at the meeting of Working Party No. 3 (WP3) on 20 October 2009. This discussion follows on from the June 2004 roundtable of the OECD Competition Committee on Regulating Market Activities by the public Sector.¹

Many governments recognise the significant benefits competition can generate. Over time competitive markets reward those firms that can adapt to the changing needs of their customers. These benefits are also available in markets where public businesses compete with the private sector. However, the administrative and legislative environment in which public businesses operate may provide those businesses with advantages, which are not present in the private sector. These advantages may affect the cost of goods and services offered by a government body. Consequently, competition could be distorted when the government business activities and the private sector businesses do not face the same costs and regulations even though they are competing in the same market.

A resolution to this competitive asymmetry can be found in a variety of competitive neutrality solutions, which will be discussed further in this issues paper.

2. Competition law and competitive neutrality

As discussed at length in the background Note for the WP3 roundtable on the Application of Antitrust Law to State-owned Enterprises,² competition law can be an important tool for dealing with competitive neutrality problems. In general, competition law enforcement is neutral as to ownership of companies. Competition law applies to both private and public economic entities. Most OECD countries do not exclude public sector businesses from competition law (except a few specific enterprises that are exempted in some countries).

In a number of OECD countries, competition rules on abuse of dominance and monopolisation have provided the basis for investigating and sanctioning business conduct by SOEs.³ These cases, mostly related to predatory pricing strategies. One important issue that may affect the use of competition law to counteract competitive neutrality inequities is loss recoupment. In some jurisdictions predatory behaviour does not violate the law unless the predator could recoup its losses, the principle being if loss recoupment is not possible then competition has not been harmed. However, public enterprises do not always aim to maximise profits and therefore recover losses in the same way as private companies. The ability of SOEs to engage in non-recoupment predatory pricing raises important issues as to whether there is any consumer harm if prices do not go up as a result of the predation and if there should be a different legal standard for SOE's predatory strategies.

¹ See DAF/COMP (2004)36

² See DAF/COMP/WP3(2009)2

³ See example discussed in DAF/COMP/WP3(2009)2

Box 1. Questions and Issues for Discussion

Does your enforcement agency have any guidelines or policy statements regarding the use of competition law to eliminate competitive neutrality problems?

Are there any recent judicial or enforcement agency decisions which have helped to shape the way your jurisdiction will deal with issues concerning public and private entities competing on a level playing field?

To what extent does the issue of loss recoupment affect the finding of a predatory pricing by an SOE in your jurisdiction?

3. Competitive neutrality frameworks (“CNFs”)

Competition law can address some important competitive neutrality issues, but it may not be well equipped to deal with all aspects of inefficient competition between public and private sector entities. Competition law provides a legal framework to prevent abuses of market power or attempts to gain market power. Many competitive neutrality issues would not be reached by competition law, either because the relevant government businesses do not have market power or the advantages they receive do not qualify as abuses covered by competition laws.

CNFs focus on reforming the environment that public and private entities compete in. Introducing a CNF involves a systematic review of the legislative and administrative landscape in which SOE’s operate, and a reform of that landscape so that the conditions in which SOE’s operate are as closely matched to those faced by private sector competitors as possible. CNFs also improve transparency and accountability of government business’s activities by presenting their costs in a comparable manner to the private sector. In other words, competitive neutrality aims to promote efficient competition by minimising competitive advantages government business activities may enjoy over their private sector competitors simply because they are government owned.

An explicit targeted CNF draws together those components of competition laws and governance reforms that redress competitive neutrality problems and extend the reform program to cover smaller government business activities and any remaining competitive advantages. CNFs also include *ex post* mechanisms to monitor the implementation and effectiveness of the competitive neutrality framework and rectify any remaining issues. CNF’s are not, as yet, the common procedure in many countries.

3.1 *The scope of competitive neutrality policies*

There is no universal definition of a government business activity and therefore identifying the different types of government activities covered by CNF’s can be complicated. Issues to consider include:

- *Levels of government* – it should be considered whether all levels of government, i.e. national, regional and local, should be included in the CNF. While larger national and regional SOE’s may appear the most potent threat to competitive neutrality, the economic significance of local government has become increasingly clear. Local government often competes with the private sector in key industries such as recreational activities, childcare, education, health care, housing and transport. Therefore CNF’s that do not, for example, encompass local level government could exclude a significant amount of government business activity.
- *Commercial nature of activity* – for a CNF to apply the activity of the SOE must be commercial, i.e. the entity needs to be organised in accordance with commercial principles and be commercial

in character. However, it is important to distinguish between non-profit and unprofitable activities. Due to social objectives an SOE may be required to provide certain services at zero profit, or even at a loss. These types of non-profit services should be left outside the CNF.

- *Actual/potential competitors* – there must be competitors in the market for a CNF to be effective, i.e. there should not be any legislation prohibiting competition. However, the competitors do not have to be ‘actual’ as the existing advantages afforded to a SOE may have prevented ‘potential’ competitors from entering.
- *Cost/benefit analysis* – a CNF is beneficial if the benefits of the reforms are greater than the costs. Therefore it may be necessary to subject each individual SOE to a costs/benefit analysis. While in theory a CNF may be suitable for smaller SOE’s in practice this may not be cost effective if there is little potential competition on the market, and a requirement for substantial changes to the administration.

Box 2. Questions and Issues for Discussion

Does your country have in place any competitive neutrality framework for SOEs? If the answer is yes, what is the scope of the CNF?

Has your country adopted any other measure to improve the commercial focus of SOEs or make the regulation of SOEs more consistent with the private sector?

Do government policies oblige SOEs to operate like private businesses or regulate the way government businesses compete with the private sector?

Do these policies affect which markets the government businesses can enter or how they conduct themselves in those markets?

3.2 Applying competitive neutrality principles

After identifying the scope of competitive neutrality reforms, the next step is the removal of any competitive advantages of SOEs. A government business activity could obtain an advantage in competing with the private sector from any aspect of its regulation, management or the method of pricing its products and services. Governments that implement competitive neutrality policies need to address these advantages. This will require calculation and adjustments in a number of areas including the following:

- *Cost allocation* — Identifying those costs that relate to a particular business activity can be a complex exercise. For example the best method of dividing fixed and overhead costs between different activities may not always be straightforward. When a government organisation undertakes both commercial and non-commercial activities, rigorous cost allocation methods help avoiding cross-subsidies between the commercial and the non-commercial activities.
- *Rate of return*— Competitive neutrality requires government business activities to earn a commercial rate of return on their assets. The government would need to determine the appropriate rates of return for different types of business activities. For example, as in the private sector, it may be reasonable for some business activities to make losses in the short term, but such losses are not sustainable in the long run.

- *Dividends* — If the government requires its business activities to pay dividends, the level of dividends should be set to reflect commercial reality.
- *Taxes* — Taxes, fees and government charges borne by the government business activity should be equivalent to those levied on its private sector competitors. It is not always possible to subject the government business directly to the same tax regime as the private sector. One way the government could address this problem is by levying a tax equivalent payment on the government business activity. The tax equivalent regime should be designed to reflect, as closely as possible, the obligations on the private sector.
- *Regulatory neutrality* — The regulatory environment facing government business activities can differ from the private sector in many ways. Under competitive neutrality both government and private sector businesses should, as far as possible, comply with the same regulations, such as planning, building and environmental laws, licensing and prudential requirements, trade practices laws and other legal obligations on the business activity. If it is not possible to equalise the regulatory environment the government may need to consider other ways of ensuring that the remaining differences do not affect the government business's ability to compete with the private sector.
- *Debt neutrality* — Usually government businesses are able to borrow money at a lower rate than the private sector. Even without specific government guarantees, there may be a perception that government ownership makes the business less risky. Government controls on public sector borrowing and the rates charged on public sector loans should be considered as part of competitive neutrality policy.
- *Provision of free or subsidised services to disadvantaged groups* — Often governments wish to fund the provision of services free, or at a reduced cost, to particular sectors of the community. Government businesses will have a competitive disadvantage if they are required to provide unprofitable services and fund them from their profitable services. Subsidised services can still be provided in a competitively neutral environment, but their method of provision and funding needs to be reviewed.
- *Separation of regulation from service provision* — Some government organisations have responsibility for both providing commercial services and regulating other service providers. These dual roles can generate a conflict between the organisation's regulatory functions and its commercial business objectives. Separating these activities can be important to create a competitively neutral environment.
- *Commercial management* — Public sector management structures are not necessarily well suited to competing in a commercial environment. For large business ventures a more commercial approach to management and governance may be desirable. This could involve setting up business objectives that reflect a commercial focus, establishing an independent board or CEO, or separating the day-to-day management of the business from the political process.
- *Public procurement* — Public procurement concerns the purchases of goods, services and public works by governments and public utilities. Procurement policy should equalise competition between the public and private sectors. For example, under the public procurement rules, transparent and open procedures should be followed in order to open up the procurement market to competition.

- *State aid* – Government subsidies should not distort competition between public and private businesses. Government should reform the approach to subsidising public services to ensure that subsidies do not advantage public sector businesses over private sector businesses.

Box 3. Questions and Issues for Discussion

Has your government adopted any policies to address SOEs advantages vis-à-vis privately-owned firms in terms, for example, of cost allocation, favourable tax regime, subsidies, favourable regulatory treatment, easier access to finance, etc.?

How have these policies been implemented?

Which competitive neutrality policies or mechanisms have been most important in promoting fair competition between SOEs and private firms?

How are SOEs and private sector businesses informed of the obligations under the above policies?

Are SOEs trained in their obligations?

3.3 Monitoring and enforcement

Any competitive neutrality reform requires ongoing monitoring and enforcement to be effective. The most appropriate approach will differ from country to country depending on existing institutions and their roles, the extent of the reforms being introduced, the type of business activities subject to those reforms and the provisions available for education and training programs.

Monitoring involves the formal process of reporting on the progress and success of new reforms, ensuring adherence to the original rules decided upon, and amending any areas that may need adjusting to ensure the continued effectiveness of the reform. Monitoring can be conducted in a variety of ways including:

- Through a *regulator*, who would be given responsibility for researching and reporting on the implementation and success of the reform.
- Through *government departments* or *Ministers*, who would be given responsibility for reporting on reform within their area of responsibility.
- Through the *SOE itself*, who could be required to report on its progress.
- Through *periodic reports*, which could be commissioned to review the implementation and success of the reform.

Enforcement involves the mechanisms used to impose obligations on SOE's to implement the competitive neutrality reforms. Enforcement measures will vary from country to country in both type and level of severity, but commonly would include:

- *Legislation* – specifying how SOE activities must be conducted when and SOE is competing with the private sector.

- *Administrative mechanisms* – requiring SOE’s to comply with their competitive neutrality obligations.
- *A formal complaints handling body* – responsible for investigating claims from competing businesses that an SOE is not complying with its obligations, and with the power to take remedial action.
- *Existing country specific mechanisms* – most governments have existing mechanisms under which agencies are accountable for their compliance with government policies. These could be adapted to accommodate competitive neutrality obligations.

Box 4. Questions and Issues for Discussion

Which public entity or regulator is/would be responsible for applying any competitive neutrality policies? Are there systems in place to ensure those policies are implemented and enforced?

Does your country have any existing procedures in place to monitor adherence to government policies and can this be adapted for the purpose of competitive neutrality?

Are there any other mechanisms for dealing with complaints against those activities of government businesses, or gaining redress if there are justifiable concerns?

What penalties should be applied for contravention of any competitive neutrality obligations?

What sort of training and education programs could be introduced to ensure SOE’s are aware of their obligations under any competitive neutrality policies?

4. SOEs corporate governance reforms

Competitive neutrality problems could be reduced by reforming the governance arrangements of government businesses so that these businesses have a commercial focus, operate efficiently and face all normal business costs, such as requirements to earn a rate of return and pay taxes.

The characteristics of state-owned enterprises raise specific challenges for their governance. Firstly, SOEs are often protected from two major threats that are essential in policing management behaviour: the threats of takeover and bankruptcy. Secondly, accounting and disclosure may be oriented towards public expenditure control and therefore may not meet the private sector standards. Without appropriate governance arrangements to counter these characteristics, the management of SOEs may have more discretion afforded to them than private firms and demands on the government’s budget for investment and expansion programmes may become excessive.

A reform of the governance arrangements of SOE’s can go a long way to reducing competitive neutrality problems.⁴ Reforms which result in SOE’s operating more efficiently, with a more commercial focus and dealing with all normal business costs, level out significantly the inconsistencies between private businesses and their public counterparts. A key aspect of this rearrangement is separating the regulatory functions of agencies from their business activities to ensure there is no confusion between the regulatory and competitive objectives of the agency. This also counteracts any perceptions of ‘favouritism’ from private competitors on the market.

⁴ See the *OECD Guidelines on Corporate Governance of State-Owned Enterprise*, OECD 2005.

Corporatisation and commercialisation both offer solutions for governance reforms:

- *Corporatisation* involves separating the day-to-day activities of the business from the government and establishing an independent board of directors and transparent governance structures. The business is set up as a separate legal entity, distinct from its owner government. It may be constituted as a government owned enterprise under corporations' law, or as a statutory authority under its own or umbrella legislation, and there may be specific mechanisms for the government to direct the entity to undertake certain activities in a particular way. Examples include government business enterprises in Australia, state-owned incorporated companies in Norway and crown companies in New Zealand.
- *Commercialisation* involves maintaining the commercial activities within the operations of a government department and there is no full corporate structure established. Instead reforms aim to put in place clear and non-conflicting objectives, sufficient management responsibility, authority and autonomy, independent, objective performance monitoring and an effective system of rewards and sanctions. Management is not as directly accountable for the performance of the business, and the distinction between the functions of the government and the business activity are less clear. However, costs are lower as there is no need to establish a full corporate structure and board of directors.

Corporatisation and commercialisation of SOE's are likely to alleviate many of the problems concerning competitive neutrality, with the added benefit that as an *ex ante* solution the cost of market distortions is avoided (unlike applying an *ex post* solution based on competition law). However, the key downside to a wholesale reform of corporate governance is the cost. While it is a cost effective solution for large SOE's, the same cannot be said for smaller SOE's, which, despite their size, may still have a significant effect on the development of private sector business in a region.

Box 5. Questions and Issues for Discussion

Does your country have any specific corporate governance policies for SOEs to ensure that they are effectively managed?

Please discuss any mechanisms to ensure that commercial and non-commercial objectives do not interfere with each other. Has your jurisdiction implemented any governance reforms involving the separation of regulation from service provision, and have these been more of the commercialisation or corporatisation variety?

Is there a legal or regulatory framework enabling the state to act as an informed and active owner?

Does it ensure that the governance of the SOE is carried out in a professional and effective manner?

Please describe any legal or regulatory framework for SOEs ensuring high standards of transparency and accountability.

NOTE POUR DISCUSSION

Par le Secretariat

1. Introduction

Ce document de réflexion désigne un certain nombre de questions clés à examiner lors de la réunion du Groupe de travail n° 3 (GT3), le 20 octobre 2009. Ces questions portent sur le gouvernement d'entreprise et le principe de neutralité concurrentielle des entreprises publiques. Cet examen fait suite à la table ronde du Comité de la concurrence de l'OCDE relative à la réglementation des activités marchandes du secteur public¹, qui s'est déroulée en juin 2004.

De nombreux gouvernements reconnaissent les avantages importants que peut générer la concurrence. Au fil du temps, les marchés compétitifs récompensent les entreprises capables de s'ajuster à l'évolution des besoins de leurs clients. Ces avantages se retrouvent également dans des marchés où les entreprises du secteur public sont en concurrence avec le secteur privé. Toutefois, l'environnement administratif et législatif dans lequel ces entreprises du secteur public exercent leurs activités peut leur conférer des avantages qui n'existent pas dans le secteur privé. Ces avantages peuvent avoir une incidence sur le coût des biens et services offerts par un organisme public. Des distorsions de la concurrence peuvent donc résulter du fait que les activités commerciales de l'Etat et les entreprises du secteur privé ne sont pas soumises aux mêmes contraintes et à la même réglementation, bien qu'elles soient en concurrence sur le même marché.

On peut remédier à cette asymétrie concurrentielle au moyen de diverses solutions de neutralité concurrentielle, qui seront examinées de manière plus détaillée dans ce document de réflexion.

2. Droit de la concurrence et neutralité concurrentielle

Comme l'a montré l'étude approfondie figurant dans la Note de référence sur l'application du droit de la concurrence aux entreprises publiques destinée à la table ronde du GT3², le droit de la concurrence peut constituer un outil important pour traiter des problèmes de neutralité concurrentielle. De manière générale, l'application du droit de la concurrence est neutre quant à la propriété des sociétés. Le droit de la concurrence s'applique aux entités économiques tant privées que publiques. La plupart des pays de l'OCDE n'excluent pas les entreprises du secteur public du champ d'application du droit de la concurrence (hormis quelques entreprises spécifiques exemptées dans certains pays).

Dans un certain nombre de pays de l'OCDE, les règles de la concurrence relatives aux abus de position dominante et à la monopolisation servent de référence aux enquêtes et sanctions relatives au comportement commercial des entreprises publiques³. Ces affaires sont essentiellement liées à des stratégies de prix d'éviction. La récupération des pertes est l'un des points importants susceptible d'avoir une incidence sur l'utilisation du droit de la concurrence pour contrebalancer les déséquilibres en matière de neutralité concurrentielle. Dans certains pays, les pratiques d'éviction n'enfreignent pas la loi, à moins

¹ Voir DAF/COMP (2004)36.

² Voir DAF/COMP/WP3(2009)2.

³ Voir l'exemple étudié dans DAF/COMP/WP3(2009)2.

que le prédateur ne puisse récupérer ses pertes, le principe étant qu'il n'y a pas préjudice porté à la concurrence si la récupération des pertes n'est pas possible. Toutefois, les entreprises du secteur public ne cherchent pas toujours à maximiser leurs bénéfices et, par conséquent, à récupérer leurs pertes de la même manière que les sociétés privées. La capacité des entreprises publiques à appliquer des prix d'éviction sans récupération des pertes soulève des questions importantes quant à l'éventuel préjudice subi par les consommateurs si les prix n'augmentent pas en raison de l'éviction et quant à l'existence d'une norme juridique différente pour les stratégies prédatrices des entreprises publiques.

Boîte 1. Questions et problèmes à examiner

Votre organisme chargé de l'application des textes peut-il s'appuyer sur des directives ou des déclarations officielles concernant l'utilisation du droit de la concurrence en vue de remédier aux problèmes de neutralité concurrentielle ?

Des décisions ont-elles été récemment prises par les tribunaux ou par l'organisme chargé de l'application des textes qui ont aidé à définir la manière dont votre pays règlera les problèmes de concurrence entre entités publiques et privées selon des règles de jeu équitables ?

Dans quelle mesure la question de la récupération des pertes a-t-elle une incidence sur la constatation de la pratique d'un prix d'éviction par une entreprise publique dans votre pays ?

3. Cadres de neutralité concurrentielle (CNC)

Le droit de la concurrence peut traiter certains problèmes importants de neutralité concurrentielle, mais il est peut-être mal armé pour régler tous les aspects d'une concurrence inefficace entre entités des secteurs privé et public. Le droit de la concurrence apporte un cadre légal pour prévenir les abus de pouvoir de marché ou les tentatives en vue d'acquiescer un pouvoir de marché. Bien des problèmes de neutralité concurrentielle échappent au droit de la concurrence, soit parce que les entreprises du secteur public concernées n'ont pas de pouvoir de marché, soit parce que les avantages dont elles bénéficient ne sont pas constitutifs d'abus couverts par les droits de la concurrence.

Les CNC s'attachent à réformer les conditions de concurrence entre entités privées et publiques. L'introduction d'un CNC implique une révision systématique du paysage législatif et administratif dans lequel les entreprises publiques exercent leurs activités et une réforme de ce paysage de manière que les entreprises publiques exercent leurs activités dans des conditions aussi proches que possible de celles auxquelles sont soumises leurs concurrents du secteur privé. Les CNC améliorent également la transparence et le régime de responsabilité des activités marchandes de l'État, en présentant leurs coûts de manière comparable à celle qui prévaut dans le secteur privé. Autrement dit, la neutralité concurrentielle vise à promouvoir une concurrence efficace en réduisant les avantages concurrentiels dont les activités des commerciales de l'État pourraient jouir par rapport à leurs concurrents du secteur privé, en raison du simple fait qu'elles sont détenues par l'État.

Un CNC clairement ciblé conjugue les composantes du droit de la concurrence et des réformes du gouvernement d'entreprise qui rectifient les problèmes de neutralité concurrentielle et étendent le programme de réformes aux activités commerciales moins importantes de l'État et aux éventuels avantages concurrentiels restants. Les CNC englobent également les mécanismes *ex post* de contrôle de leur propre application et de leur propre efficacité et remédient aux éventuels problèmes restants. Dans beaucoup de pays, les CNC ne constituent pas à l'heure actuelle, la procédure ordinaire.

3.1 *Champ d'application des politiques de neutralité concurrentielle*

Il n'existe pas de définition universelle d'une activité commerciale des administrations publiques et par conséquent, l'identification des différentes catégories d'activités de l'État couvertes par un CNC peut être compliquée. Les questions à examiner incluent :

- *Niveau administratif* – il faut se demander si l'ensemble des niveaux administratifs, c'est-à-dire, national, régional et local, doivent être couverts par le CNC. Bien que les grandes entreprises publiques nationales et régionales puissent paraître constituer la plus forte menace pour la neutralité concurrentielle, l'importance économique de l'administration locale est devenue de plus en plus évidente. L'administration locale se trouve souvent en concurrence avec le secteur privé dans des branches essentielles telles que les loisirs, l'accueil de la petite enfance, l'éducation, les soins de santé, le logement et les transports. En conséquence, les CNC qui, par exemple, n'englobent pas les administrations locales, risquent d'exclure une partie importante de l'activité commerciale des administrations publiques.
- *Nature commerciale de l'activité* – pour que soit appliqué un CNC, l'activité de l'entreprise publique doit être commerciale ; en d'autres termes, l'entité doit être organisée conformément aux principes commerciaux et avoir une nature commerciale. Toutefois, il convient de distinguer entre activités à but non lucratif et les activités non rentables. En raison d'objectifs sociaux, une entreprise publique peut être tenue de fournir certains services à bénéfice nul, voire à perte. Ces types de services sans bénéfices doivent être laissés en dehors du CNC.
- *Concurrents effectifs/potentiels* – il faut des concurrents sur le marché pour qu'un CNC soit efficace. en d'autres termes, il ne doit y avoir aucune législation interdisant la concurrence. Toutefois, les concurrents n'ont pas besoin d'être « effectifs » puisque les avantages existants accordés aux entreprises publiques peuvent avoir empêché des concurrents « potentiels » d'entrer sur le marché.
- *Analyse des coûts/avantages* – un CNC est utile si les avantages des réformes sont plus importants que leurs coûts. Par conséquent, il conviendra peut-être de soumettre chaque entreprise publique séparément à une analyse des coûts/avantages. Bien qu'en théorie, un CNC puisse convenir à des entreprises publiques plus petites, en pratique, cela risque de ne pas être efficient s'il existe peu de concurrence potentielle sur le marché et s'il faut procéder à des changements importants dans l'administration.

Boîte 2. Questions et problèmes à examiner

Votre pays dispose-t-il d'un cadre de neutralité concurrentielle pour les entreprises publiques ? Dans l'affirmative, quel est le champ d'application de ce CNC ?

Votre pays a-t-il adopté d'autres mesures destinées à améliorer l'orientation commerciale des entreprises publiques ou à rendre la réglementation des entreprises publiques plus cohérente avec celle du secteur privé ?

L'action des pouvoirs publics oblige-t-elle les entreprises publiques à exercer leurs activités comme des entreprises privées ou réglemente-t-elle la manière dont les entreprises du secteur public concurrencent le secteur privé ?

Cette action a-t-elle une incidence quant aux marchés dans lesquels les entreprises du secteur public peuvent entrer ou quant à la manière dont elles se comporter dans ces marchés ?

3.2 *L'application des principes de neutralité concurrentielle*

Après avoir identifié le champ d'application des réformes relatives à la neutralité concurrentielle, l'étape suivante consiste à supprimer tous les avantages concurrentiels dont bénéficient les entreprises publiques. L'activité commerciale des administrations publiques peut tirer un avantage concurrentiel par rapport au secteur privé d'un aspect quelconque de sa réglementation, de sa gestion ou de sa méthode de fixation des prix de ses produits et services. Les autorités qui mettent en œuvre des politiques de neutralité concurrentielle, doivent traiter la question de ces avantages. Cela suppose des calculs et des ajustements dans un certain nombre de domaines, notamment :

- *Affectation des coûts* — L'identification des coûts liés à une activité commerciale particulière peut être un exercice complexe. Par exemple, la meilleure méthode pour répartir les coûts fixes et les frais généraux entre différentes activités n'est pas toujours forcément simple. Lorsqu'un organisme public entreprend des activités commerciales et non commerciales, des méthodes rigoureuses d'affectation des coûts contribuent à éviter les subventions croisées entre les activités commerciales et non commerciales.
- *Taux de rendement* — La neutralité concurrentielle exige que les activités commerciales de l'État produisent un taux de rendement commercial sur leurs actifs. Il faut que les autorités déterminent les taux de rendement appropriés aux différentes catégories d'activités commerciales. Par exemple, comme dans le secteur privé, il pourrait être raisonnable que certaines activités commerciales produisent des pertes à court terme, sachant que ces pertes ne sont pas soutenables à long terme.
- *Dividendes* — Dans l'hypothèse où les pouvoirs publics exigent que leurs établissements commerciaux versent des dividendes, le niveau de ces dividendes doit être fixé de manière à refléter la réalité commerciale.
- *Impôts* — Les impôts, honoraires et charges administratifs supportés par les établissements commerciaux des administrations publiques doivent être égaux à ceux prélevés sur leurs concurrents du secteur privé. Il n'est pas toujours possible de soumettre une entreprise du secteur public directement au même régime fiscal que celui du secteur privé. L'une des solutions peut consister à prélever une somme équivalente sur les activités commerciales des administrations publiques. Le régime d'imposition équivalent est conçu pour refléter, autant que possible, les obligations du secteur privé.
- *Neutralité réglementaire* — L'environnement réglementaire auquel sont soumises les activités commerciales des administrations publiques peut différer de bien des manières de celui du secteur privé. Au titre de la neutralité concurrentielle, les entreprises du secteur privé et celles du secteur public doivent, dans la mesure du possible, se conformer aux mêmes réglementations, telles que les lois relatives à l'occupation des sols, à la construction et à l'environnement, les conditions d'agrément et les normes prudentielles, ainsi que les usages professionnels et autres obligations juridiques applicables à l'activité commerciale. S'il n'est pas possible d'instaurer des conditions de réglementation équitables, les pouvoirs publics doivent envisager d'autres moyens pour que les différences restantes n'aient pas d'incidence sur la capacité de l'entreprise du secteur public à concurrencer le secteur privé.
- *Neutralité de la dette* — Habituellement, les entreprises du secteur public sont en mesure d'emprunter de l'argent à un taux plus faible que celles du secteur privé. Même en l'absence de garanties particulières de l'État, on peut penser que le fait d'appartenir à l'État réduit le risque de l'entreprise. Les contrôles exercés par l'État sur les emprunts du secteur public, ainsi que les taux

qui leur sont appliqués doivent être considérés comme une composante de la politique de neutralité concurrentielle.

- *Prestation de services gratuits ou subventionnés à des groupes défavorisés* — Les pouvoirs publics souhaitent souvent financer la prestation de services gratuits ou à coûts réduits à des secteurs particuliers de la collectivité. Les entreprises du secteur public auront un désavantage compétitif, si elles sont tenues de fournir des services non rentables et de les financer au moyen de leurs services rentables. Des services subventionnés peuvent encore être fournis dans un environnement concurrentiel neutre, mais leurs modes de fourniture et de financement doivent être révisés.
- *Séparation de la réglementation de la prestation de service* — Certains organismes publics sont responsables à la fois de la fourniture de services commerciaux et de la réglementation d'autres prestataires de service. Cette dualité des rôles peut créer des conflits entre la fonction régulatrice de l'organisme et ses objectifs commerciaux. La séparation de ces activités peut être importante pour instaurer la neutralité concurrentielle.
- *Gestion commerciale* — Les structures de gestion du secteur public ne sont pas nécessairement adaptées à la concurrence dans un environnement commercial. Pour les grandes entreprises, une approche plus commerciale de la gestion et de la gouvernance peut être souhaitable. Cela peut impliquer la fixation d'objectifs commerciaux reflétant une orientation commerciale, la mise en place d'un conseil d'administration ou la nomination d'un directeur général indépendant ou la séparation de la gestion quotidienne de l'activité du processus politique.
- *Appels d'offres publics* — Les appels d'offres publics concernent l'achat de biens, services ou travaux publics par des administrations publiques ou des services publics. La politique d'appel d'offres doit instaurer des conditions équitables de concurrence entre secteur public et secteur privé. Par exemple, dans le cadre des règles relatives aux marchés publics, il convient de respecter des procédures transparentes et ouvertes afin d'ouvrir le marché concerné à la concurrence.
- *Aides d'État* — Les subventions publiques ne doivent pas fausser la concurrence entre entreprises publiques et privées. Les pouvoirs publics doivent revoir leur approche de l'octroi de subventions aux services publics afin de garantir qu'elles n'avantagent pas les entreprises du secteur public par rapport à celles du secteur privé.

Boîte 3. Questions et problèmes à examiner

Votre gouvernement a-t-il défini des principes de traitement des avantages des entreprises publiques par rapport aux entreprises privées en termes, par exemple, d'affectation des coûts, de privilèges fiscaux, de subventions, de traitement par la réglementation, d'accès au financement, etc. ?

De quelle manière ces principes ont-ils été mis en œuvre ?

Quels principes ou mécanismes de neutralité concurrentielle ont le plus contribué à promouvoir une concurrence équitable entre entreprises publiques et privées ?

Comment les entreprises publiques et privées sont-elles informées de leurs obligations au titre de ces principes ?

Les entreprises publiques sont-elles formées à leurs obligations ?

3.3 *Contrôle et application des textes*

Pour être efficace, toute réforme relative à la neutralité concurrentielle nécessite un dispositif permanent de contrôle et d'application des textes. L'approche la plus adéquate varie d'un pays à l'autre, selon les institutions existantes et leurs rôles, l'étendue des réformes introduites, la catégorie d'activités commerciales soumise à ces réformes et les fonds mobilisés pour les programmes d'éducation et de formation.

Le contrôle implique le processus formel de reddition de comptes sur l'état d'avancement et le succès des nouvelles réformes, la vérification de l'adhésion aux règles décidées à l'origine et les modifications à apporter dans les éventuels domaines pouvant nécessiter un ajustement pour assurer l'efficacité continue de la réforme. Le contrôle peut être exercé de manières différentes, y compris :

- Par le biais d'une autorité de tutelle, chargée d'étudier la mise en œuvre et le succès de la réforme et d'en rendre compte :
- Par le biais de *services gouvernementaux* ou de *ministres*, chargés de rendre des comptes sur la réforme dans leur domaine de compétence.
- Par le biais de *l'entreprise publique elle-même*, qui peut être tenue de rendre compte de ses progrès.
- Par le biais de *rapports périodiques*, qui peuvent être commandés pour faire le point sur la mise en œuvre et le succès de la réforme.

L'application des textes fait intervenir les mécanismes utilisés pour obliger les entreprises publiques à mettre en œuvre les réformes de neutralité concurrentielle. L'application des textes variera d'un pays à l'autre, à la fois quant au type de mesure et à leur rigueur, mais elle a généralement recours à :

- *La législation* – prévoyant comment les entreprises publiques doivent exercer leurs activités lorsqu'elles sont en concurrence avec le secteur privé.
- *Des mécanismes administratifs* – imposant aux entreprises publiques de respecter leurs obligations de neutralité concurrentielle.
- *Un organisme officiel de traitement des réclamations* – chargé d'étudier les réclamations d'entreprises concurrentes affirmant qu'une entreprise publique ne respecte pas ses obligations, et ayant le pouvoir de prendre des mesures correctrices.
- *Des mécanismes spécifiques existants dans un pays* – la plupart des pays ont déjà des mécanismes en vertu desquels les organismes doivent rendre des comptes sur leur respect des politiques de l'État. Ces mécanismes peuvent être adaptés au respect des obligations de neutralité concurrentielle.

Boîte 4. Questions et problèmes à examiner

Quelle entité publique ou autorité de tutelle est/serait responsable de l'application des principes de neutralité concurrentielle ? Des systèmes sont-ils en place pour garantir l'application et la mise en œuvre de ces principes ?

Votre pays dispose-t-il de procédures pour contrôler l'adhésion aux orientations définies par les pouvoirs publics et

ces procédures peuvent-elles être adaptées aux besoins de la neutralité concurrentielle ?

D'autres mécanismes permettent-ils de traiter des réclamations contre des activités d'entreprises du secteur public ou d'obtenir réparation, si cela se justifie.

Quelles sanctions doivent être appliquées en cas de non-respect des obligations de neutralité concurrentielle ?

Quels types de programmes de formation et d'éducation peuvent être introduits pour que les entreprises publiques soient au fait de leurs obligations au titre des principes de neutralité concurrentielle ?

4. Les réformes du gouvernement d'entreprise dans le secteur public

Les problèmes de neutralité concurrentielle peuvent être réduits par une réforme des dispositifs de gouvernance des entreprises du secteur public, de manière que ces entreprises aient une orientation commerciale, exercent leur activité avec efficacité et assument l'ensemble des contraintes commerciales ordinaires, comme l'obligation d'obtenir un taux de rendement et de payer des impôts.

Les caractéristiques des entreprises publiques posent des problèmes de gouvernance spécifiques. Premièrement, les entreprises publiques sont souvent à l'abri de deux menaces importantes, qui sont essentielles dans la régulation des comportements de la direction : les menaces de prise de contrôle et de faillite. Deuxièmement, la comptabilité et la communication financière peuvent être guidées par des considérations propres au contrôle des dépenses publiques et par conséquent, peuvent ne pas satisfaire aux normes du secteur privé. Sans dispositifs appropriés de gouvernement d'entreprise pour contrebalancer ces caractéristiques, les dirigeants des entreprises publiques peuvent jouir d'un pouvoir discrétionnaire plus grand que celle des sociétés privées et les sollicitations du budget de l'État pour des programmes d'investissement et de développement, peuvent devenir excessives.

Une réforme des dispositifs de gouvernance des entreprises publiques peut fortement contribuer à réduire les problèmes de neutralité concurrentielle⁴. Des réformes aboutissant à un fonctionnement plus efficace des entreprises publiques, avec une orientation plus commerciale et assumant toutes les contraintes commerciales ordinaires, peuvent aplanir sensiblement les incohérences entre les régimes applicables aux entreprises privées et publiques. L'un des aspects clés de cette réorganisation est la séparation des fonctions de réglementation assumées par les organismes vis-à-vis de leurs activités commerciales afin d'éviter toute confusion entre objectifs de réglementation et objectifs concurrentiels de l'organisme. Cela permet en outre de faire pièce aux éventuelles impressions de « favoritisme » ressenties par le secteur privé.

La transformation des entreprises publiques en sociétés et le processus de « commercialisation » offrent l'un et l'autre des voies de réforme du gouvernement d'entreprise.

- *La transformation des entreprises publiques en sociétés* implique la séparation des activités quotidiennes de l'entreprise vis-à-vis de l'administration publique et l'établissement d'un conseil d'administration et de structures de gouvernement d'entreprise transparentes. L'entreprise est alors dotée de sa personnalité morale propre, distincte de l'État qui la possède. Elle peut être constituée sous forme d'entreprise publique soumise au droit des sociétés ou d'autorité légale relevant d'une loi la concernant spécifiquement ou d'une législation cadre. En outre, il peut y avoir des mécanismes spécifiques pour que l'État donne des instructions à cette entité afin qu'elle entreprenne certaines activités selon certaines modalités. À titre d'exemples, on retiendra les

⁴ Voir les *Lignes Directrices de l'OCDE sur le gouvernement d'entreprise des entreprises publiques*, OCDE 2005.

entreprises publiques à caractère commercial en Australie, les entreprises publiques constituées en sociétés en Norvège et les sociétés de la Couronne en Nouvelle-Zélande.

- Avec la « *commercialisation* », les activités commerciales continuent de relever d'un ministère et il n'y a pas création d'une structure sociétaire à part entière. Les réformes visent alors plutôt à définir des objectifs clairs et non conflictuels, à doter la direction des responsabilités, de l'autorité et de l'autonomie qu'il convient en matière de gestion, et à mettre en place un contrôle indépendant et objectif des performances et un système efficace de récompenses et de sanctions. La direction n'est pas directement responsable des résultats de l'activité et la distinction entre les fonctions du gouvernement et l'activité commerciale est moins claire. Toutefois, les coûts sont moindres, puisqu'il n'est pas nécessaire de créer une structure sociétaire à part entière et un conseil d'administration.

La transformation des entreprises publiques en sociétés et la commercialisation peuvent atténuer bien des problèmes de neutralité concurrentielle, avec pour avantage supplémentaire que, s'agissant d'une solution *ex ante*, on évite les distorsions du marché (à la différence de l'application d'une solution *ex post*, fondée sur le droit de la concurrence). Toutefois, le grand inconvénient d'une réforme intégrale du gouvernement d'entreprise réside dans son coût. Même si la réforme intégrale est une solution rentable pour les grandes entreprises publiques, il n'en va pas de même pour les plus petites, qui, malgré leur taille, peuvent avoir un effet significatif sur le développement des entreprises du secteur privé dans une région.

Boîte 5. Questions et problèmes à examiner

Votre pays a-t-il prévu des principes de gouvernement d'entreprise spécifiques aux entreprises publiques pour qu'elles soient gérées efficacement.

Veillez décrire les éventuels mécanismes destinés à éviter toute interférence entre les objectifs commerciaux et non commerciaux. Votre pays a-t-il mis en œuvre des mesures de réforme du gouvernement d'entreprise séparant la réglementation et la prestation de service, et ces mesures sont-elles davantage de type « commercialisation » ou « transformation en société » ?

Un cadre juridique ou réglementaire permet-il à l'État d'agir en qualité de propriétaire avisé et actif ?

Ce cadre permet-il une gouvernance professionnelle et efficace des entreprises publiques ?

Veillez décrire le cadre juridique ou réglementaire qui permettrait aux entreprises publiques de respecter des normes exigeantes de transparence et de responsabilité.

FINLAND

1. The definition and importance of state-owned enterprises (SOEs)

1.1 *Introduction*

Finland has witnessed far-reaching reforms in the public sector since the late 1980s, and major reforms continue to be underway. Marketization of the production organizations and operating environment in the public sector, and opening them up to competition, has constituted the essence of these reforms. In many cases, this has been accompanied by expansion of public sector production into areas ideal for, and already supplied by, private enterprise.

Finland has traditionally belonged to those market economies in which government is involved in productive activities on a broad scale. In order to give a valid overview of governmental involvement in productive activities in Finland, it is necessary to take a broad view as to what constitutes an SOE. In addition to the state, productive entities are owned by municipalities or their associations.¹ The economic importance of both the state-owned productive activities and the municipal activities is very substantial.

Marketization of government-owned production and opening it up to competition began in the late 1980s in the state sector as part of a general trend towards deregulation. In the municipal sector, this trend gained pace only a decade later. As regards municipal production in Finland, reforms in progress are increasingly exploiting markets and competition, and for municipalities markets and competition are means of developing the provision of welfare services and making them more efficient. Tendering for services and increased outsourcing have been features of the municipal sector in recent years, and it is possible that over the next few years vouchers will be instituted on a large scale.

In sections 1.2. – 1.8. below, the various forms of government-owned productive entities will be discussed, starting from state-owned companies, and proceeding to state enterprises, state agencies, municipal enterprises, municipal companies, and municipal agencies.

1.2 *State-owned companies*

There is a long tradition of state-owned companies in Finland. On Finland's independence, it was deemed acutely necessary to establish an industrial infrastructure (i.e. capital-intensive basic industries providing other industrial sectors with inputs) and ensure utilization of Finland's natural resources. Just after a devastating Civil War, it was considered unlikely that private capital would be invested in such activities, at least in a reasonable time. Thereby it was decided that the state shall establish such companies and hold them in its exclusive ownership. The intellectual foundation of the public policy to establish state-owned companies was economic nationalism, not an attempt to build a socialist-model command economy. To emphasize the latter point, the governance model of these companies allowed wide discretionary power to the company management, the state assuming a relatively retrenched ownership position. This governance principle still largely carries, although there have been more recent revisions.

¹ There are also some governmentally-owned actors that in a formal sense belong neither to the state nor to the municipal sector.

Since the late 1980s, most businesses of the state have been converted into state enterprises and then incorporated limited companies. During the past twenty years, most state-owned companies have been partly, and some fully privatized, and the stocks of state-owned companies are currently usually listed. There are now several companies in which the state currently only has a minority share holding. It is typical of state-owned companies that they operate in a regular market environment. Overall, state ownership has arguably affected the nature of these companies' business policies and the FCA has investigated into their alleged restrictive practices.²

1.3 State enterprises

In Finland, as in many other nations, the state has traditionally run natural monopoly-type activities such as railroads. In contrast to state-owned companies, these activities were, at first, organized as government agencies responsible for providing the service. A major change starting in 1989 created state enterprises out of many former government agencies. The state enterprise is a kind of hybrid model between state agency and a regular market-oriented company. It is considered that being a state enterprise is the best option for state operations that should be steered for socio-political or other reasons. The model was designed to make it simultaneously possible to give public interest-based guidelines to these actors, while also enabling them to operate in a commercial manner.

State enterprises are created by government statute and are strategically steered by the government (Parliament, Council of State, ministries). A new State Enterprise Act (1185/2002) came into force in 2003. In addition to the overall Act governing the model in general, there are specific Acts on each state enterprise. The enterprises are, however, independently and commercially managed, and usually also operate in a competitive market. The basic aim is to produce products and services on market terms, adopting business principles.

The strong public interest and/or outspoken natural monopoly feature have distinguished the state enterprise model from the state-owned company model. The former model has also been widely used as a transitional model as a government agency is transformed into a regular state-owned (or even more or less privatized) company. That is why there are currently only five state enterprises left³. In the foreseeable

² For example Rautaruukki, Outokumpu, Neste and Kemira.

³ *Finavia* offers airport and air navigation services. There are 25 airports in the network maintained by *Finavia*. In the administration of Finnish aviation, commercial activities were de-coupled from the official functions at the beginning of 2006. The Civil Aviation Administration continued to work as a commercial enterprise under the operating name of *Finavia*, and the official air transport functions are handled by the Civil Aviation Authority, a body under the Ministry of Transport and Communications.

Since the beginning of 2004, the pilotage unit of the Finnish Maritime Administration has operated independently under the name of *State Pilotage Enterprise*. The State Pilotage Enterprise provides national pilotage services and other related services that support maritime safety and operational requirements, and it is responsible for the development of these services.

Metsähallitus administers more than 12 million hectares of state-owned land and water areas. *Metsähallitus* is a state-owned enterprise that runs business activities while also fulfilling many public administration duties.

Senate Properties under the aegis of the Finnish Ministry of Finance is responsible for managing the Finnish state's property assets and for letting premises. *Senate Properties* provides services related to premises, primarily to customers which form part of the state administration. The services include leasing premises, investments, and the administration and development of the property portfolio. As a business enterprise, *Senate Properties* finances its own operations and is not dependent on the state budget. The building stock comprises university, office, research, cultural and other buildings.

future, these five state enterprises will be reorganized so as to make it possible to abandon the state enterprise model altogether.⁴

1.4 *State agencies*

The importance of the business operations of state agencies has significantly decreased as most of the state's business operations have been transferred to state enterprises or incorporated since the late 1980s. Most of the business operations on market terms have been transferred outside the scope of the state agencies. State agencies share all the shortcomings in view of competitive neutrality that state enterprises suffer from. It is, thus, obvious that government agencies can no longer be relied on to provide marketized goods and services, and that the remaining cases have to be reconsidered. Examples of major state agencies providing marketized goods and services include Statistics, Finland, and the Finnish Meteorological Institute.

1.5 *Municipal productive entities: introduction*

The building up of the Finnish welfare state has made the Finnish municipalities large producers of welfare services (health care, social services, education, infrastructure-related technical services, and cultural services). The statutory services of the municipalities can in principle be provided in four ways: the municipality takes care of its duties within its own organization; the services are provided in cooperation with other municipalities; the municipality purchases the services from an outside provider, in other words a company or a third-sector service provider; or the municipality can issue vouchers⁵ for citizens' choices. The traditional model relied on municipal agencies that provided the service in a non-marketized environment at no fee or at low administrative fees to residents without having to compete.

Since the late 1990s, there has clearly been increasing marketization of municipal services. There are two essential trends: from monopoly-type provision to competitive provision and from non-market provision to market provision. Municipalities can establish quasi markets, for example, by instituting a procurer and provider system. They can also establish municipal enterprises which provide the goods or service to the municipalities concerned while also possibly selling these goods or services to the residents or on the outside markets. It is also possible to incorporate the productive activity as a municipal limited company which leads into more transparent mode of operation vis-à-vis other economic operators.

Thus, the productive entities within the municipality can be arranged according to the degree of autonomy of their activities into the following progression: agency -> net budgeted cost or profit unit -> enterprise -> company.

Finstaship is a specialized shipowner, concentrating on assisting water transport. It provides private customers and the public sector with icebreaking services, offshore services by multipurpose icebreakers, buoy tender and maritime construction services, oil dispersal services, ferry services for archipelago traffic, and vessel maintenance and charterage services. Finstaship will be incorporated in early 2010. The new company will begin its work on 1 January 2010. The business structure of Finstaship will be rearranged in the incorporation process.

⁴ This is, in practice, dictated by the Commission's decision on Destia. See section 2.2.

⁵ Recently, national legislation has been amended to enable municipalities to issue vouchers for services on a far larger scale in social services and health care. According to the new legislation, citizens can use the voucher only to buy services from those private providers the municipality has found eligible for the purchase. Thus there cannot arise competition between municipally-owned and private providers, as far as the voucher regime is concerned.

1.6 *Municipal enterprise*

A municipal enterprise is a municipality's means of organizing its own operations according to commercial principles. The starting point for establishing a municipal enterprise is that it aims to be profitable in its operations through financing from sources external to the budget, mainly charges for customers. Investments should be covered from net cash flow at least over the long term. An enterprise is more flexible, faster in decision making and more independent in accounting than a municipal agency. However, an enterprise is not an independent legal entity and not independent in keeping accounts; it is a public sector unit within a municipality's organization. An enterprise is often considered a transition vehicle because, commercially, an enterprise resembles a private sector company more than a profit centre of a municipality that covers its costs.

The same restrictions on operations apply to an enterprise as to other activities of a municipality: the primary aim of an enterprise must be the statutory service and other functions within the autonomy of a municipality, not making a profit. In fact, many municipal enterprises, in energy business, in particular, are highly profitable and their profits are an important source of revenue to the respective municipalities. An enterprise could be organized to include cooperation with other municipalities. In some operations, such as water and electricity utility services, legislation requires separation of commercial activities.⁶

1.7 *Municipal limited companies*

The number of municipal limited companies is steadily increasing. A municipal limited company is a company under the authority of the municipality that does not differ as regards legislation from a private sector limited company. However, the Articles of Association of such a company often state that it is a non-profit company, so its conduct might differ from that of a private sector limited company.

Under civil law, a limited company is a legal entity separate from a municipality. The business operations of a municipal limited company are more separate and independent of the municipal organization than those of municipal enterprises. In addition, the financial connections between the company and the municipality are much more transparent. Incorporation can also be used to form a joint venture between municipalities.

Most of municipal limited companies are municipal housing corporations. Municipalities are also involved in companies promoting tourism and regional development companies. Several energy and water agencies of municipalities have also been incorporated.

Operations by limited companies are considered the more suitable, the more they are subject to competition. The competitive position of municipal companies relative to private sector companies then becomes more transparent. In spite of advances in competitive neutrality thereby gained, as with state-owned companies, a municipal limited company's strategic position relative to private sector companies is strengthened by the municipality's shareholding in the company.

1.8 *Municipal agencies*

The traditional way of providing municipal welfare services to citizens – a municipal agency – still accounts for the bulk of municipal productive activities, although the reforms outlined above (section 1.5.) have made this model constantly recede as an organizing model.

⁶ Consonantly with the state enterprise model, the municipal enterprise model will have to be reassessed. See chapter 5.

1.9 *Statistical data*

There are several ways of illustrating the importance of SOEs in the Finnish economy. In 2008, the net sales of state majority-owned companies amounted to EUR 39 billion, and that of state-associated companies amounted to EUR 137 billion. In 2007, the total turnover of the currently existing 5 state enterprises was EUR 1.4 billion. In 2007, the revenue collected by state agencies from the sales of marketized goods and services amounted to EUR 0.7 billion.

According to Statistics, Finland, the total turnover of municipal enterprises amounted to EUR 2.9 billion in 2007, but information recently published by the Federation of Finnish Enterprises suggests that the real figure may be much higher, maybe up to 4 EUR billion. The number of municipally-owned limited companies is steadily increasing, and it is difficult to give up-to date figures. But according to recent assessments, there are approximately 1500 municipal limited companies, which operate primarily in the following sectors: electricity, water maintenance, waste management and development. Because of the very nature of the productive activities of municipal agencies, which in most cases do not have any turnover in the regular sense as they do not sell goods or services on a market, only indirect ways of illustrating the extent of their operations are feasible. A rough illustration of the extent of their productive operations is gained by subtracting purchases from outside suppliers (EUR 1.64 billion) from the total municipal operating outlays on services (EUR 31.25 billion) which is approximately EUR 30 billion.

2. **Corporate governance for SOEs**

Questions of corporate governance are important, not only in defining the role of state ownership in the market, but also in relation to those antitrust and competitive neutrality concerns which may arise in markets where state owned companies are actively present.

This line of reasoning is crystallized by Buccirosi and Spagnolo (2007): “Corporate governance factors directly shape firms’ objectives and choices and therefore play a crucial role in determining a firm’s attitudes towards competition and anticompetitive behavior. Corporate governance factors also determine who are the “key players” in a firm’s decision to behave anticompetitively. Corporate governance therefore must be a consideration in fashioning an effective competition policy.”⁷

For Finnish SOEs some general principles of corporate governance are outlined in the Government resolution on state ownership policy (GRSOP). This resolution also contains guidelines for governance of firms with special state assignments as for state owned firms operating on market terms.

2.1 *General principles of corporate governance in SOEs*

According to the GRSOP, state ownership steering shall be arranged so that the state owner does not participate in business decision-making other than in shareholders’ meetings. Thus, a company’s result remains the responsibility of the company’s executive management and governing organs. Their decisions concerning operations should be made in compliance with the framework of the Companies Act and the Articles of Association.

2.2 *Companies with special state assignments*

In companies entrusted with special state assignments the state as an owner has, according to the GRSOP, primarily social goals. It is, however, also a general goal that operations are profitable. The

⁷

P. Buccirosi and G. Spagnolo (2007) Corporate Governance and Collusive Behaviour, CEPR Discussion Paper No. DP6349.

earnings target and other goals are decided by the responsible Ministry, following the recommendations of the Cabinet Committee on Economic Policy. Certain companies are regulated by separate statutes, which on their part prescribe standards for the state's ownership policy and ownership steering.

Due to the social goals of the companies entrusted with special assignments, they must remain under the sole ownership of the state or at least under the state's control. If the state is the sole owner of such a company, the company's social service duty can be taken into consideration when setting its profitability goals. But if such a company has other owners, departing from normal profitability goals is possible only if this is based on jointly agreed conditions.

2.3 *Ownership goals in companies operating on market terms*

A majority of the state-owned companies and associated companies operate on market terms. Operating on market terms is defined as that the companies' operating principles, financial structure and earning targets must be comparable with those of other companies operating in the same field, which supports the idea of competitive neutrality.

The state owner's strategic interests, relating for example to maintaining and securing infrastructure or obligations to provide basic services, may also apply to companies operating on market terms, but they are still expected to operate according to clear business principles.

SOEs operating on market terms always have normal goals for profitability and competitiveness. Additional goals relating to industrial, regional and employment policy, or environmental protection, can be set for a market-based state-owned company, provided that all owners agree on them. However, any additional expenses caused to the company must be compensated based on decisions made beforehand.⁸

2.4 *State ownership and management reward programs*

On 8 September 2009, the Cabinet Committee on Economic Policy issued a statement providing guidelines on executive management remuneration and pension benefits.

The guidelines are to be followed when the state as an owner determines its view on arrangements to be implemented in the state-owned companies operating on market terms. Regarding the responsibility of the management, the guidelines state that, "The boards of directors of these companies are responsible for the application of and compliance with the guidelines before the state as an owner".

According to the guidelines, executive management and key staff's remuneration is treated as a larger whole comprising both the salary itself and the terms concerning pension and fringe benefits included in the executive or employment contract. Remuneration of executive management has to meet the requirements of being both reasonable, and importantly, of enabling the companies' to compete for the highest-skilled executives.⁹

The goal of reasonable remuneration is served by that a "profit-based bonus may not account for more than 40 per cent of the basic salary on an annual level, unless there are special grounds for deviation".

⁸ These should not be in conflict with obligations arising from an EU membership. Government resolution states that "Ownership is evaluated on the basis of the State's strategic interests and on the maintenance of the authority needed to safeguard these interests."

⁹ Basic salaries must be competitive and additional benefits should be based on measurable profitability and the executives' good performance on a long-term perspective.

Moreover, the minimum duration of long-term incentives is set to three years and the maximum remuneration to 100% of the basic salary paid during such a scheme.

The state does not approve remuneration in the form of share options, and ownership commitment has to be an element in share-based remuneration. Remuneration schemes must include a possibility for adjustment and recovery.

The guidelines also encompass the staff of SOEs in that the entire staff of a state-owned company must be given an opportunity to benefit from the company's good performance. Thus, "a fair share of the company's good results must be guaranteed to its personnel by performance-based remuneration and bonus schemes".¹⁰

2.5 *Management of state holdings–Solidium Oy*

On 21 October 2008, the Government decided to propose to Parliament that state-owned equities in eight non-strategic listed companies¹¹ be transferred to the entirely state-owned Solidium Oy.¹² In this context, guidelines were provided for the management of the entrusted holdings. Solidium is to manage the holdings in a way that ensures the highest possible yield for the state. It can increase or decrease the state's equity investments and, and acquire holdings in other companies as well. Solidium is to cover its expenses with its income and the acquisition of new holdings in companies operating on market terms are financed through cash-flow and/or debt. The investment decisions of Solidium should reflect long-term and economically important national criteria. In mid-September 2009, Solidium controlled roughly 42 per cent of state's total 17,606 million euro direct and indirect share holdings in listed companies. Table 1 below lists the value of holdings of Solidium in mid-September 2009, together with the total values of state ownership.

¹⁰ In the remuneration of the staff, the main rewarding tools are result-based bonuses and staff funds.

¹¹ I.e. Kemira, Metso, Outokumpu, Rautaruukki, Sampo, Sponda, Stora Enso and TeliaSonera.

¹² Initially Solidium was founded by the Bank of Finland in 1991 during the banking crisis, to manage the portfolio it received from the SKOP. The Finnish Parliament approved the proposal in the third supplementary budget proposal (HE 184/2008 vp) on 28 November 2008 (Statute 745/2008).

Table 1: the value of holdings of Solidium in September 2009, and the total values of state ownership.

Value of Solidium shareholdings in listed companies as of 9/17/2009 6:27 PM					
	Price/Share (€)	Number of shares in portfolio	Of total amount of shares in %	Weight in portfolio in %	Value of holdings in million €
Elisa Oyj	14.08	16,631,000	10.00	3.12	234.16
Kemira Oyj	11.23	20,656,500	16.52	3.09	231.97
Metso Corp.	19.64	15,695,287	11.07	4.11	308.26
Outokumpu Oyj	14.23	56,440,597	31.01	10.70	803.15
Rautaruukki Corp.	17.44	55,656,699	39.68	12.93	970.65
Sampo Plc	17.17	79,280,080	14.15	18.13	1,361.24
Sponda Plc	2.69	95,163,745	34.28	3.41	255.99
Stora Enso Oyj total	0.00	97,079,438	12.30	7.50	562.80
A-Share	6.34	55,595,937	31.38	4.70	352.48
R-Share	5.07	41,483,501	6.77	2.80	210.32
TeliaSonera AB	4.51	616,128,221	13.72	37.02	2,778.74
Total				100.00	7,506.96
<i>Value of State direct shareholdings</i>					<i>10,261.62</i>
<i>Total value of State direct shareholdings and indirect holdings via Solidium in listed companies</i>					<i>17,606.18</i>

2.6 Governance of municipal enterprises

Properly formulated principles of corporate governance of municipal enterprises are also essential in addressing the shortcomings in competitive neutrality.¹ Finnish municipalities have taken important steps in order to level the playing field in which their productive entities operate.

On 3 June 2008, the Board of Association of Finnish Local and Regional Authorities accepted a memorandum (henceforth "the memorandum") concerning the role of municipal enterprises in the market.² This memorandum provides the municipalities with criteria for evaluation of the effects of municipal enterprises on competitive neutrality. Moreover, the memorandum provides recommendations for directioning the activities of the enterprises. It is also underlined that a municipal enterprise can be founded

¹ On the antitrust issues regarding municipal enterprises cf. Finland's contribution on Antitrust and SOEs.

² Association of Finnish Local and Regional Authorities 3.6.2008: Kunnallisten liikelaitosten asema markkinoilla – kriteereitä kuntien oman arvioinnin tueksi ("The position of municipal enterprises in the market—criteria to support evaluation by municipalities"). [http://www.kunnat.net/k_perussivu.asp?path=1;29;63;375;132839;139364;139506].

to operate for a commercial purpose, where the activity is financed through its revenue. As a mirror image, an activity is considered to be based on commercial principles if costs are supposed to be covered by the revenue, although if the activity is not of commercial nature. In the latter case the municipality is, for example, responsible for statutory public functions or services. Where these functions include responsibilities of authorities, the enterprise may receive compensations in a transparent and reasonable manner.

As municipal enterprises may also be formed by one or several municipalities to provide internal services, it is important to distinguish in which cases the enterprise competes with firms that operate on market terms. This is important not least from the neutrality point of view, as municipal enterprises enjoy a tax privilege and are protected from being adjudicated in bankruptcy.

The memorandum also lists the basic criteria for when a municipal enterprise can be considered to operate in the market³ ⁴and on the other hand when this is not the case. It also lists a number of recommendations on how to direct the activities of the enterprises. From a competitive neutrality perspective, the most important recommendations may be those stressing that municipal enterprises should be founded specifically for municipal purposes, and should neither initially nor by expansion compete with private industrial or commercial activity.

Municipal companies may, however, as a result of overcapacity temporarily sell their products or services in the market if this supports a sensible use of resources. This should not, however, result in distorting the price mechanism by cross subsidies or predatory pricing.

The accepted memorandum also provides recommendations for cases where the strategy is to corporatize municipal enterprises. These recommendations stress that a corporatization should be made according to an open and documented plan, in order to avoid competition problems and/or to enable a gradual adaptation of the activity to a competitive environment.

2.7 *Governance – concluding remarks*

The recent government guidelines together with the activity within state ownership entities and that of the municipal sector all imply that the public sector is committed to the broad requirement competitive neutrality in a manner which is in keeping with the goals of Finnish competition policy. Although thorough reforms are time consuming, progress is now made on a relatively broad front, reaching from municipal agencies to state majority owned enterprises. Factors such as new precedents and the consequences of the economic downturn in the aftermath of the financial crisis may prove to speed up this development, leading to further advances in competitive neutrality.

³ These are for example, but not exhaustively: *i*) the enterprise is an undertaking, i.e. it finances its operation with sales revenues or sells a substantial part of its products or services outside the municipal sphere. *ii*) If pricing is market based, including that a customer relationship is contractual or is based on the customers' discretionary power. *iii*) The branch of activity of the enterprise is such that it is not motivated by statutory obligations or that private sector enterprises are or could as well be responsible for the activity in the industry or line of business.

⁴ It might be questioned whether it is appropriate to make a distinction between municipal enterprises that operate on the markets and those that do not. Arguably, all municipal enterprises operate on a quasi market –type environment in their dealings with the municipalities. The point is, actually whether the municipal enterprises compete – actually or potentially – with private operators (“they are on the market”) or not (they are not on the market). This conceptual issue does not undermine the basic rationale for the recommendation.

3. The scope of competitive neutrality policies

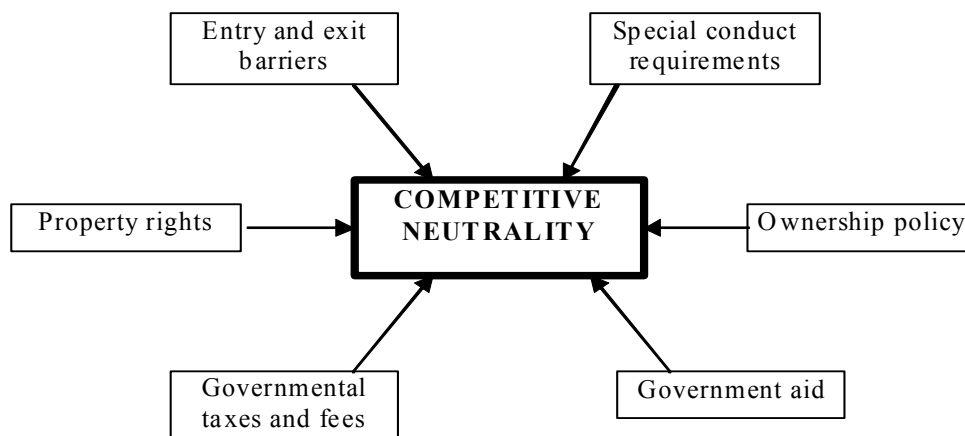
3.1 Outline

Currently, in Finland, there is not any one framework for competitive neutrality related policies. Competitive neutrality, however, is a frequently occurring issue in the daily activities of the FCA, and it has gained increasing attention by the various stakeholders and media. Over the last few years, the FCA has emphasized the importance of properly tackling the issue, particularly in view of its importance to the very important reform of government-owned productive activities and the related overhaul of the service provision system on which the Finnish welfare state relies on.

Within the FCA, competitive neutrality is approached through its logical opposite, distortion of competition. Tentatively, competitive neutrality can be defined as completely undistorted competition between rival companies. If competition is undistorted, a trading partner whose purchase of a certain product the rival companies compete for will make his choice among the alternatives offered by the rival firms solely on the basis of his preferences, i.e. the ranking he makes of the rivals' products is not affected by any outside factor. Conversely, competition is distorted if such an outside factor affects the trading partner's product choice. The term "outside factor" refers to elements of the institutional environment that have a bearing on the choice made by the trading partner and that have a differential effect on the alternative products to be ranked, e.g. taxes differentially imposed on the rivals' products. If competition is distorted, competition neutrality is correspondingly more or less wanting.⁵

The institutional factors that may intervene in the ranking made by a trading partner may emanate from a wide array of sources. The institutional factors which underlie neutrality problems may originate from legislation or from established procedures which do not necessarily have a legal basis. The factors may be further classified according to the figure below.

Figure 1. Sources of competitive neutrality problems⁶



The neutrality problems examined in more detail below and having at least a partial legal basis are primarily related to state aid in its various forms (taxation, bankruptcy protection), the in-house procedure

⁵ Virtanen, M. and Valkama, P., Competitive Neutrality and Distortion of Competition: A Conceptual View. *World Competition*, Vol. 32 (2009), Issue 3, pp. 397-399.

⁶ The sources of competitive neutrality problems are not mutually exclusive; rather, they may be connected. According to the EU state aid provisions, for example non-neutral taxation may be considered state aid.

in public procurements and the pricing of public utilities. Additionally, an example is given on regulation which impedes private sector entry. Ownership policy was examined in more detail above.

It is important to bear in mind that not all rules relevant to the competitive neutrality problems work in favor of the government-owned productive entity.⁷ However, in the following we discuss rules that do work in their favor.

3.2 *Taxation and bankruptcy protection*

The neutrality problems related to taxation and bankruptcy protection involve such situations in particular where the state or municipality conducts business in a state enterprise form.

The income tax of state-owned enterprises (6.1828% in 2007) is roughly 19% lower than the income tax of private firms engaging in similar operations (26%). If a state-owned enterprise produces services primarily for state administration, it is exempt from income tax.

The activities of municipal enterprises are taxed even more leniently than the activities of state-owned enterprises. The municipality is liable to tax as regards its business activities only and the income fetched by a property or part of a property used for a general purpose or for public good. The municipality is not liable to tax as regards the profits of its business activities or the income fetched by a property located in its own territory.

Under the Bankruptcy Act (120/2004), a debtor who is unable to pay his debts may be declared bankrupt. An enterprise owned by the state or a municipality cannot be declared bankrupt, however. State or municipal enterprises are not separate legal persons but a part of a state / municipality, so the state / municipality is responsible for their debts.

The EU Commission judged in its Finnish Road Enterprise (now Destia) decision that the benefits pertaining to taxation and bankruptcy protection described above could be considered prohibited state aid.⁸ As a result of the decision, a re-examination of the state enterprise model began in Finland.

⁷ For example, state enterprises have obligations that private sector companies do not have. State enterprises have generally been defined as public procurement entities under the Public Procurement Act (1505/92), which imposes on them an obligation to put their own procurements out to tender as specified in this Act.

⁸ Commission decision C 7/2007, 11.12.2007, so-called Destia decision.

The Finnish associations Rakennusteollisuus ry and Suomen Maanrakentajien Keskusliitto ry made a complaint to the European Commission concerning the potential illegal state aid obtained by the Finnish Road Enterprise.

Until the end of 2000, the primary maintenance of the Finnish road infrastructure was done by the Finnish Road Administration which was a state-owned entity. It also managed the planning and building of new common roads. Prior to opening up the market, private consulting, planning and maintenance firms were only used when the Road Administration's own production unit could not produce the service.

The Finnish Road Administration was split into two following the buyer-producer model. The purpose of the reform was to split the activities of the customer purchasing building and maintenance services (Road Administration) and the provider of these services (a state-enterprise called Finnish Road Enterprise). The road maintenance market was gradually opened up to competition so that, after the transition period of 2001-04, the planning, building and maintenance of common roads was wholly opened up to competition by 2004.

The Commission held the bankruptcy protection and exceptional tax treatment of the state enterprise as prohibited state aid (inapplicability of bankruptcy legislation and common Community taxation). However,

All these competitive neutrality problems also concern both state and municipal agencies. Therefore, the future reforms must also tackle the marketized output of the agencies as well.

3.3 *In-house procurements*

Particularly important for competitive neutrality is the issue concerning the terms and conditions on which the state or a municipality may purchase products or services directly from the organization it owns (in-house procurements).

The Act on Public Procurements allows the state or a municipality to make purchases without putting them out to tender (so-called direct purchase) even from agencies and enterprises which also have marketized production. If the state or a municipality buys the services from its own separate enterprise, it cannot purchase without a tender if the company simultaneously sells over 10% of its turnover out to the market. So the 10% limit does not tie e.g. state or municipal enterprises who may freely sell their services to outsiders without the threat of losing their interest unit position.

3.4 *Pricing*

It is problematic for competitive neutrality if the public actors do not consider all production costs in the pricing of their products and services. Since public production has operated in a protected environment, there has not necessarily been any need to set profitability goals or to itemize the costs of individual inputs. The cost accounting of public production units has typically been inadequate. The lack of cost awareness may have led to competitive neutrality issues, particularly as the public productive entities have begun to exploit their underused production capacity in the competitive markets in the prevailing tightened budget situation. This underpricing type of situation may hence have resulted from the strongly sheltered position of a public producer or an inadequate consideration of the relevant costs.

The Act on Criteria for Charges Payable to the State aims to prevent the potentially distorting market pricing of state agencies or enterprises, but in practice the steering impact of the Act has remained insufficient. The municipalities have no similar Act pertaining to criteria for charges.

3.5 *On entry barriers – with pilotage activities as an example*

Entry or exit barriers may be regarded as an extreme form of a competitive neutrality shortcoming as institutional barriers to entry or exit may block the supply of alternative goods or services altogether.

the Commission approved the arrangements relating to the setting up of the Road Enterprise. The Commission estimated that the de facto opening up to competition of the Finnish road service market was in the common interest. Neither did the Commission approve the allegation put by the complainants according to which the Finnish Road Enterprise had exploited predatory pricing during the transition period.

The aid measures which were estimated to be prohibited were overturned regarding the Finnish Road Enterprise from 1 January 2008 when it was made an incorporated limited company (Destia). This was in accordance with a previously determined line of action.

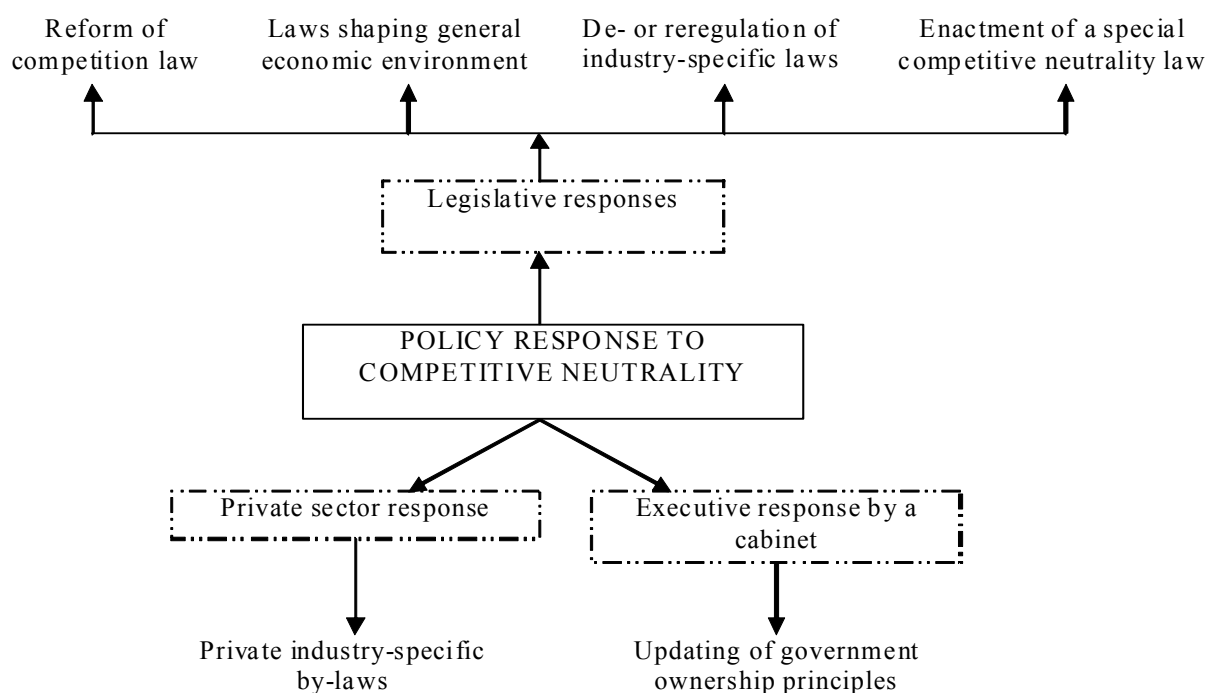
Attempts have been made to eliminate the tax rate which is lower than that of the competitors by deciding that the public enterprises enter as income a minimum of the margin between the income tax of limited companies and the income tax paid by them. In recent years, the Ministry of Finance has set the target that the public enterprises would enter a minimum of 50% of their profit as income; in practice, this has alternated between 50 – 95%. The Commission did not approve the practice concerning the elimination of an exceptional tax treatment.

The pilotage service is a recent case in point. The service had traditionally been provided by the state, and since 2004, the service has been provided by the State Pilotage Enterprise, a state enterprise. The first private company started pilotage activities in 2007. It met with difficulties, however, when the supervising authorities interpreted the relevant legislation to mean that pilotage was a government monopoly. The Chancellor of Justice confirmed this view, although he held that the legislation was vague. The private enterprise ceased its activities as a result of these reviews. In the midst of this process, on the FCA's initiative, the Ministry of Transport and Communications set up a working group to consider opening up pilotage activities to competition. The group proposed three different regimes: extension of the state monopoly, a model based on regional tendering and a model based on open competition. In June 2009, the Ministry of Transport and Communications decided to extend the present model based on a state monopoly, but a government proposal to this effect has not yet been issued.

3.6 *On policy responses*

The most effective policy response to competitive neutrality problems tackles the very institutional sources of the problem. Thus, a number of policy spheres relevant to the issue may be pinpointed. (See Figure 2 below). At least optimally, public policy responses would be based on a calculated and coordinated policy mix.

Figure 2. Main types of policy responses to competitive neutrality problems.



In the figure above, competition law is envisioned in a broad sense, encompassing government aid and public procurement laws. Government ownership principles are related to the key issue of this contribution, i.e. corporate governance of SOEs. Special competitive neutrality laws govern the conduct of economic operators so as to eliminate competitive neutrality problems.⁹ Industry-specific rules can be

⁹ What is implied here are special legal provisions on competitive neutrality. Such provisions could embody an independent act by themselves but they might also be included in other legislative acts, for example, competition law or a law on municipalities. In Finland, the working group investigating into competitive neutrality between government-owned productive entities and private operators (to be discussed in the next

created in two ways, by government (de- or reregulation) or by private agreement between economic actors.¹⁰ Laws shaping the general economic environment refer to such issues as taxation or environmental rules.

In order to devise proper policy responses to competitive neutrality problems, policy-makers must bear in mind the original goals of the structural reforms assisting market creation, and thereby leading to new competitive neutrality problems. To solve competitive neutrality problems in such a way as to block further progress towards attaining the goals of these structural reforms would imply solving a problem at the cost of even more serious problems which would not be in the public interest. Reasonable policy responses must be devised in a way that that avoids this pitfall, and far-reaching attempts, discussed next, to identify them have been made in Finland.

4. Coping with the challenges – recent measures in Finland

In view of the myriad of institutional sources of competitive neutrality problems between SOEs and private operators, it would be highly ambitious to attempt to reform all the various institutional sources of these problems so as to stamp out competitive neutrality problems altogether. In addition, that might not be advisable policy as some institutional factors may be, after all, necessary to safeguard other important social interests or to make complicated transition processes possible. Preventing competitive neutrality problems in all legislative or regulative acts certainly is an important viewpoint. What is called for most acutely, however, consists of legislation that makes it possible to control the market operations by SOEs so as to prevent at least the socially most harmful competitive neutrality effects by conduct or structural remedies. It is also clear from what has been stated above that government can itself put competitive neutrality problems to an end simply by using its ownership and governance rights so as to make SOEs abide by the requirements of competitive neutrality. This is what is now being envisioned for future implementation.

Improving the competitive neutrality between the public and private business has been fairly high on the political agenda in the past couple of years. The present government began its activities in the spring of 2007. The government program included the definition: “the government will ensure, by means of competition policy, the equal preconditions of private and public service production”. The Ministry of Trade and Industry (from 1 January 2008 the Ministry of Employment and the Economy) set up a working group to investigate the competitive neutrality of public business in the autumn of 2007 to implement this section of the program. The FCA has two representatives in the group.

The Ministry stated in its appointment letter that when the public and private business increasingly meet in the same market, there are bound to be problems for competitive neutrality and for market operations caused by the different preconditions and starting points for conducting the business.

The tasks of the working group were the following:

- to investigate the nature of the potential distortions of competition related to public business;
- to estimate the extent and practical meaning of the phenomenon;
- to map ways by which the implementation of competitive neutrality may be ensured; and

chapter) outlined special provisions on competitive neutrality but left it open in which kind of legislative acts these provisions should be incorporated.

¹⁰

In this context, we leave aside the lawfulness of such by-laws under competition law.

- to make recommendations for policy definitions or legislative reforms.

In December 2007, the EU Commission issued the decision on the Finnish Road Administration which has been described above. This had a major impact on the work of the working group and other ways of promoting competitive neutrality.

In its final report¹¹, the working group estimated that competitive neutrality problems are primarily related to the use of the present public enterprise form while conducting business. The working group proposed a review of the Municipalities Act in that the agency or enterprise form and the corresponding cooperation forms of the municipalities could no longer be extensively used for conducting business competing with private business, notwithstanding a reasonable transition period caused by incorporation or a possible exceptional situation pertaining to a SGEI position. A public or municipal enterprise would still remain an option as an internal organization form of a municipality or association of municipalities and it could retain the present tax benefits, bankruptcy protection and special position in *in house* procurements. Marketized activities should be conducted in the common private law company forms (incorporated company, trust etc.) which would eliminate the distorting factors related to the public enterprise form.

In the autumn of 2009, the Ministry of Finance has announced that it will commence a project to reform the Municipalities Act, in which the municipal enterprise model and the marketized activities of the agencies and associations of municipalities will be examined from the point of view of competitive neutrality.

The working group also issued a series of recommendations to increase transparency and to develop municipal ownership steering and good administrative procedure. In addition, the working group assessed the need to develop the monitoring of competitive neutrality. It held that the present means provided by the Municipalities Act are not valid when issues pertaining to competitive neutrality are examined. When the legislation is reassessed, monitoring measures that befit the chosen models and are in the right proportion to them should also be considered. The working group held that in the competition law assessment the FCA is best placed.

In March 2008, the Ministry of Finance set up a project with the task of assessing the applicability of the state-owned enterprise to the common market. It was estimated in state administration that even though the Commission's decision on Finland only concerned the Finnish Road Enterprise, it has an indirect impact on the entire public enterprise system and the present state-owned companies (Finavia, Finnpiilot, Metsähallitus, Senate Properties and Finstaship).

By the end of 2009, the project will have

- charted the applicability of the state-enterprise model to the common market,
- made state-enterprise specific proposals for further measures together with the steering ministries, competition authorities and ownership steering department of the State Council and
- made proposals for potential new organization and steering models.

The Cabinet Committee on Economic Policy discussed an interim report of the project in March 2009 and held that state-enterprise model cannot be considered compatible with the common market and decided that the state business is hereinafter conducted primarily in an incorporated company form. State-enterprise

¹¹ Competitive neutrality of public business, Publications of the Ministry of Employment and the Economy 23/2009.

type of business which takes place in a workable market in open competition will be incorporated. It was also found that, in the state's marketized paid service production, there are similar obstacles to activities in the common market as there are in the state enterprise model.

It has been decided that the State Enterprise Act will be amended to the effect that a state enterprise could only operate in an *in house* capacity in the future and hence produce services specifically for state agencies and enterprises. A decision was also made to prepare government proposals on the incorporation of Finavia, Finnpiilot and Finstaship. It was also decided that the examination of the different forms of organizing Metsähallitus and the Senate Properties and the development of these organizations would be continued. The first incorporations can be implemented from the beginning of 2010. Attention shall be paid to the preconditions for operating in the common market when the paid service production of the government agencies is arranged.

5. Discussion

The extensive role played by government-owned production has characterized the 20th century industrial development in most OECD nations, and Finland makes no exception on this point. As this development was by large seen as an engine of growing prosperity, especially in the post-World War II era during which also private operators had ample room for expansion, conflicts with private sector production were not that frequent. In Finland, government-owned production and private operators used to have only limited competitive interface. Accordingly, neither competitive neutrality nor corporate governance issues in relation to this gained much attention.

This has all changed as a result of several factors such as deregulatory reforms, unfavorable macroeconomic development, reform of the welfare services, and the increasing propensity of SOEs to expand their operations to markets primarily inhabited by private operators, often accompanied by relatively aggressive rivalry. Under these circumstances, competitive neutrality problems could not fail to come to the foreground.

Indeed, chiefly since the late 1980s, competitive neutrality has become topical as the public policymakers have chosen to adapt the government-owned productive activities so that they market-conform rather than to privatize these activities and eliminate government-owned productive activities from the market altogether. This continuing adaptation and strive to contribute to competitive neutrality is embodied for example in the recently updated guidelines for state ownership policy. It is also evident that policy makers display increasing propensity to discuss competitive neutrality issues related to the governance of SOEs with the FCA in an *ex ante* manner, i.e. before major reorganizations are implemented.

Competitive neutrality is a multidimensional issue and its precise features can vary both in time and with the context, as distortions of competition can stem from laws, public budget decisions and governance practices. Institutional circumstances of markets are materialized and regulated by a multi-level regime applied by administrative bodies working on international, national, regional and local levels.

The FCA has from its establishment dealt with the enlargement of SOEs to industries previously primarily inhabited by private operators. While the FCA believes it has managed to influence the expansion process and its competitive ramifications, it has been obvious for a long time that the legislative set-up is insufficiently suited to removing competitive neutrality shortfalls.

In order to safeguard the steady development of the Finnish economy, it is absolutely essential to remove at least the most serious shortcomings of competitive neutrality between SOE's and private enterprise. The attempts to develop a new legislative set-up designed to tackle the most serious problems

are very important, and they could, to a very large degree, complement the efforts to enhance corporate governance of SOEs.

Consequently, what is in horizon is a modern competitive welfare state in which private and government-owned producers, and charities all have a chance to compete on an equal footing for publicly and privately financed transactions throughout the economy. In such an economy, the rationale for governmentally-owned productive activities is considered in the same vein as other owners consider their activities.

Finally, such a vision is well in line with the FCA's long-standing neutral policy position to the ownership of productive activities. It has been and continues to be the role of the FCA to act to safeguard workable and undistorted competition between market participants whatever their ownership pattern.

NORWAY

1. Corporate governance for SOEs¹

The established interpretation of Article 19 of the Norwegian Constitution is that, the King (the Government) is responsible for administering the State's shareholdings in limited liability companies and its ownership of State-owned enterprises and "special law companies" (State-owned enterprises with special authority, e.g. public service obligations). The administrative responsibility is in practice delegated to a minister who, under Article 12 of the Constitution, presides over the ministry under which the company is placed.

Because the Government is responsible for administering the state-owned companies, the Storting (Parliament) does not have a direct relationship with the companies nor does it exercise any direct ownership control. This implies that ownership issues arising within the companies are handled by the ministries. Administration of state ownership in a company by the minister is exercised under constitutional and parliamentary responsibility. However, the Storting can not hold the Government responsible for business-related decisions that fall under the authority of the companies as stipulated in general corporate legislation.

State ownership is exercised through formal corporate bodies such as the annual general meeting/corporate meeting. These bodies exercise executive authority in their respective companies, and delegate responsibility to the company boards through company bylaws and resolutions. At these meetings, the frameworks and objectives for the companies are adopted, and the annual financial accounts and annual reports are approved, including the apportionment of dividends and the election of the board or corporate assembly. In companies with a corporate assembly, it is the corporate assembly that elects the board.

In addition to the meetings of the corporate bodies, regular contact between the State in its capacity as shareholder and the company management is maintained (just as it is for other important owners). This normally takes the form of quarterly meetings in which the companies report on their performance and the ministry states its position on matters such as the rate of return and size of dividends. These meetings are based on information available to all shareholders. State representatives also participate in the companies' presentations along with other investors and analysts.

1.1 Commercial and non-commercial objectives

In the State's ownership report² the companies are classified in four main categories.

- Companies with commercial objectives
- Companies with commercial objectives and ensuring head office functions in Norway
- Companies with commercial and other specific, defined objectives
- Companies with sectoral policy objectives

¹ Based on <http://www.eierberetningen.nhd.no/>

² http://www.eierberetningen.no/2008/index.php?seks_id=7&element=Del&lang=english.

Examples of companies in the last category include inter alia Avinor AS (airports), Statnett SF (the national electricity grid), Statsskog SF (forestry and land development) and AS Vinmonopolet (the state alcohol retail monopoly).

The broad scope of state-ownership demands a clear division of roles. Ambiguity about the premises underlying state decisions can affect the market's confidence in state-ownership in general and raise questions regarding the existence of inequities in the competitive arena. Consequently, the state-ownership role is organised in such a way that an overlap between its regulatory and ownership roles is sought avoided. This helps to maintain the market's confidence.

Furthermore, and as alluded to in the 1st contribution to this WP3 meeting, the management of state-owned companies is carried out in accordance with the Private Limited Companies Act, with its clear division of roles between the shareholders, management, and board of directors, and in accordance with the currently held principles of corporate governance. Managing the State's share in these companies involves, amongst other things, nominating representatives to the companies' boards and corporate assemblies, representing the State at shareholder's meetings, monitoring the companies' financial results, formulating anticipated rates of return and dividends, and considering any eventual owner transactions within these companies.

Companies with a primarily commercial objective are administered by the Ministry of Trade and Industry, unless special circumstances call for a different arrangement. Thus, the State's roles as owner and as governmental authority are separated. It is for this reason that the decision was taken to transfer the administration of State ownership to the Ministry of Trade and Industry for the following companies: BaneTele AS³ (fiberoptical network and broadband capacity and communication products), Cermaq ASA (aquaculture), DnB NOR ASA (commercial banking), ECC AS (electronic charts), Entra Eiendom AS (property development and management), Flytoget AS (Airport Express train), Mesta AS (road construction), SAS AB (civil aviation), Statkraft SF (hydro electric power) and Telenor ASA (telecommunication).

There are some important exceptions to this rule. For instance the State's ownership in StatoilHydro ASA (petroleum exploration and production) is managed by the Ministry of Petroleum and Energy.

The State does not coordinate the business-related aspects of the companies in which it has majority shareholdings. On the contrary, State-owned companies compete against each other when they operate in the same market. One example of this is BaneTele and Telenor, both broadband suppliers, and before the merger; Norsk Hydro and Statoil, competitors in the energy sector.

1.2 Rate of return and dividend targets

In an internal process, the State formulates an opinion of what the long-term targets for rate of return should be for the companies. This is the case for the commercial companies as well as for certain other companies with other objectives. Targets for rate of return and dividends are not established for companies without commercial operations or those dependent on State subsidies to continue their operations. For these companies, government regulations on subsidies are followed as they pertain to allocations and reporting. The target figures for rate of return are used as a basis for dialogue with the companies. When following up the targets, commercial considerations and professional judgment are used to assess the assumptions upon which the models are based and the annual fluctuations in rate of return and return on equity. In some cases, the targets are formulated in a document submitted to the Storting.

³ The state's shares have recently been sold to a private co-owner.

Internally, the responsible ministry formulates long-term expectations regarding dividends as well as annual dividends for State-owned companies with commercial objectives. When determining targets for the individual companies, a systematic review of a number of criteria is conducted. Certain criteria will suggest that high dividends are in order, while other criteria will call for low dividends. The priority given to the different criteria will vary from one company to another. The ministry informs and discuss with the company its expectations regarding annual dividends prior to the board's handling of the annual accounts. The ministerial owners' expect the board to give weight to the State's views and take these into account when assessing recommendations regarding the distribution of profits. In companies wholly owned by the State (public corporation), the annual general meeting is not bound by the recommendations of the board or corporate assembly regarding payment of dividends. Instead, the State may establish the dividend payments for these companies.

1.3 Code of Practice for Corporate Governance

As a predominant owner, the State is a driving force for ensuring that State-owned companies comply with the Norwegian Code of Practice for Corporate Governance, which calls for companies to draw up ethical guidelines, articles of association, and other relevant management documents.⁴

The State's own principles of corporate governance focus on the administration of the State's ownership interests in all State-owned companies, whether these are wholly or partially owned by the State. These principles are in line with commonly accepted principles of corporate governance, and they address important issues such as equal treatment, transparency, autonomy, the composition of the board and its role, etc.

The principles have been established on the basis of two primary considerations. First, the principles should promote the practice of good corporate governance by the State, thereby safeguarding the State's assets. In this regard, the most important principles relate to establishing targets for rates of return and dividends, capital structure, election of boards, and incentive and control systems. As illustrated by the many accounting and financial scandals at home and abroad, it is important to place great emphasis on these principles - not least in regard to incentive and control systems.

Secondly, the principles help to ensure that the various shareholder groups receive equal treatment. In companies in which the State shares ownership with others, the State wishes to act on the basis of the same rights and obligations as all other shareholders. It is particularly important to private shareholders that the State, which is an important owner in many companies, does not negatively affect the rights or economic interests of the other shareholders through its conduct. For this reason, special emphasis is placed on equal treatment of shareholders, transparency related to State ownership, and the use of the annual general meetings as a forum for decision-making. Although the State does not have its own board members, it assumes that all board members, including those elected by the employees⁵, will seek to safeguard the joint interests of the company and its shareholders. These principles do not prevent the State, just as any other owner, from expressing its views regarding development of the company's operations. On the contrary, guiding company development is an important owner function, not least for the State, which as an owner has a long-term perspective on value creation within the companies.

⁴ The Norwegian Code of Practice for Corporate Governance was published on 7 December 2004 and was formulated by a work group consisting of members of nine organisations, including the Oslo Stock Exchange, Norwegian Shareholders' Association, Norwegian Confederation of Business and the Institutional Investor Forum. The Ministry of Trade and Industry participates in OECDs Steering group on corporate governance and its Working group on corporate governance of SOE's.

⁵ One third of the board members are elected from and among the employees according to Norwegian general company law.

The State's principles for good corporate governance stipulate that the companies are to be aware of their responsibility to society at large. The concept of corporate social responsibility has been put into practice by trade and industry in Norway and abroad through various concrete measures, including the establishment of special stock indexes, such as the Dow Jones Sustainability Index and the FTSE4Good Index, for companies that satisfy globally recognised ethical standards. Inclusion in these indexes is regarded as a mark of quality, which may serve to attract more investors to the companies. Among the companies in the State's portfolio, Telenor ASA, Norsk Hydro ASA and Statoil ASA are included in both indexes, and DnB NOR and Yara International ASA are included in the FTSE4Good Index. It is expected that all serious companies in Norway, whether State-owned or privately owned, conduct themselves in a manner that develops trust and respect over time within society at large.

The State's principles of good corporate governance and corporate management⁶ can be summarized in the following ten points:

- All shareholders shall receive equal treatment.
- There shall be transparency in State ownership of companies.
- Ownership decisions/ resolutions shall be taken/ adopted at the annual general meeting.
- The State, in cooperation with other owners when relevant, shall set performance targets for the companies; the boards shall be responsible for achieving these targets.
- The capital structure of the company shall be consistent with the objective of ownership and circumstances of the company.
- The composition of the board shall be characterised by competence, capacity and diversity, and reflect the distinctive characteristics of the company.
- Wage and incentive schemes shall be formulated so that they promote value creation in the companies and are perceived as reasonable.
- On behalf of the owners, the board shall exercise independent control of the company management.
- The board shall adopt a plan for its own activities and work actively to develop its own competencies.
- The company shall be aware of its responsibilities to society at large.

The Department of Ownership at the Ministry of Trade and Industry prepares annually, "The State Ownership Report", about the management of State ownership in all ministries.

2. The scope of competitive neutrality policies

Competitive neutrality involves a commitment to establish a level playing field between public, private and voluntary providers of goods and services in existing markets ones. The notion of competitive neutrality is important because a lack of neutrality would undermine the whole rationale for efficient competition, i.e. to contribute to the efficient utilization of society's resources, economic growth and

⁶ <http://www.eierberetningen.nhd.no/index.gan?id=1427&subid=0>.

increased welfare. A competitive neutral framework will also help to promote the legitimacy of the government as a neutral regulator for commercial state-owned entities.

The Norwegian state is in general concerned with exercising beneficial corporate governance, including organizing state-ownership such that the State's different roles are kept clearly separate and that there is transparency with respect to the administration of state-ownership.

Moreover, and as presented in the 1st contribution to this WP3 meeting, the Norwegian Competition Act applies fully to SOEs engaged in commercial activities.

However, we have for many years witnessed a development with blurring of sectors, i.e. indistinct boundaries between the private, public, and non-profit sectors of national economies. This obliteration of boundaries has taken many forms and patterns, where hybrid forms of organizations, such as general or local government owned enterprises, government corporations and heavily regulated business firms can be placed in a continuum where government agencies is at the one extreme and full private ownership enterprises are at the other.

In the last thirty years we have also witnessed a shift in the approach to public sector management in many countries, and Norway is no exception. One aspect of this development has been the increasing use of market mechanisms to increase public sector efficiency, from benchmarking to exposing previously sheltered public sector activities to competition by establishing new entities competing in tenders with private companies.

In many cases the aim for state-ownership has changed over time as well, with companies in several sectors undergoing reorganisation and adaptation to market competition. The interests of society at large are increasingly safeguarded through the exercise of governmental authority (licenses, public procurements, taxes, etc.). This allows state-owned companies to compete on ordinary terms, although in some cases the State still uses its ownership to achieve sectoral policy objectives. Examples of this are state control of the National Health Service through the Regional Health Authorities; and the active use of land managed by Statskog SF to achieve social objectives related to conservation or other publicly-beneficial purposes.

The next section presents cases where these issues have been encountered by the NCA.

3. Monitoring and enforcement

In principle, quite a few possible sources of competitive distortions⁷ for public sector businesses can be identified:

- Advantages and disadvantages that arise from their governance and regulatory arrangements. This includes inter alia regulation, taxation and the cost of capital.
- Legal or practical exemption from competition law
- Subsidies from government to fund public service obligations, if used to cross-subsidise commercial activities

⁷ When discussing competitive neutrality related to general or local government enterprises, we most often are concerned with structural and statutory advantages enjoyed by public undertakings. It should be mentioned however, that the principle is just as important and applicable to any disadvantages suffered by government enterprises.

- Advantages from lax public procurement rules, where public sector providers are allowed to set prices below full cost
- Power to collect data for public purposes, where the public sector entity can use that data on terms more favourable than those available to the private sector).

As seen from the statistics presented in the first contribution from Norway to this WP3 meeting, the public sector plays a heavy role in the Norwegian economy. This combined with the development relating to public sector management we have witnessed accentuates issues related to competitive neutrality. During the last decade, the NCA has encountered and raised concerns related to all of potential sources of distortions in the bullet point above. Some cases are covered briefly below, while two cases are covered more in depth in two fact boxes at the end of this contribution.

The NCA has for example identified neutrality issues related to competitive advantage for state-owned entities in the power generation sector. The first is a financial advantage: Parliament provided NOK 16 billion in equity, loans and guarantees to Statkraft, enabling it to pursue an aggressive growth strategy through acquisitions. (An ESA ruling led to the recent abolition of the system of providing preferential loans through government guarantees.). The second concerns the unequal ownership rights attached to hydropower resources, an issue which has been under review following an ESA ruling.

Cross-subsidisation is another issue which can easily arise when one entity fulfils public functions (such as universal service provision) financed over public budgets and the other entity competes in the market place and these two units are more or less organizationally intertwined. Thus, the entity competing in the market may get a financial advantage relative to private providers. Such concerns have for instance been raised by the private company Storm Weather Centre, which is the leading commercial weather service provider in Scandinavia, in relation to the Norwegian Meteorological Institute, a state institution which also sells services on a commercial basis. This case is presented in more detail below. The NCA has on several occasions proposed either prohibiting an entity in this situation from offering products in competition with private enterprises, or accounting separation.

The opening balance sheet for state-owned entities affects their basic cost structure and flows through to the prices they can charge. If assets are undervalued, and if debt and equity positions do not conform to private sector norms, the state-owned entity has an advantage over private sector rivals. It is important to assign asset values at the market price. In practice however, it is difficult to evaluate whether this is actually being done. To add to the difficulties, accounting systems differ between the public and private sectors and comparable private sector firms may not exist at the outset.

Taxation is another important issue. Neither public nor private entities have to pay Value Added Tax (VAT) on production for their own use. To save money municipalities have resorted to more "in-house" production, where the VAT regime distorts comparison to potentially more efficient private providers. In 2003 the NCA endorsed the introduction of a compensation scheme that neutralises VAT on public purchases, and which would reduce such distortions.

3.1 *Enforcement of competition neutrality*

According to Norwegian Competition Act, the Competition Authority shall supervise competition in the various markets, among other things by calling attention to any restrictive effects on competition of public measures and, where appropriate, submitting proposals aimed at furthering competition and facilitating market access by new competitors. If the Competition Authority so requires, a response from the public body responsible for the measure must be made within the deadline specified by the

Competition Authority. The response must include inter alia a discussion of how the competition concerns will be dealt with.

The NCA has basically two means to raise and follow up its concerns related to competition neutrality. According to Section 14 of the Act, the competition authorities may, if it is considered necessary to promote competition in the markets, intervene by *regulation* against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act.

The NCA shall also, according to Section 9 e supervise competition in the various markets, among other things by *calling attention to* any restrictive effects on competition of public measures and, where appropriate, submitting proposals aimed at furthering competition and facilitating market access by new competitors.

The NCA has used these tools frequently with regards to issues of competition neutrality.

Finally, focusing on the more normative aspect, there is still an ongoing discussion whether public companies with either social responsibilities, exclusive rights, or both, should have restricted access to well-performing markets.

In this regard, it can be mentioned that the NCA some years ago commissioned a report to discuss these and related issues. The report "*On equal terms? An analysis of competition between public and private enterprises*" (only available in Norwegian), was published in 2005. Some of the main recommendations in the report are that:

- Accounting systems should causally attribute costs to the activities generating the costs.
- Public entities should only be allowed to enter competitive markets as long as there are clear and documented synergies between the competition exposed activity and the core activity, and these benefits accrue to the core activity.
- Revenues from the competition exposed activity must more than cover fully distributed costs. Prices must reflect these costs.
- Competitive branches of public companies should be separated into separate legal entities which are managerially, personnel and physically separated from the core activity.

It seems reasonable to argue that a blanket prohibition of public firm entry is too restrictive. Nevertheless, public companies should document substantial economies of scale/scope from diversifying as a prerequisite to enter markets. Moreover, if substantial economies are present, synergies should benefit the core undertaking.

Fact box 1. Municipal health studio (1999)

The case. A municipality in Northern Norway operated a sports centre, consisting of sports halls, swimming pools and training/health studios. Rates for using the facilities were set by the local council. A private competitor in the training/health studio market approached the NCA in 1997 and 1998, claiming that operations of the sports centre services to a large degree were financed over municipal budgets, also the parts which sold services in competition with the private firm. It can be added that the complaining firm was the only competitor in the area.

NCA concerns. In the opinion of the NCA there were many indications that the municipality indirectly subsidized the operation of the training/health studio, which was part of the facilities, and that the subsidy was in conflict with the

objective of the Competition Act concerning efficient utilization of resources. Moreover, this could lead to the only competitor in the area being forced out of the market, leaving the municipal health studio in a monopoly position. The NCA stated that, if it is considered desirable to subsidize training in a health studio, the subsidies should be as neutral to competition as possible.

However, the competence to intervene in cases directed at municipal bodies rested with the Ministry of Labour and Government Administration. The NCA recommended that the Ministry intervene against the municipality's subsidization of the health studio. The NCA suggested that the health studio be divested as a separate organizational unit and that the charge for training should basically reflect the actual costs of training in the health studio. A separate unit with independent accounts would also make it easier to control that the entity operated on equal terms with private players in the market.

Thus, the case involved issues of municipal independence, health policy, economic efficiency considerations as well as competition problems. Following an overall assessment of all of these aspects, the Ministry stated that it did not wish to intervene against the local municipality.

Fact box 2. Storm Weather Centre AS and the Norwegian Meteorological Institute (2000/2001)

The case. In 2000 and 2001 Storm Weather Centre AS (Storm) approached the NCA and requested the Authority to consider the competitive situation between the Storm and the Norwegian Meteorological Institute (Norsk Meteorologisk institutt - MI), which is the Norwegian national institute for weather forecasts. MI is a state administrative agency under the Ministry of Education and Research and has responsibility for the public meteorological services for civil and military purposes in Norway. MI also sold special services to the public and private companies.

Storm is a weather forecasting company that sells products and alert services to the media. The company also operates within markets like hydropower, offshore and agriculture. Storm sells products that are processed meteorological raw data. These raw data Storm are mainly bought from MI.

Storm was of the opinion that MI was not exposed to the same competitive conditions as Storm. Storm pointed to three factors it considered of significance in this regard. First, it argued that the MI partially could transfer the cost of its commercial production to the activities the company exercised by virtue of being a state agency. Second, it argued that the marketing department of MI did not face the same risks as Storm, because MI with the state in the back could cover any deficit. Finally, Storm argued that there was cooperation on the price of the data that Storm was dependent on in its production. According to Storm, this cooperation took place between the MI and other meteorological institutes in Europe, through the organization ECOMET.

NCA concerns. MI and Storm both operated on the supply side of the market for processed weather and climate services in Norway. MI was the largest company, and at the time Storm was the only competitor. The NCA considered it important to protect competition on equal terms in this market, and concluded that MI's activities created, or could easily create competition distortions.

The main reason for this point of view was that MI had the ability to finance its commercial activities with grants the agency got over the national budget. Thus, it was a risk that MI could operate with lower prices than those reflecting actual production costs. Another factor that could create competitive barriers in the NCA's opinion was the incentive to provide MI's commercial activity access to raw data on different terms than the competitors.

On this basis, it was the NCA's assessment that the MI's commercial activities should be separated out into a separate company, for example, a state corporation. The new company should not have access to raw data from MI on different terms than those offered to competitors. Moreover, the NCA also pointed out that a new company should be able to take advantage of the MI's other resources, such as marketing on the MI's homepage on better terms than its

competitors.

However, the NCA also underlined that before any separation took place, an assessment had to be made whether any economies of scope between MIs agency activities and the commercial activities suggested that such a separation not should be made.

The current situation. Traditionally, the sale of basic meteorological products in the form of automated sales of meteorological data to commercial institutions had been an important source of revenue for the MI's market department. The decision to release all meteorological data for free made in 2007 limited the market potential for commercial activities at the MI. Thus, the same year, the board of MI decided that the Institute's paid activities should be restricted to projects contributing to the development of the Institute's expertise, thus improving the fulfilment of the state assignment. The market department in its current form should be phased out. The board underlined that any remaining market activities should be administered in accordance with state aid rules and competition legislation, ensuring that any cross-subsidization not take place.

Fact box 3. Airport charges (2002)

The case. In a response to a public hearing, the NCA proposed that the user charges for Avinor's (formerly the Norwegian Civil Aviation Administration) airports should in the long term be reorganized so as to promote greater economic efficiency and competition.

In the NCA's opinion, such reorganization would probably mean lower tax rates imposed on less busy airports and higher rates on the busier ones. This could provide stimulation for new business establishment and competition between airlines, and promote better utilization of airport capacity. As long as Avinor's current airports belonged to the same owner, the NCA considered that it would be right to cover the deficit on the smaller, less busy airports with earnings from the larger airports.

The NCA also took the view that it would be favorable if a certain proportion of the payment were to be linked to the price of air tickets, for example through a fixed percentage charge.

Another proposal was to have airport taxes vary with the scope and quality of the airport services offered. The NCA also proposed to introduce peak load pricing, charging higher rates in rush hour periods.

Fact box 4. Airport charges (2007)

The case. The background for this case was a public hearing with a proposal from the Ministry of Transport and Communications on proposed fare scale for Avinor's airports in 2008.

In the response to the public hearing, the NCA expressed that it believed that the system for financing of Avinor's airports should be reconsidered to take advantage of the increasing competition between Oslo Airport Gardermoen, Sandefjord Airport, Torp and Moss Airport, Rygge.

The NCA concerns. The background for the NCA's concerns was the recent developments in competition between airports in the central east area. The vast majority of airports in Norway are owned by Avinor, and most are unprofitable. The financing of these is through cross-subsidization, where revenues from the profitable airports also cover the costs of the unprofitable airports. The biggest airport, Gardermoen, has a central role in the financing of Avinor's airport network.

The establishment of Rygge, in addition to Torp, outside the Avinor network created competition between airports in the central east area. Effective competition in this geographical area can in the NCAs view provide valuable benefits to the airline passengers. However, the Ministry of Transport and Communications had in a previous hearing on

charges for the use of Rygge Airport stated that the strong competition from Rygge and Torp could threaten the traffic base at Gardermoen, and that the charges at Rygge, possibly also at Torp, should be set at a level to prevent this from happening.

The NCA expressed in the hearing that it would be inappropriate to restrict the two airport's ability to compete on price to attract airlines. The authority also expressed that it saw a need for reconsidering the funding framework for the airport network.

The NCA finally opined that as long as the current funding is maintained, a balance must be found between the need for cross-subsidization in the Avinor network and the positive effects which competition between airports in the east area can provide for the airline passengers.

Fact box 5. The Bergen Area's Inter Municipal Waste Handling Company (2005)

The case. BIR is Norway's second largest waste management company and is responsible for waste handling from (for) approximately 320.000 inhabitants in the municipalities owning BIR. The joint-stock company BIR AS was formed in 2001, and from July 1st 2002 with BIR AS as the holding company of the group. BIR is the abbreviation of Bergensområdet Interkommunale Renovasjonsselskap (The Bergen Area's Inter Municipal Waste handling Company). The municipalities owning BIR, forms the general assembly and elect the corporate assembly and Board of Directors.⁸

In 2005, the NCA received an approach from three private companies in the waste industry in the Bergen area. The companies claimed that the competitive situation in the waste sector was difficult, because BIR as a public waste disposal company operated in both the sheltered (BIR Privat AS) and the competitive market.

NCA concerns. Based on the allegation above and the Authority's own investigations, the Competition Authority submitted a letter to the owner municipalities of BIR calling attention to competitive concerns. In the letter the owner municipalities were asked to consider measures to ensure competition on equal terms. In this regard, it was particularly pointed to the need for structural changes in the organization of BIR as well as changes in the organization of the tendering processes.

The letter resulted in a proposal by BIR of structural changes in the BIR group. The proposed changes were that BIR Privat AS got an independent board of directors, its own general manager, and that the General Assembly would consist of representatives from the owner municipalities and not from the board of BIR. The purpose of the proposed changes was to ensure competition on equal terms. BIR also had several meetings with the NCA in the last part of 2007, where BIR made it clear that they also had made several changes to its internal instructions on public procurement in BIR Private AS to ensure real competition, which in particular would be important when another subsidiary of BIR participated in the tender.

The NCA expressed in a letter in 2008 that it considered the proposed changes as positive from a competition neutrality perspective. The changes would result in a clearer distinction between competitive business and activities decreed by law. Furthermore, the changes would also help to reduce the possibility of illegal cross-subsidization and harmful under-pricing in the competitive market. The proposed restructuring would also help to ensure that tendering processes are implemented in a way that would be positive for the competition. However, the NCA opined that there would still be a need for further improvement of the tender processes, in particular the need to make the tendering process more transparent to outsiders to prevent suspicion that discrimination took place.

In the letter of 2008, the NCA encouraged BIR to make the instruction transparent to both employees and outsiders, both to ensure that instructions are followed and to make the tendering process more visible to outsiders. The NCA further encouraged BIR, like any other public entity that has statutory responsibilities in addition to commercial activities, to continue to focus on the tendering process in order to strengthen competition. Finally, the NCA

⁸ http://www.bir.no/biras_no/archive/Internett_filer/Div/2008Engelsk.pdf.

emphasized that it is the responsibility of the companies to act in accordance with the Competition Act.

SPAIN

1. Introduction

Nowadays corporate governance is among the concerns of both private and institutional investors. In Spain, initial proposals to support the establishment of self-regulation codes designed to modify corporate governance practices in listed companies have led to the enactment of legal provisions that specifically require state-owned enterprises to comply with certain corporate governance principles. In this context, the very recent Royal Decree 1373/2009, implementing Act 33/2003 on the Public Administrations' Wealth, introduces the necessary precisions on the actual public enterprises' organizational model in order to align it with the *OECD Guidelines on Corporate Governance of State-owned Enterprises*.

2. Spanish Legislation on *corporate governance* for state-owned enterprises

The Spanish legal provisions on the management of public enterprises are contained in Act 6/1997 on the organization and operation of the State Administration (LOFAGE); in Act 33/2003 on the Public Administrations' Wealth and the mentioned Royal Decree 1373/2009, which will come into force on October 28, 2009; and in Act 4/2007 on the transparency of financial relations between Member States and public enterprises.

- The LOFAGE is a horizontal Act on the organization and operation of the State Administration that contains the general guidelines for the operation of *public trading entities*¹.
- The Public Administrations' Wealth Act updates the regulation on State-owned enterprises, among other issues.
- Royal Decree 1373/2009 explicitly states that public enterprises must comply with the constitutional principles of efficiency and economy in their management and defines a transparent framework within which to satisfy obligations associated with the provision of services of general economic interest² in order to prevent market distortions. Also, as already mentioned, it introduces precisions on the public enterprises management model previously established in Act 33/2003, in order to meet the *OECD Guidelines on Corporate Governance of State Owned Enterprises*.
- Act 4/2007 transposes the Commission Directive 2006/111/EC, of 16 November 2006, which shapes up article 86.3 of the European Treaty, having regard to the difficulties of the Commission to obtain the necessary information. This article 86.3 of the European Treaty requires the Commission to ensure the application of the provisions contained in indents 1 and 2 of that same article, which impose antitrust obligations on Member States as regards public enterprises,

¹ See the classification of the Spanish public enterprises included in the Spanish contribution to the roundtable *Application of antitrust law to state owned enterprises*.

² *Services of general economic interest* are to be understood as those activities that, being identified by the public authorities as particularly important for the citizens, would not be provided (or would be differently provided) in the absence of public intervention. Such services can either be directly provided by the Public Sector (i.e public authorities or public undertakings) or by the private sector through mechanisms such as competitive tender offers or universal service obligations.

undertakings that have been granted special or exclusive rights, and undertakings entrusted with the operation of services of general economic interest.

3. **Corporate Governance and the principle of competitive neutrality for state-owned enterprises**

More specifically, the Spanish legislation addresses the issues related to corporate governance and the principle of competitive neutrality for state-owned enterprises in the following way:

The State Administration, as the owner of public enterprises, must aim at achieving four **goals**:

- Promoting management efficiency and economy.
- Identifying and reporting to both the citizens and the markets, the obligations and costs derived from the provision of services of general economic interest.
- Not straining competition, by avoiding market distortions resulting from the activity of public enterprises that is not linked to public service obligations.
- Promoting high conduct standards appropriate to the nature of each entity.

The **responsibility for the management of public enterprises** is shared by the Council of Ministers, the Ministry of Economy and Finance and the *Supervisory Ministry*³.

In general terms, the Council of Ministers shall identify the guidelines and strategies for the management of the State enterprises; the Supervisory Ministry shall exercise an operational and efficiency control of such enterprises; and the Ministry of Economy and Finance shall, in accordance with the principles of efficiency and economy due in the prosecution of the public interest, set the criteria for managing the assets and rights of the State enterprises, as well as represent the Administration's economic interest within the governing bodies of such enterprises and monitor that they do not distort competition (by virtue of Royal Decree 1373/2009, as detailed below).

The **public enterprises' organizational structure** must ensure, in any case, the board and management bodies' responsibility for the companies' results; the recognition, where appropriate, of minority shareholders' rights; and the effective monitoring of the enterprises by the corresponding supervisory agencies. More specifically, the following provisions have been established:

- As for *State trading companies*, the Shareholders' Meeting shall encourage the implementation of corporate governance standards, for which it shall make sure that the Board of Directors is composed of highly qualified professionals. Likewise, the Shareholders' Meeting will provide that at least fifty percent of the Board of Directors' members are independent.
- As for *Supervised companies*, the Supervisory Ministry shall not propose for appointment more than one third of the total number of directors, except for exceptional motivated reasons (the directors appointed by the Supervisory Ministry must, in any case, be less than fifty per cent of the Board).

³

The Council of Ministers is responsible for attaching the public limited State trading companies to a particular Ministry –the one responsible for an area connected to the companies' purpose. When no Ministry is expressly called upon, the company is considered to be attached to the Ministry of Economy and Finance.

- As for *public trading entities* and *public law entities*, the Ministry of Economy and Finance shall propose for appointment one third of its governing body.

The new Royal Decree introduces specific **provisions oriented to reinforce competitive neutrality** in the markets where public enterprises are active. Thus, the Ministry of Economy and Finance has been entrusted with the following functions as regards *public trading companies* and *public law entities*:

- To determine the additional costs derived from their assigned public service obligations.
- To estimate the advantages obtained in terms of finance as well as the impact of specific regulations applicable to them.
- To estimate the income that the State Budget should receive as a compensation for the amounts invested in these entities, considering the public service obligations and the financial and regulatory advantages previously calculated.

These functions shall be exercised prior communication to the Competition Authority.

For the sake of **transparency**, Royal Decree 1373/2009 provides that the Public Administrations shall make public on the Web all relevant non-confidential information concerning their business activities. In particular, the following information on public enterprises shall be made public: the statutes or starting up rules, the names of the members of the management bodies, the annual accounts, the conduct codes or best practices to be observed, and the identification of the activities linked with the provision of services of general interest. In the case of Groups, the relevant consolidated information on the Group must be published by the parent company.

On the other hand, Act 4/2007 imposes information obligations to public enterprises -and to private companies granted with special or exclusive rights or operating services of general economic interest-, with the aim of facilitating the fulfilment, by the Spanish government, of the European Commission's information requirements on State-owned enterprises.

Thus, public enterprises are required to provide data related to the public funds made available to them by a Public Administration, the use of such public funds and their purpose⁴.

Furthermore, an obligation to maintain **separate accounts** is imposed onto the public and private enterprises operating services of general economic interest or entrusted with special or exclusive rights by the Public Administrations, be they State, regional or local, and carrying out commercial activities at the same time. In addition to the information mentioned in the previous paragraph, these undertakings are required to provide data on the costs and revenues associated with each of their activities, and on the methods by which costs and revenues are allocated to the different activities.

However, the Act exempts from such information requirements those public undertakings operating services that do not appreciably affect trade between Member States, and to undertakings whose total net turnover does not exceed a certain threshold in each of the two years preceding that in which the public funds were either made available or used.

⁴ The Act mentions six purposes: compensation of operating losses, refundable grants or loans on terms different to the market, providing financial benefits in the form of performance perceptions or non-recovery of loans, renouncing to remunerate the public funds assigned on market conditions, and compensation of burdens imposed by public authorities.

4. Conclusion

From the perspective of competition defence, the provisions designed to ensure competitive neutrality between private and public enterprises operating in the same markets have special interest. The fact that the Spanish legislation explicitly recognizes the obligation of the Public Administrations to ensure fair and effective competition in the markets is worth highlighting. Moreover, the Ministry of Economy and Finance has been entrusted with new responsibilities for evaluating costs and benefits associated with the provision of public services.

Besides, the role assigned to the Competition Authority is, in principle, a step in the right direction. The eventual impact of the Competition Authority's actions in this field will depend on the nature of the information transmitted to it and on final scope of its participation. For now, the rule that will enter into force on October 29, 2009 will simply compel the Ministry of Economy and Finance to inform the CNC of the fulfilment of its new functions.

Finally, while the posting on the corresponding websites of all relevant non-confidential information on public enterprises is welcome, a more specific regulation in this field could be desirable and could eventually lead to the publishing of separate accounts, one for trading activities and one for activities connected with the provision of public services or the management of exclusive rights.

In this context, the extension of the information requirements established by Act 4/2007 to all public enterprises, and the posting of the relevant non-confidential information, would be advisable.

SWEDEN

1. Summary

Public intervention in markets can often result in distortion of competition and act as a barrier to market entry and expansion. In order to address the competition issues that arise when the public sector competes with private undertakings on the open market, the Swedish Government recently proposed an amendment to the Swedish Competition Act (the “Competition Act”).

The Swedish Government issued a Bill (2008/09:231) on public commercial activity (the “Bill”) which proposes new rules stipulating that the Stockholm District Court (the “District Court”) may prohibit:

- certain *conduct*, in the context of *offering goods or services*, by a municipality, county council, state or companies controlled by either of these bodies; or
- an *activity*, consisting of *offering goods or services*, from being carried out by municipalities, county councils or companies controlled by either of these bodies;
- ...if that conduct or activity
 - *distorts*, by object or effect, the conditions for effective competition on the market; or
 - *impedes*, by object or effect, such competition from occurring or developing.

The above prohibitions can be issued by the District Court, through an injunction, further to an application by the *Swedish Competition Authority* (the “SCA”).

Conduct that is found to be justifiable on public interest grounds; and activities which are compatible with law, may *not* be prohibited.

Should the SCA decide not to bring a case before the District Court, an *undertaking* affected by a certain conduct will have standing before the Market Court to apply for a Court order, as per above.

If adopted by the Swedish Parliament later this autumn, the new rules will be included in the Competition Act and come into force on 1 January 2010.

2. Introduction

The SCA highlighted some of the main competition issues that often arise as a result of public intervention in competition with the private sector in its submission to the OECD Competition Committee policy roundtable in 2004.¹

When public players in central, regional or local government level act in competitive markets there is a risk that market entry by private undertakings is impeded and those active in the market may be driven

¹ See DAF/COMP(2004)36, p. 227 et seq.

out, particularly SMEs. Smaller companies generally have a weaker market position, which amplifies the competition issues that arise from public intervention.

The significance of these issues are further illustrated by the extent of the public sector in Sweden and its engagement in commercial activities. In 2007, approximately 35% of the employed population were employed by the public and in terms of size in relation to GDP, Sweden had the largest public sector in the EU².

3. Corporate governance

The public sector in Sweden does not only encompass the state but also county councils and municipalities, which enjoy a very high degree of independence.

It is also common in Sweden for municipalities and county councils to engage in commercial activity in competition with the private sector. The municipalities and county councils, as well as companies they operate, are regulated by the Local Government Act ("LGA"); and the Act on Certain Municipal Powers, which sets out the conditions for municipalities to engage in commercial activity within certain sectors, e.g. employment of disabled and tourism.

Municipalities must adhere to certain key principles set out in the LGA, and shall also ensure that companies they control adhere to the same principles. From an antitrust perspective, the most important of these principles that have given rise to competition issues, are the following:

- **The location principle (LGA §2:1); and municipalities' powers:** Municipalities and county councils may themselves attend to *matters of general concern* which are connected with the *area* of the municipality or county council or with their "*members*"³ and which are *not to be attended to solely by the state, another municipality, another county council or some other body*. "*Matters of general concern*", however, has never been further defined in law and the municipalities' powers have thus been significantly widened over the years through case law.⁴
- **The Prime Cost principle (LGA §8:3c⁵):** Municipalities and county councils may levy charges for services and utilities which they provide but such may not exceed the cost of the services or

² Statistiska Centralbyrån (Statistics Sweden): "*Offentlig Ekonomi 2009*" ("*Public Finances in Sweden 2009*"), p. 31-35, available at: http://www.scb.se/statistik/_publikationer/OE0903_2009A01_BR_OE06BR0901.pdf

³ This is wider than the geographic borders of the municipality, as it has been considered that an activity outside the municipality still can concern its "*members*", which are defined as *persons resident in the municipality* or who *own estates* in the municipality. For *legal persons* it is not sufficient to be based in the municipality; these must therefore *own an estate* registered in the municipality to be considered a "*member*".

⁴ The Swedish Administrative Courts have, e.g., considered energy supply, providing housing and public transport, as well as erecting sports and parking facilities to fall within the municipalities' remit. Moreover, certain activities that, taken alone, would have fallen outside the scope of a municipality's powers, have been allowed by the Courts when the activity has been neighbouring to an activity which fell within the municipal competence (e.g. selling gravel from public gravel pits).

⁵ A similar principle is contained in the Regulation on Fees that applies to state agencies but this generally works as a recommendation, unlike the principle in the LGA, which is compulsory.

utilities provided (the prime cost). However, it also follows that this provision does *not prohibit* pricing *below* cost.⁶

Furthermore, the scope for appealing decisions by municipalities and county councils, on the basis that they are exceeding their authority, is rather restricted under the LGA.⁷

4. The Bill on public commercial activity

4.1 Background and key issues

A key difference between private and public entities is that the latter cannot be declared bankrupt and public entities also benefit from being financed through tax funding. Consequently, they operate on the market under different conditions and their mere *presence* on the market give rise to inevitable market distortions; e.g. it acts as a disincentive to private undertakings to expand or establish themselves. This increases barriers to market expansion and entry.

Examples of areas in which public entities in Sweden have been or become active in competition with the private sector and where such an activity does not appear to be justified include cleaning services, vehicle rental, architecture services and building maintenance.

The SCA receives many complaints regarding public intervention and, as stressed in the Bill, these complaints often concern cases where a public body's pricing practice is being questioned, either for being allegedly below cost or for being considered excessive. Other typical cases that give rise to competition issues are those that, *e.g.*, involve one or more of the following factors:

- cases where one and the same public entity carries out both activities of a legal state monopoly and activities that are subject to competition, particularly where the former constitute tasks of a public authority;
- sole access to an essential facility and/or refused or selective access to such facilities where access shall be provided on fair, reasonable and non-discriminatory terms;
- sales of excess capacity; and
- support of the public entity's own commercial activity and/or own bids in public procurement⁸.

⁶ Public entities active in the sectors of district heating, electricity, networks and gas industries are exempted from this principle but it does apply to public entities that sell/provide goods/services in other business areas subject to competition. As regards activities where competition issues arise as a result of the Prime Cost principle, it should also be noted that the Government is keeping under review as to whether a general exemption from the Prime Cost principle should be adopted in the case of activities on open markets subject to competition.

⁷ Only "members" (see above) of the municipality can launch an appeal. An appeal must be made within three weeks of a decision being taken by the municipality and if no appeal is made within this period, the decision takes legal effect even if it was illegal. Decisions by companies owned by municipalities, e.g. to start offering a product/service, cannot be appealed (however, the municipality's decisions concerning the scope of the company's articles of association or its activities can be appealed, as long as such appeals are brought within the above-mentioned three-week time period).

⁸ In Sweden, a state authority may submit its own bid in a public procurement that it has initiated itself.

4.2 *The difficulties of applying general antitrust rules in the public sector*

The SCA has enforced, and will continue to enforce, the general antitrust rules contained in the Competition Act and the EC Treaty *vis-à-vis* public entities but has faced certain difficulties in the past when applying these rules in the public sector, including the following:

- **Is the entity an undertaking?:** Despite extensive case law on how the notion of an ‘*undertaking*’ under certain circumstances can cover also public bodies for the purpose of competition law, it may in some instances be difficult to ascertain whether a public entity constitutes an ‘undertaking’ (e.g. certain areas and aspects of health care).
- **Outside rules on anti-competitive agreements:** The anti-competitive effect of public intervention in the market is rarely the result of public bodies having concluded an anti-competitive *agreement* with other undertakings, thus bringing it outside the scope of §2:1 of the Competition Act and/or Article 81 of the EC Treaty (“Article 81”).
- **Is there dominance?:** It might be argued that the unique position that a public entity holds on a market (i.e. tax funding, not having to consider the threat of bankruptcy, etc.; cf. Section 4.1 above) suggests the very independence described in the definition of ‘dominance’.⁹ Moreover, public undertakings that are granted special/exclusive rights by the state can become dominant through such rights. However, it may still be difficult to demonstrate ‘dominance’ as defined in case law under Article 82 of the EC Treaty (“Article 82”) and/or §2:7 of the Competition Act, particularly before national Courts, who may be reluctant to accept an interpretation of dominance, which is broader than expressly stated in case law.¹⁰
- **Is there an abuse?:** In the event that dominance *can* be demonstrated, it may be difficult to establish whether that position has actually been *abused*:
 - An abusive intention may be hard to establish in the case of conduct by a public entity which does not have a profit motive.¹¹
 - In cases concerning either excessive pricing or predatory pricing, it may be very challenging to calculate the relevant capital cost incurred by the entity in question.

⁹ I.e. “...the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers”; see e.g. Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 65; Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 38.

¹⁰ E.g. the European Commission is trying not to apply a too rigid view of dominance that would focus solely on market shares (see e.g. Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings) but it may still prove difficult to demonstrate dominance in cases where the undertaking in question holds a market share well below 40-50%.

¹¹ E.g., the Prime Cost principle (see above) often results in prices being charged at such a low level that private undertakings find it difficult to compete. Thus, although the prices may not necessarily be below cost and the intention of the public entity may not be to eliminate competition, the anti-competitive effect may in some cases be similar to that of predatory pricing by a dominant undertaking. However, because the price is not set below cost and/or the intention of the entity in question is not “predatory”, as defined in case law, these provisions would not be applicable on the conduct in question.

4.3 *The proposed legislation and scope*

Given the above background and the difficulties in applying the general antitrust rules to public entities' distortions of competition, the Swedish Government has in its Bill, issued on 19 August 2009, proposed that specific rules are adopted to ensure competitive neutrality between the public and private sector.

The key provisions, proposed to be incorporated into the Competition Act and to come into force on 1 January 2010, state the following:

[Ch.3 §27] The state, a municipality or a county council may be prohibited from carrying out a certain conduct, in the context of offering goods or services, if this

distorts, by object or effect, the conditions for effective competition on the market; or

impedes, by object or effect, such competition from occurring or developing.

A prohibition may not be imposed in relation to conduct that is justifiable on public interest grounds.

A municipality or a county council may be prohibited from carrying out a certain activity, in the context of offering goods or services, in cases considered in the first paragraph. However, such an activity may not be prohibited if it is compatible with law.

A prohibition is immediately enforceable, unless otherwise decided.

[Ch.3 §32] Cases concerning prohibitions [...] are tried by the Stockholm District Court on application by the Swedish Competition Authority. Pleadings concerning a re-examination of an issued prohibition may also be brought by the entity against whom the prohibition has been imposed.

If the Swedish Competition Authority as regards a certain case decides not to apply for a prohibition [...], the undertaking affected by the conduct or activity in question may apply for a prohibition to be imposed.¹²

This prohibition is a *complement* to the two general antitrust prohibitions, i.e. on anti-competitive agreements and abuse of a dominant position, which of course both remain applicable *vis-à-vis* public entities (see also below, Section 5). In the event a certain conduct or activity which distorts or impedes competition affects the trade between EU Member states and, hence, falls within the scope of Article 81 and/or Article 82, those provisions will be applied in accordance with EC Regulation 1/2003.¹³

For this proposed “third prohibition” to be applicable, a number of criteria need to be met. At the same time, there are some important differences to the criteria in Articles 81 and 82 and their national equivalents in the Competition Act:

¹² This is not an official translation of the proposed legislation.

¹³ See Article 3, Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

Group of criteria	The proposed provision	Article 81 / Competition Act §2:1	Article 82 / Competition Act §2:7
Possibility to prohibit future conduct ('cease and desist')	Yes	Yes	Yes
Possibility of imposing penalties (fines, etc.)	No	Yes	Yes
Entity	Public entity (state, municipality or county council) offering goods or services	Undertakings (public <i>or</i> private)	Dominant undertaking (public <i>or</i> private)
Type of action	Conduct (state, municipality or county council) or activity (municipality or county council, i.e. <i>not</i> state)	<i>Agreement</i> or concerted practice	<i>Abusive conduct</i>
Effect on competition	Distorts or impedes competition, by object or effect	<i>Prevents, restricts or distorts</i> competition, by object or effect	Effect on structure of competition; or no effect ¹⁴
Market impact	Conduct/Activity of some ' significance '	De minimis (10/15% market share), unless hardcore	
Exception	Compatible with law or justifiable on public interest grounds	Individual or block exemption (Art. 81.3) ¹⁵	(Objective justification)

4.3.1 Sanctions

The proposed new legislation will apply to **future** conduct in the sense that no penalties can be imposed for *past* conduct or activities. The prohibition will instead apply to the future, similar to the 'cease and desist' obligation in cases concerning Articles 81 and 82, and a violation of such a prohibition decision can be made subject to a fine.

¹⁴ Cf. European Commission decision of 20 July 1999, Case IV/36.888, *1998 Football World Cup*, OJ 2000 L5/55, para. 100, i.e. "Article 82 can (...) be applied (...) to situations in which a dominant undertaking's behaviour direct prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition". Although "the application of Article 82 often requires an assessment of the effect of an undertaking's behaviour on the structure of competition (...), its application in the absence of such an effect cannot be excluded."

¹⁵ I.e. economic or other benefit; fair share of benefits for consumers; indispensability of restriction; and no elimination of competition.

4.3.2 Entity

As mentioned above, when applying §§2:1 and 2:7 of the Competition Act, which mirror Articles 81 and 82, vis-à-vis public entities, it may be difficult to ascertain whether a public entity constitutes an ‘undertaking’ for the purpose of these rules. This can, e.g., be due to the social aspects and the entity’s mix of commercial activities and tasks of a public authority. EC case law has confirmed that one and the same entity can constitute an undertaking for the purpose of the antitrust rules insofar as an activity is economic in nature, whilst as regards tasks typical of state authorities, the entity would be considered as a public authority. However, the process of ascertaining which activity of a public entity’s operations that is commercial and which one that is not can be onerous and raises challenges to applying the general antitrust rules effectively vis-à-vis public entities.

The current proposal will apply to **public undertakings** and the notion of undertaking still follows the established definition in competition law, i.e. the key criterion is the economic *activity*, not the legal status of the entity or the way in which it is financed. However, the wording of the provision further *clarifies* that it applies to the *state, county councils and municipalities* when engaging in the *offering of goods or services*, as well as companies controlled by the state, county councils and municipalities. Thus, although *purchasing* activity is not covered¹⁶, it removes any doubts as to whether the rule applies to a *public* entity, which in some cases may exist when applying the main antitrust rules. Moreover, there is *no* requirement to demonstrate that the entity in question holds a dominant position, as in Article 82 cases.

4.3.3 Type of action

The type of actions covered by the proposed rules will concern “*conduct*” and “*activities*”.

‘**Conduct**’ for the purpose of the proposed rule covers both actual *actions* and a *failure* to act. The conduct can be ongoing; have ceased; or be planned and likely to occur. Examples of conduct that may be covered are listed above in Section 4.1 (see also below, Section 4.3.4).

Municipalities or county councils may also be prohibited from carrying out an **activity**, consisting of offering goods or services, if that activity (i) distorts, by object or effect, the conditions for effective competition on the market; or (ii) impedes, by object or effect, such competition from occurring or developing. However, it follows from the wording that, although state *conduct* when offering goods or services can be prohibited (as explained above), state *activities* cannot.

In order for conduct/activities by a public entity to be prohibited under the proposed rule, there is *no* requirement to establish an *agreement* or concerted practice, as in Article 81 cases.¹⁷

4.3.4 Effect on competition

In each case, the SCA will assess whether the conduct/activity is harmful to the conditions for competition or alters the structure of competition. The substantive test of the new rule is proposed to cover certain conduct or an activity that:

¹⁶ The scope is therefore somewhat narrower in that respect than the definition of ‘undertaking’ in EC case law, which may cover *some* purchasing activity; cf. Case C-205/03P *FENIN v Commission* ECR [2006] I-6295; Case T-319/99 *FENIN v Commission* ECR [2003] II-357.

¹⁷ Indeed, further to Article 3 of Regulation 1/2003, the proposed rule would not be applicable in a case concerning an anti-competitive agreement that affects trade between Member states.

- **distorts**, by object or effect, **conditions** for effective competition on the market (§27, para. 1(1));
or
- **impedes**, by object or effect, such competition from **occurring** or **developing** (§27, para. 1(2)).

As regards **distortion** of conditions for effective competition in the first tier of the test, this takes aim at situations where *existing* competition is not on as equal terms as possible; e.g., a public entity benefiting from unjustified advantages as a result of having a role as an authority parallel to its commercial role in the market. Typical instances of distortion include below-cost selling, discrimination and refusal of access to certain infrastructure.

As is clear from the above, **impeding** the occurrence or development of effective competition is potentially wider than the scope of e.g. Article 81 (i.e. “...*prevention, restriction or distortion of competition*...””) and takes aim at situations where the private alternative exits the market, or does not even enter the market, as a result of the conduct. It also covers instances where the expansion or development of private undertakings is hampered by the conduct. Examples could include situations where the mere presence of a public entity makes it more difficult for a private undertaking to expand or creates a barrier to entry; so-called foreclosure effects.

It should be noted that the Bill does not contain any list of conduct or activities that would be considered as distorting or impeding competition *per se*, such as in Article 81. Each case will therefore need to be assessed individually on its merits.

4.3.5 *Market impact*

According to the Bill, the competition distortion/impediment resulting from the conduct/activity in question must be of some significance. However, the preparatory works to the proposed legislation do not provide any further guidance on the level of market impact required to meet the ‘significance’ test (e.g. a particular market share below which the conduct/activity would be regarded as falling outside the scope of the provision similar to the “*de minimis*” test under Article 81).¹⁸ Hence, it is expected that this will be developed through case law.

4.3.6 *Exception*

The following conduct/activities may not be prohibited:

- *Conduct* that is found to be justifiable on **public interest** grounds; and
- *Activities* carried out by county councils or municipalities which are compatible with **law**.

The scope of this justification is somewhat wider than the exception set out in Article 81(3) of the EC Treaty in that there is (a) no explicit requirement to demonstrate a fair share of the benefit for consumers (although that may be considered as covered by “public interest” as regards certain conduct); and (b) no requirement to demonstrate that competition is not eliminated as a result of the conduct/activity.

However, when assessing whether certain *conduct* is justifiable on public interest grounds or not, it should be considered whether the public interest objective can be attained by other less restrictive means. If they can, the conduct cannot be considered justifiable on public interest grounds. Moreover, if the

¹⁸

Cf. European Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) (*de minimis*), OJ 2001 C368/13.

conduct harms competition, the alleged reasons for a justification must have certain weight and importance. This means that the principle of proportionality applies, i.e. in order to justify conduct with more severe anti-competitive effects, the reasoning to support the alleged public interest must be all the more substantiated.

The justification assessment should in particular take into account whether the conduct is in breach of other laws or regulations, e.g. the LGA. When a conduct is a direct and intended effect of specific regulations, or is an inevitable result of such regulations, it will be considered justifiable on public interest grounds. E.g. as regards conduct covered by Article 82 but considered compatible with Article 86, the conduct in question would generally be considered justified on public interest grounds. A justification assessment shall also take into account whether the motives of the conduct were external, i.e. the public need for the public offering of goods/services; or internal, i.e. concerning the entity's own interests, e.g. to keep employees. External motives may be considered as justifiable on public interest grounds, whilst internal may not.

If an *activity* carried out by a municipality or a company owned by a municipality is compatible with the LGA it shall be considered as justified on public interest grounds and, hence, cannot be prohibited. However, it should be noted that there is nothing preventing a prohibition being imposed on an activity carried out by a municipality, which is *outside* the scope of the powers allocated to municipalities in the LGA or related case law.

4.4 Monitoring and enforcement

The monitoring and enforcement of the proposed rules, if adopted, will be the responsibility of the SCA, who decides whether to apply to the **District Court** for an injunction to prohibit the conduct/activity in question. The prohibition decision can be made subject to a fine.

The SCA can make the above application either at its own initiative or further to a complaint having been lodged. The District Court may, where there are special reasons, also adopt an interim decision to prohibit certain conduct/activity.

However, should the SCA choose not to bring a case before the District Court, an **undertaking affected** by a certain conduct or activity will have standing before the Market Court to apply for a Court order prohibiting the conduct/activity in question.

This means that a prerequisite for undertakings affected by the conduct/activity in question to have *locus standi* is that an SCA decision *not* to investigate the complaint has been issued.

A judgment by the District Court can be appealed to the Market Court in accordance with the Competition Act, §7:2.

5. Competition law enforcement and public entities

In addition to applying the proposed new rules, the SCA will continue to enforce the following legislation *vis-à-vis* public entities, as and when applicable:

- the general antitrust provisions in the Competition Act, i.e. §2:1 and §2:7; and Articles 81 and 82;
- the rules on public procurement, as contained in the Public Procurement Act, which is based on EC legislation; and

- the Transparency Act, which is based on the so-called EC Transparency Directive.¹⁹

However, as explained above (see Section 4.2), the SCA has faced some difficulties in applying the general antitrust rules in the public sector. The SCA therefore welcomes the new legislative initiative described above, which will provide the SCA with further tools to tackle these competition issues that often arise between public and private entities. It is the SCA's expectation that the new rules will have a preventive effect and discourage public entities from engaging in commercial activities. Practice will show how extensive the rules will prove to be and, e.g., how the "public interest defence" will be interpreted by the Courts.

¹⁹ Commission Directive 2006/111/EC on the transparency of financial relations between Member states and public undertakings as well as on financial transparency within certain undertakings, OJ 2006 L318/17.

TURKEY

1. Introduction¹

In international practice, state economic enterprises (SOE's) are generally defined as public undertakings which operate in economic area using public resources and described as undertakings whose capital or management control is under central or public administrations. For instance, the regulations of the European Union² of which Turkey continues membership negotiations, approaches state enterprises with respect to capital and management control regardless of the difference between central or local administration.

There are differences arising from both legislation and applications in the concept of state owned enterprises in Turkey. There is neither a legislation nor an entity determining principles on all public enterprises nor an organization following and reporting activities of these enterprises in a consolidated form. Undersecretariat of Treasury and other public shareholders (Privatization Administration, Local Administrations, etc.) monitor the enterprises under their portfolio, but most of them do not prepare any reports concerning them (Undersecretariat of Treasury, (2007). Generally speaking, management control is not taken into account and the ownership of the capital is emphasized for the qualification of SOE's. In this respect, Turkish Constitution describes SOE's as "public establishments and partnerships in which more than half of the capital directly or indirectly belongs to the state." (Article 165).

Foundation of SOE's and their participations, and affiliates; procedures and principles related to foundation, operation, management and auditing of participations are regulated under a framework legislation (Decree Law No. 233). SOE's are defined, in the Decree Law No. 233, as undertakings whose whole capital is owned by the state and divided in two part such as "State Economic Enterprises" (SEE) and "Public Economic Institutions" (PEI)³, and the said institutions are listed one by one in the table in the Annex of the Decree Law.

The scope of the Decree Law No. 233 is determined more narrowly than the definition in the Constitution and SOE concept is built on 100% ownership of the State. There are public enterprises falling under the definition in the Constitution (enterprises where the state owns more than 50% of the capital) as well as institutions that are clearly defined as SOE in the Decree Law No. 233 (For instance public banks, the undertakings in privatization portfolio, enterprises owned by local administrations, and participations of other public bodies). Those enterprises are not regarded as SOE in the legislation as they are not under the scope of the Decree Law No. 233; however, they are public enterprises within the framework of the capital control principle in the Constitution.

¹ Joint Work by the State Planning Organisation and the Turkish Competition Authority.

² Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings

³ SEE's are profit-seeking enterprises that operate in economic field according to commercial principles (namely institutions operating in areas such as military equipment, electric generation, hard coal and lignite). PEI's are enterprises that produce and market goods and services that have monopolistic nature by taking into account the public interest (namely institutions operating in areas such as railways, electricity and natural gas distribution and transmission, coastal security, postal services, and airport services).

With respect to capital control, there are many public enterprises apart from the frame regulations determined by the Decree Law No. 233 (see, subsection 1). The establishment of those institutions are subject to different legal regulations. Moreover, there is not a uniform regulation on the management and auditing of all public enterprises in Turkey. Public bodies inspect the enterprises whose shares they own and a structure to coordinate and gather the data of all public enterprises has not been established.

SOE's under Decree law No 233 had been excluded from Public Procurement Law, auditing by the Council of State and public accounting regulations, and were operating as competing firms with the title of trader being subject to private law provisions since 1930's, when they were intensely established. In time, they have been turned into administrations that are subject to general administration and their competitiveness has been reduced by being subject to almost all of the legislation to which general administration is subject (for instance, the Law on Allowance, the Law on Vehicle, the Law on Public Procurement, etc.). Therefore, with respect to public finance, SOE's have begun to be treated like a general administration in many areas ranging from budgeting to employment policies. However, international developments provide for their disintegration from the general administration, autonomy and commercialization. SOE's experience certain problems due to the responsibilities arising from being regarded as an administration that is subject to general management, although they operate in economic area and mostly in competition. The main problems they encounter different from the competing private firms are given in Box 1.

Box 1. The Salient Problems of SOE's in Turkey

- **Pricing policy:** According to the legislation, managers of SOE's are able to determine the prices freely like a prudent trader. However, problems sometimes occur while applying the said provisions.
- **Duty losses:** Duty loss is defined as the sum of the amount which is constituted of the difference between the cost and the price when the prices of the goods and services produced by SOE's are determined below cost by the political authority; and the profit which the enterprise is deprived of because it cannot sell the said goods and services under market conditions. Duty losses are later paid to SOE's by the Treasury. In respect of duty losses, SOE's do not suffer from financial losses on the basis of accrual but they could experience financial inconveniences, as they cannot collect their receivables in cash in time.
- **Inflexible employment policy:** The fact that there are employees with different statuses such as public official, contract personnel, permanent worker, and temporary worker, and the wages are determined according to different legislation and practices complicates active and dynamic management of human resources. Therefore, SOE's are not as flexible as their competitors in employment, dismissal, wage policies and promotion, which are the basic elements of human resources management. Moreover, many public institutions are included in the employment process.
- **Investment:** The boards of directors of SOE's are not independent with respect to investment, which is the most important decision field of businesses and obligated to get certain permissions from different public agencies to make investment.
- **The Boards of Directors:** The current legal infrastructure does not allow for the convenient environment to implement corporate governance principles. According to the Decree Law No. 233, General Manager is the head of the board of directors at the same time. There are not clear criteria for membership and few existing criteria do not apply for all of the members. These create problems regarding qualifications and accountabilities of managers.
- **Auditing:** The legality and convenience of SOE's activities are audited and evaluated late. In addition, many institutions can carry out inspection and auditing. There is not an obligation for independent external auditing.

This fragmented audit structure leads to coordination failures and ineffective performance evaluation.

Source: Undersecretariat of Treasury (2007)

2. The management and auditing of SOE's

2.1 Types of SOE's

State enterprises and participations operating according to different laws in Turkey can be categorized under the following titles:

2.1.1 Central Administration

- SOE's and their affiliates whose capital is owned by the Undersecretariat of Treasury and which are subject to the Decree Law No. 233;
- Institutions which are mainly under the scope of the Decree Law No.233 but which are under the scope and program of privatization and whose shares are owned by Privatization Administration;
- Public banks whose capital is owned by the Undersecretariat of Treasury (Agricultural Bank, and Development Bank);
- Enterprises whose capital is owned by Undersecretariat of Treasury partly or wholly but which are not subject to the Decree Law No. 233 (such as Türksat Satellite Communication and Cable TV Operating Inc.);
- Participations of other public institutions (participations of Housing Development Administration, Savings Deposit Insurance Fund, Social Security Institutions)

2.1.2 Municipalities

- The enterprises and participations that are established and operated to carry out services in a more flexible and easy way and that belong to municipalities (Municipality Owned Enterprises, thereafter MOE's).

2.2 Establishment

SOE's that are under the scope of the Decree Law No. 233 are established with a decision of the Board of Ministers. Economic needs are taken into account in the establishment of a new enterprise. The board of directors and senior management of SOE's are appointed by a common decision (the prime minister and the president) upon the proposal of the related minister. Professional and administrative expertise with respect to the field of the enterprise is required for the appointment to senior management.

2.3 Auditing

The auditing of SOE's is made by Turkish Grand National Assembly (TGNA) depending on the file in principle within the frame of the reports of the Supreme Audit Board (SAB). Auditing by the SAB, which is the first and technical stage of the auditing by TGNA, is made on-site. SAB makes financial, administrative and technical auditing to SOE's in line with their aim of establishment. TGNA analyses the situation of the institutions to be audited in respect of the compliance of their activities to the legislation, long-term development plan and implementation programs of the plan in order to ensure that they attain

their aim of establishment in an autonomous way, via being directed parallel to efficiency and profitability principles.

Besides being commercial entities, SOE's are included in public administration. Therefore, auditory agencies that have general auditory powers on public administration have also auditory powers on SOE's. State Supervisory Council of the Presidency, Prime Ministry Inspection Board, and Ministry of Finance Inspection Board are examples of such organs. Auditing by those organs are not periodic but made whenever needed. Public banks that are at SOE status are audited periodically by Sworn Auditors' Board. SOE's, as commercial entities, are subject to general administrative regulations and inspections (for instance Turkish Code of Commerce and Tax Laws) to which other commercial institutions are subject. Also some institutions, particularly the Prime Ministry, the Undersecretariat of State Planning Organization and the Undersecretariat of Treasury, have some authorizing, regulatory, controlling and restrictive monitoring powers over SOE's in subjects such as investment, funding, pricing and employment.

To some extent, supervision of the TGNA helps in improving the accountability and performance of the SOE administrators. Similar to other private companies, principles and procedures related to the organizational administration of public banks and of participations of other public institutions are regulated and supervised within the scope of the provisions of the Turkish Code of Commerce (TCC) and of sectoral regulations such as banking and electricity legislations. However, the public banks and other participations, the administration and supervision of which are regulated and controlled under TCC provisions, are not evaluated comparatively in terms of their performances. Moreover, there are significant uncertainties concerning the administrative performances, supervision and accountability of the MEE's which fall outside of the TGNA supervision.

Within the framework of improving financial transparency and accountability, Public Financial Management and Control Law (PFMCL, No. 5018) specifies regular monitoring and reporting of public accounts, which includes the accounts of public institutions and organizations under the general administration as well as those of public enterprises. The aforementioned Act also allocates responsibilities among various public administrations. As stated above, there are many enterprises whose shares are held by the central government or local governments. However, these public enterprises are exempt from the scope of PFMCL. Within this framework, since there are no regulations or authorities that specify principles for all public enterprises, there are no institutions that monitor and report on the operations of these enterprises in a consolidated manner, either. The Undersecretariat of Treasury and other shareholders only monitor those enterprises which fall under their own portfolio. However, most of the shareholders do not issue any reports on their participations⁴.

2.4 Assessment

Where the supervisory authority does not establish targets for the relevant institution to achieve in a certain period of time, accountability becomes a unilateral transaction which never gets beyond a review of expediency. As stated above, there are uncertainties concerning the method of accountability for SOE's and MEE's which fall outside the scope of SAB audits. For this reason, it is difficult to determine the overall actual performance of the whole SOE system (Köseoğlu, 2005).

⁴ In order to overcome these problems, the Undersecretariat of Treasury has started to publish an encompassing Public Enterprise Reports in 2006 and 2007 (for full texts of these reports, please see treasury web site, www.treasury.gov.tr). These reports aims at including all enterprises which operate in Turkey and which may be broadly described as SOE's. However, they have still insufficient information regarding the actual performances of MEE's.

The functions and powers various institutions have over the administration, operation and control of SOE's on one hand reduce elasticity and cause delays in the decision-making processes and on the other reduce accountability and transparency due to the fact that this situation allows more than one institution to interfere in the decisions. As a result of interventions by different institutions SOE's are given more than one purpose and multi-purpose business administration leads to these institutions operating in a non-productive and instable way. In the past, SOE's were used to support selected social classes and sectors, to complement private sector in investments by investing in areas where private sector could not due to insufficient capital and organization, and provided employment for large masses of people (Özkan, n.d.). As a result of these non-commercial policies, the SOE system began to incur losses in 1990s. While the total profit of the SOE system within GDP was 0,36 % in 1985, this amount fell to 0,07 % in 1989. The SOE system suffered losses in 1990s, but returned to profitability in 2000s because of the policies implemented which aimed at increasing productivity. However, the share of the total profits of the SOE system within GDP never found the level it enjoyed in 1980s, always staying below 1%.

SOE's have been able to continue their operation without interruptions in spite of interventions by many institutions in their administration and control process, with sometimes non-commercial priorities. This is due to the fact that they have very soft restrictions on their budgets. In principle, public enterprises do not have an advantageous position in tax regulations and in accessing funding. However, due to the state aids they receive in the form of direct transfers, capital contributions and consolidation of debts, state enterprises do not feel the pressure of market discipline and bankruptcy. On the other hand, SOE's are held *de facto* exempt from the control of some regulations in practice, because of some special duties assigned to them. For instance SOE's were used as a support mechanism in sectors such as energy, agriculture and housing and consequently suffered duty losses. State enterprises which had failing financial structures due to duty losses were subjected to looser public regulations than private undertakings operating in the same sector. The best example to this would be the duty losses of the public banks, which were among the triggering factors for the 2000-01 crisis. The rapid erosion of the capital adequacy ratio of public banks, who did not receive the payment for their duty losses incurred in 1990s in time and whose financial structures were increasingly deteriorating, were tolerated by regulatory and supervisory bodies (Hoekman and Togan, 2005)⁵.

3. Competitive neutrality policies

As previously mentioned in the contribution of Turkey to the OECD Competition Committee, there is no separate competitive neutrality policy in Turkey. However, other policies and regulations implemented for public enterprises make significant direct and indirect contributions to competitive neutrality policies (Turkey, 2004). It is possible to group the practices, which contribute to competitive neutrality policies under three categories:

- Liberalization and privatization;
- Commercial Considerations;
- Commercial Incorporation

⁵ The Undersecretariat of Treasury, which is the owner of public banks, was in charge of regulating and supervising the banking sector until 2000. The Treasury had a conflict of interest due to its ownership status and its supervisory powers, and this prevented an efficient control of public banks by the Treasury.

3.1 *Liberalization and privatization*

Even though privatization policies are on Turkey's agenda since 1980s, efficient implementation started after the 2000-01 financial crisis. In the period after 2000-01 crisis, privatizations are not seen only as sources of income, and significant liberalization was introduced in sectors such as infrastructure and agriculture in particular, where SOE's were a significant factor. Within the framework of these liberalization policies, relevant sectors were opened to competition, independent agencies charged with the regulation and supervision of the sector were created and it was ensured that public and private undertakings would be operating under equal conditions within the sector.

In this regard, the Eighth Five-Year Development Plan identified following policy priorities, concerning public enterprises and privatization implementations (State Planning Organization, 2000):

- Direct intervention by the state in economy will be limited as much as possible within the framework of privatization policies, and principles of efficiency and productivity will be followed in the performance of functions carrying the nature of public services. Enterprises that are left out of the scope of privatization will be restructured so that they can operate autonomously.
- Privatization strategy will be based on large public support, negotiation and the transparency of the privatization process.
- In order to attain the goals expected from privatization, liberalization will be introduced in the sectors such as transportation, communication and energy where public capital is a determining factor, with continuing regulations aimed at ensuring private sector participation. In sectors such as communication and energy which are opened to private sector participation, all structural regulations required in order to protect consumer rights and create competition will be ensured via independent regulatory authorities.
- Capital markets will be utilized in privatization applications to ensure a large base for the capital.

Between the years 1985 and 2009, the total of privatizations amounted to \$38.2 billion. In the 24 years from 1985, when the privatization practice was initiated, to 2009, more than half of the institutions included within the scope of the process have been privatized⁶. To date, all production units have been fully privatized in sectors such as dairy products, animal feed industry, tourism, cement and forestry products and the state has withdrawn from the market as an operator in these sectors. State ownership and effect on sectors such as iron-steel, telecommunications, electricity generation, petroleum and port operation have been reduced. As a result of privatization implementations, the share of gross sales of SOE's in GDP has fallen from 28% in 1985 to 8% in 2007. This ratio is expected to fall further to 3% in 2013 (Privatization Administration, 2009).

Within the framework of privatization efforts, and liberalization policies, public enterprises in the manufacturing industry have been mostly privatized, and private undertakings have been given the opportunity to freely operate in these sectors. As a result the share of public enterprises in manufacturing

⁶ While some undertakings within the scope of the privatization process were rapidly privatized, some others have been waiting for long years. However, in those undertakings, which have been under the scope of privatization, productivity and workforce motivation are observed to fall. Especially for those institutions under the scope of privatization which operate in sectors open to competition, rethinking administrative approaches and reformulating financial structures in line with profitability targets are necessary (State Planning Organization, 2004).

industry has been significantly reduced. Applications of liberalization and privatization in infrastructure sectors are underway. Necessary regulations have been implemented in energy, telecommunications, air transportation, tobacco and sugar beet sectors so that markets are transformed into a competitive structure and regulated and audited in this context. Efforts of restructuring, opening to competition and forming the regulatory structure of the public-operated postal services and railroads are underway.

Even though privatization and liberalization policies are implemented and steps are taken to improve the supervisory system for the SOE's, there are still some practices that give SOE's an advantage over the private sector. In this framework, practices such as duty losses as mentioned above may distort the cost structure of the SOE's as well as give them a competitive edge over private enterprises. Duty loss practices whereby a certain SOE is chosen and that enterprise is enabled to sell its products without having to search for a customer appear as one of the commercial advantages given to SOE's. While SOE's are provided with significant support in regard to marketing activities through duty loss practices, they could also receive additional financing support with duty loss payments in the form of advance payment in some cases.

3.2 *Commercial considerations*

Various saving measures were implemented following the 2000-01 crisis in order to ensure that SOE's work more productively and their financing deficits are reduced. An important factor that distorts the financing structure of the SOE's and functioning of the markets is the advantageous prices offered to the selected social groups. As of 2002, applications of discount and free-of-charge rates to privileged persons and institutions were finalized. On the other hand, Various measures were taken to reduce employment expenditures, which take up a significant place within the SOE costs. Employment expenditures, the share of which within the total costs is large, affect the competitive power of SOE's negatively. With regulations made within the framework of employment policies, only a certain percentage of the vacant positions created by the staff members that left workplace during the previous year were allowed to be refilled. As a result of the incentivized retirement policy applied during 2002-04 in order to reduce employment, a significant number of staff members left workplace (Ministry of Finance, 2008). As an outcome of these practices, the share of personnel expenditures within the gross sales revenues of the SOE's declined from 17% in 2000 to 11% in 2004.

Policies developed in official documents in order to ensure that SOE's function efficiently under commercial conditions are as follows in general terms (State Planning Organization, 2008):

- All business policies of the SOE's, especially costing and pricing, shall be determined in accordance with the market conditions and be effectively implemented, so that the objectives foreseen in the general investment and financing decrees are attained.
- A financing policy that is sensitive to international price changes and that reduces the costs of stock, supply, production and marketing, and thus increases productivity and efficiency shall be followed.
- In the utilization of the idle immovables of the SOE's, market price shall apply.
- Those business units of SOE's that are at a loss shall be brought to a solution, also taking account of their functions.
- Measures aimed at reducing idle employment in SOE's shall be continued and necessary measures shall be taken towards meeting the need for qualified staff only.

3.3 *Commercial incorporation*

Another method to ensure that SOE's operate under competitive market conditions and in conditions that are similar to those of private enterprises, is for them to be organized in the form of incorporated companies. In case of incorporated companies, there are two different structures. In the first structure, there are no boards or auditors which are the main elements of accountability in the structure of incorporated companies. The main reason why these undertakings are organized in the form of incorporated companies is to be able to sell at least a portion of their shares within the scope of privatization. Undertakings which were transformed into incorporated companies –for instance, Türkiye Elektrik Üretim A.Ş. (Turkish Electricity Production Inc.) and Türkiye Elektrik Dağıtım A.Ş. (Turkish Electricity Distribution Inc.)– are audited by the Turkish Parliament.

In the second structure, management and auditing of public enterprises that are transformed into incorporated companies are carried out within the framework of the regulations under the Turkish Code of Commerce (TCC), in a similar way to private enterprises. In this framework, for instance public banks that formerly had SOE status (Ziraat Bank, Halk Bank and Emlak Bank) were transformed into incorporated companies within the scope of TCC provisions. Under TCC provisions, managerial and auditing organs of public banks are elected by their boards. Public banks are also audited by independent auditing institutions⁷.

TCC regulates the governance structure of companies that are not open to public. Whereas, governance structure of companies that are open to public are regulated and audited within the framework of the capital market legislation. Governance structure of institutions such as Turkish Airlines and Halk Bank which are within the scope of privatization and shares of which are partially sold on the stock exchange by public offering is audited by the Capital Market Board.

4. **What needs to be done**

Arrangements made for the purposes of liberalization, privatization and productivity contribute to the corporate governance of SOE's and to competitive neutrality, to a great extent. However, besides their benefit, repetitions and gaps created by these fragmentary regulations may cause inconsistency in the management and activities of SOE's as well as distort their financial structure. In this regard, considering public enterprises, efforts are underway to provide institutions with performance objectives for the enhancement of corporate governance practices, to increase the accountability and efficiency of management, and to allow for performance and financial auditing by external auditors.

For the implementation of principles of corporate governance in public enterprises and increasing the productivity of public enterprises within this framework, the following strategic steps are aimed to be taken (Undersecretariat of Treasury, 2007):

- Adopting the legal regulation and secondary legislation to ensure the implementation of principles of corporate governance, in cooperation with the relevant institutions;

⁷

Having reviewed Turkey's corporate governance structure, OECD (2006) states that TCC's current provisions are insufficient for corporate governance and should be improved. In this respect, new TCC bill which changes the current structure wholly is still on the agenda of the Turkish Parliament. Draft TCC Bill aims at enhancing transparency, responsibility, accountability, and objective equity, which are indispensable factors of corporate governance.

- Forming an index to measure and develop the compliance levels of public enterprises with principles of institutional governance⁸;
- Putting forth efforts for analysis of current situation at public enterprises and preparing reports for the reconstruction of these enterprises;
- Preparing sector reports which also include suggestions for the functioning of markets where public enterprises that have importance in their respective sectors operate;
- Transfer of the infrastructure for monitoring public enterprises to an electronic format.

At the same time, spreading an understanding of strategic management is aimed at through the determination of missions, visions, strategic goals, main principles and policies, and objectives and priorities, by SOE's, with a mid- and long-term perspective. "Procedures and Principles for the Preparation of the Strategic Plans of State Economic Enterprises" have been drawn out by the State Planning Organization. Strategic planning is presently implemented at a pilot level. Strategic plan preparations for all SOE's for the period 2010-2014 are underway.

⁸

For an index development attempt to measure the performance of SOE's in Turkey, see Köseoğlu, (2005).

REFERENCES

- Hoekman, B.M. & Togan, S., editörler, (2005). *Turkey: Economic reform and Accession to the European Union*. World Bank ve Centre for Economic Policy Research: Washington D.C.
- Köseoğlu, M. A. (2005). *Kamu İktisadi Teşebbüslerinde Performans Ölçümü, [Performance Measurement in State Economic Enterprises]*. DPT Uzmanlık Tezleri: Ankara.
- Ministry of Finance, (2008). *2009 Yılı Bütçe Gerekçesi [Budget Reasoning for the Year 2009]*. Available from www.bumko.gov.tr, [Accessed September 8, 2009].
- Privatization Administration,, (2009). “Türkiye’de Özelleştirme” [Privatization in Turkey]. Available from www.oib.gov.tr, [Accessed September 9, 2009].
- OECD, (2006). *Corporate Governance in Turkey: A Pilot Study*. Paris.
- Özkan, M. (n.d.). “Kamu İktisadi Teşebbüsleri’nin Tabi Olduğu Mevzuat ve TBMM’nce Denetlenmesi Hakkında Mevzuatla İlgili Not”. Yüksek Denetleme Kurulu, Available from www.ydk.gov.tr/egitim.htm, [Accessed September 4, 2009].
- State Planning Organization, (2000). *Long Term Strategy and Eighth Five Year Development Plan (2001-2005)*. Available from www.dpt.gov.tr, [Accessed September 9, 2009].
- State Planning Organization, (2004). *2004 Yılı Programı [2004 Annual Programme]*. Available from www.dpt.gov.tr, [Accessed September 9, 2009].
- State Planning Organization, (2008). *Orta Vadeli Program 2009-2011. [Medium-Term Programme for 2009-2011]*. Available from www.dpt.gov.tr, [Accessed September 9, 2009].
- Turkey, (2004). “Note by Turkey”. Roundtable on Regulating Market Activities by Public Sector, OECD Competition Committee, Jun 7.
- Undersecretariat of Treasury, (2007). *Public Enterprise Report*. Available from www.treasury.gov.tr, [Accessed September 9, 2009].

UNITED KINGDOM

1. Introduction

This submission addresses the application of the UK competition regime to government involvement in markets¹. The UK competition authorities have a variety of tools available which can and have been applied to address government involvement in markets.

Government and markets are tightly linked. Markets do not exist independently of government, which has a legitimate role in intervening in and shaping them. Government also intervenes more widely in markets to achieve other policy goals and to correct market failures. The ways in which it chooses to do so are crucial to both the effectiveness of its interventions and their consequences.

With respect to government involvement in markets generally, sections of this paper draw on a report which the UK Office of Fair Trading (OFT) recently published on ‘Government in Markets: why competition policy matters – a guide to policy makers’². The report sets out the rationale for government intervention and the impact that government policy can have on markets. In addition, it sets out how interventions might be designed to minimise any distortions on competition.

In relation to the application of the competition enforcement rules to the activities of state-owned enterprises (SOEs), this submission focuses on the OFT’s jurisdiction to apply the competition rules governing anti-competitive agreements and abuse of dominance. The OFT’s competition enforcement powers allow it to address anti-competitive behaviour by both privately-owned enterprises as well as state-owned enterprises. The OFT can and does apply the competition rules governing anti-competitive agreements and abuse of dominance to both privately-owned enterprises and state-owned enterprises equally.

This submission also touches on the application of market studies³ and market investigation references (MIRs) to SOEs. These tools are particularly useful where the competition enforcement rules do not apply. The OFT has specific powers to provide advice and make proposals to the UK Government. Government has given a commitment to respond within 90 days to recommendations addressed to Government in market study reports from the OFT under these powers and to recommendations from the CC following a MIR when these authorities do not have the necessary powers of remedy themselves, for example where legislative change is recommended.

1.1 Background

Government and markets are tightly linked, as described in the OFT’s report on ‘Government in Markets’. Markets do not exist independently of government, which has a legitimate role in intervening in

¹ This paper addresses the application of antitrust law (ie rules on behaviour and conduct) and does not deal with merger control.

² The OFT report ‘Government in Markets: why competition policy matters – a guide to policy makers’ is available on the OFT website: http://www.offt.gov.uk/advice_and_resources/resource_base/guidelines/

³ OFT market studies are carried out under Section 5 of the Enterprise Act 2002 (EA02) which allows a market-wide consideration of both competition and consumer issues.

and shaping them. Government also intervenes more widely in markets to achieve other policy goals and to correct market failures.

Government intervention – both globally and nationally– has more recently been observed following the financial crisis and economic downturn. Since the onset of the crisis, governments across the world have recently intervened in markets more actively than in recent history. This may be attributed, at least in part, to a feeling that markets, left to their own devices, may not deliver efficiency and stability.

In the UK, Government has sought to minimise the impact of the financial crisis and the economic downturn on both consumers and business, and to promote economic recovery. The UK Government has intervened in markets by increasing its spending in large capital infrastructure projects (such as national broadband cables) and by increasing investment in innovation and education to secure future economic growth. More generally, governments around the world have also intervened to help their economy respond to longer term challenges, such as energy and climate change, through, for example, providing subsidies for renewable energy production.

Naturally, there are costs and benefits associated with any government intervention in a market. Potential distortions to competition may not be immediately visible and experience suggests it takes time for the full consequences of interventions to emerge and that anticompetitive measures can be very difficult to reverse.

The OFT, in its report, has identified the importance for policymakers– whose focus tends to be on the more short-term benefits than on the long-term costs– to consider *all* of the costs and benefits of a policy intervention.

The mission of the OFT is to make markets work well for consumers and the OFT has a variety of tools available to achieve this goal, as does the UK Competition Commission (CC). The OFT's competition enforcement powers which address anti-competitive behaviour by state-owned enterprises are discussed in the following section.

2. Competition enforcement: state-owned enterprises

This section discusses how the OFT would apply competition law, under the Competition Act and Articles 81 and 82 EC, to anti-competitive agreements involving or abuse of a dominant position by state-owned enterprises.

The OFT has powers to enforce Articles 81 and 82 in cases involving anti-competitive agreements and abuses of dominance affecting trade between EC Member States. This is in addition to its powers to enforce the UK Competition Act 1998 which applies to anti-competitive agreements and abuses of dominance with the potential to affect trade within the UK.⁴

2.1 Application of competition law: concept of 'undertakings'

The prohibitions of the Competition Act 1998 apply to enterprises (whether state-owned or privately-owned) in so far as the enterprise constitutes an 'undertaking' within the meaning of Articles 81 and 82 of

⁴ The Competition Act 1998 is also enforced by the regulators for communications matters, gas, electricity, water, railway and air traffic services (under section 54 and Schedule 10 of the Competition Act 1998). These regulators can exercise powers under the Competition Act 1998 concurrently with the OFT in relation to their respective sectors. In addition, these regulators also have concurrent powers to apply Articles 81 and 82 EC.

the European Community Treaty (EC) and the UK Competition Act 1998, which is modelled on Articles 81 and 82 EC. The application of the prohibitions is therefore neutral to the ownership of the enterprise.

Article 81 EC and section 2 of the Competition Act 1998 prohibit agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition. Article 82 EC and section 18 of the Competition Act 1998 prohibit conduct by one or more undertakings which amounts to an abuse of a dominant position. Such activities within the common market which may affect trade between Member States fall within Article 81 and/or Article 82 EC; activities which may affect trade in the UK, or part of the UK, fall within the section 2 of the Competition Act 1998 and/or section 18 of the Competition Act 1998.

The term ‘undertaking’ is not defined in the EC Treaty or the Competition Act 1998, but its meaning has been set out in case law.

2.1.1 *Engaged in an economic activity*

European case law defines the concept of an undertaking as any entity engaged in economic activity, regardless of its legal status or the way it is financed.⁵

It is the offering of goods or services on a given market that is the characteristic feature of an economic activity.⁶ State-owned enterprises engaging in economic activities can be undertakings for these purposes⁷ as well as quasi-governmental bodies which carry on economic activities⁸.

When the State acts as an undertaking, the OFT can and does apply the competition rules governing anti-competitive agreements and abuse of dominance. The text box that follows provides a recent example.

Box 1. Cardiff Bus⁹

In 2008, the OFT found that a publicly-owned bus company (Cardiff Bus) – owned by a local authority – had engaged in predatory behaviour designed to eliminate a competitor.

The OFT considered that the publicly-owned bus provider Cardiff Bus competed directly with commercial bus providers and as a result was engaged in an ‘economic activity’. On this basis, the OFT considered that Cardiff Bus constituted an ‘undertaking’ for the purposes of the Competition Act 1998.

Cardiff Bus had responded to the introduction of a new ‘no-frills’ bus service by another bus company, 2 Travel, by introducing its own no-frills bus services which ran on the same routes, at similar times as 2 Travel’s services and made a loss for Cardiff Bus. Shortly after 2 Travel’s exit from the market Cardiff Bus withdrew its own no-frills services. The OFT concluded that Cardiff Bus had infringed the prohibition imposed under the Competition Act 1998 by engaging in predatory conduct which amounted to the abuse of its dominant position in the relevant markets.

⁵ Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR I- 1979.

⁶ Case C-180/98 etc *Pavlov* [2000] ECR I-6451, [2001] 4 CMLR 30, para 75.

⁷ See Case 155/73 *Sacchi* [1974] ECR 409, [1974] 2 CMLR 177; Case 41/83 *Italy v Commission* [1985] ECR 873, [1985] 2 CMLR 368.

⁸ See Case 258/78 *Nungesser KG v Commission* [1982] ECR 2015, [1983] 1 CMLR 278.

⁹ See Decision of the Office of Fair Trading No CA98/01/2008 (Case CE/5281/04): http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/cardiffbus.

In addition, the DG of Fair Trading (now OFT) has investigated Companies House¹⁰ (an executive agency of the UK Department for Business, Innovation and Skills) which is required by statute to maintain a register of information about companies but which also acts commercially in the markets for the provision of information.¹¹ The OFT considered that Companies House was acting as an undertaking for the purposes of the Competition Act 1998 in the market for the supply of refined data products¹², in that it had competed directly in that market, but concluded that it had not breached competition law.

This case also exemplifies that the State may be an undertaking for some activities, where the activity is of an economic nature, and not for others. Another example of this in the UK is the provision of health care by the National Health Services (NHS). The NHS ensures that all citizens have access to healthcare. Where NHS bodies generate private patient income through commercial or economic activity, in respect of those activities they would constitute undertakings under the Competition Act 1998 and/or Articles 81 and 82 EC. However, the provision of non-commercial health services would not constitute commercial or economic activity, as is further explained below.

2.1.2 *The concept of solidarity*

The European courts have, however, carved out an exception to the general rule that the provision of goods or services constitutes an economic activity: where the provision of goods or services takes place in the context of performing an exclusively social function, this does not constitute economic activity. The prohibitions in the UK Competition Act 1998 against anti-competitive agreements and abuses of a dominant position, and Articles 81 and 82 EC, will therefore not apply to state-owned enterprises that are performing an exclusively social function.

In determining whether the provision of goods or services is a purely social function the European courts have typically looked to whether there is some element of 'solidarity' in the manner in which goods and services are provided. Solidarity was defined by Advocate General Fennelly in *Sodemare v Regione Lombardia* as the 'inherently uncommercial act of involuntary subsidisation of one social group by another'¹³. In *Poucet v Assurance Générales de France*¹⁴ for example, the ECJ held that regional social security offices administering insurance schemes were not acting as undertakings but were acting according to the principle of solidarity and were therefore exempt from the application of competition law.

The European courts have generally required that the activity in question have also a non-profit making character or can be characterized as having a social function, even where the entity levies some form of charges¹⁵.

2.1.3 *Activities connected with exercising of the powers of a public authority*

Although it is clear that state-owned enterprises may qualify as 'undertakings' when engaged in economic activity, the ECJ has held that an entity would not be pursuing economic activity where it acts in

¹⁰ See the OFT website for further details on this case: http://www.oft.gov.uk/shared_of/ca98_public_register/decisions/companieshouse.pdf

¹¹ OFT decision of 25 October 2002, [2003] UKCLR 24.

¹² The OFT did not assess the other activities of Companies House.

¹³ [1997] ECR I-3395, [1997] 3 CMLR 591, para 29.

¹⁴ Case C-159/91 and 160/91 [1993] ECR I-637.

¹⁵ Joined cases *AOK Bundesverband* C-264/01, C306/01, C-354/01 and C-355/01 judgment of 16 March 2004.

the exercise of official authority in so far as it is pursuing ‘a task in the public interest which forms part of the essential functions of the State’ and where that activity ‘is connected by its nature, its aim and the rules to which it is subject with the exercise of powers...which are typically those of a public authority’.¹⁶

For that reason, in *SAT Fluggesellschaft v Eurocontrol*¹⁷ the ECJ concluded that Eurocontrol was not acting as an undertaking when it created and collected route charges from users of air navigation services.

2.1.4 Purchasing activities

The scope of the application of the competition rules to state-owned organisations, both as a purchaser of goods and services and as a provider has highlighted principal differences between the UK and EC cases. This issue arose in *BetterCare Group v Director General of Fair Trading*¹⁸ which is discussed in the text box below.

Box 2. Bettercare

The OFT received a complaint from BetterCare Group Ltd (BetterCare), a UK provider of residential and nursing care that a UK Health and Social Services Trust, had abused its dominant position by offering unfairly low prices and unfair terms in its purchases of social care from BetterCare. The Trust provided residential and nursing care to the elderly both directly and through a private contractor. Whilst the Trust charged for its services, it did not recover its costs in full.

The OFT considered that the Trust was not an undertaking for the purposes of the Competition Act 1998 when engaging in purchasing activity. On appeal to the UK Competition Appeals Tribunal (CAT) in *BetterCare II* the CAT held that the Trust was acting as an undertaking, both in the purchasing of services from BetterCare as well as in the direct provision of care.¹⁹ The CAT’s reasoning was that, in deciding whether the activity was economic in character, a key consideration was whether an entity is in a position to generate the effects which the competition rules seek to prevent.²⁰

However, the subsequent judgments of the CFI and ECJ cast some doubt on the CAT’s reasoning. In *FENIN v Commission* the Courts concluded that the nature of the purchasing activity had to be determined according to whether or not the subsequent use of the purchased goods is an economic activity.²¹ The CFI considered that where an organisation purchased goods, not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as an activity of a purely social nature, then it is not acting as an undertaking simply because it is a purchaser of those goods. This judgment was upheld on appeal to the ECJ²².

Clarification through further case law on the scope of the application of the competition rules to state organisations in this context may be needed in order to settle these differences.

¹⁶ Case C-343/95 *Cali e Figli* [1997] ECR I-1547, [1997] 5 CMLR 484, para 23.

¹⁷ Case C-364/92 [1994] ECR I-43, [1994] 5 CMLR 208.

¹⁸ Case No 1006/2/1/01 [2002] CAT 7, [2002] CompAR 299.

¹⁹ Ibid, paras 191-194.

²⁰ Ibid para 190.

²¹ Case T-319/99 *FENIN v Commission* paragraph 36.

²² Case C-205/03 P [2006] ECR I-6295, [2006] 5 CMLR 559, paras 25-26.

2.2 Conclusion

Whether the UK and EC competition prohibitions apply to an entity thus depends on whether the entity is engaged in economic activities and therefore can be categorised as an ‘undertaking’, or is not an ‘undertaking’ because the activities in question are not economic or are solidarity-based.

This emphasises the need for close and regular dialogue with Government in order to ensure that policymakers understand the implications of certain conduct on the market, and in order to ensure that where governments compete alongside private firms, they do not distort the market unfairly.

3. Application of competition law: exceptions for services of general economic interest

In addition to the exception referred to above, EC and UK competition law excludes from the application of the competition prohibitions certain categories of agreements and types of conduct. Therefore even where an entity (whether state-owned or privately-owned) constitutes an ‘undertaking’, consideration must be given to whether the conduct in question is excluded from the application of EC and UK competition law.

Article 86(2) of the EC Treaty provides for an exclusion from the application of Articles 81 and 82 EC in respect of undertakings entrusted with the operation of services of general economic interest or monopolies producing revenue for the State.²³

The exclusion from the UK Competition Act 1998 for ‘services of general economic interest’ and ‘revenue-producing monopolies’ is contained in paragraph 4 of Schedule 3 of the Competition Act 1998. Although not identical, the provision is closely modeled on Article 86(2). The provision states that:

‘Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.’

In considering whether this exclusion applies, the OFT will, in particular, need to be satisfied that the undertaking has been ‘entrusted’ with the operation of a service of general economic interest, and that the application of the Competition Act 1998 or Articles 81 and 82 EC would obstruct the performance, in law or in fact, of the particular task entrusted to it.

The act of entrustment may be by way of legislative measures, regulation²⁴, through the grant of a concession²⁵, or licence governed by public law. Alternatively, the method of entrustment could be through an act of a public authority²⁶.

²³ Article 86(2) states: ‘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 this Treaty, in particular to the rules on competition, insofar 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 Community.’

²⁴ British Telecommunications OJ 1983 L360/36.

²⁵ C-159/94 and C- 160/94 *EC Commission v the French Republic* [1997] ECR I 05815.

²⁶ Commission Decision 91/50/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 – *IJsselcentrale and others*) OJ 1991 L28/32.

For obligations imposed on an undertaking entrusted with the operation of a service of general economic interest to fall within the particular tasks entrusted to it, they must be linked to the subject matter of the service of general economic interest in question and must contribute directly to that interest²⁷.

The European Commission has stated²⁸ that to constitute a service of general economic interest, the service must be provided in all cases (and widely available and not restricted to a class, or classes, of customers) whether or not there is an incentive for the private sector to do so and must not be one that is concerned with managing private interests.

The ECJ has held that the services of general economic interest exclusion may apply where the restriction on competition is necessary for an undertaking to perform the service of general economic interest under economically acceptable conditions²⁹.

In a number of cases³⁰ the exclusion was found to apply to exclusive rights to provide a service of general economic interest in order to protect a 'universal service' obligation, as otherwise the undertakings in question would not have been able to meet their service obligations. Without the benefit of the exclusion, competition would allow new entrants to target profitable customers (so called 'cherry picking' or 'cream skimming'), while leaving unprofitable customers to the incumbent (leading to higher prices being charged to those customers or a reliance on state subsidies).

The OFT considers that the burden will, in principle, be on the undertaking seeking to benefit from the exclusion to show that the obligations could not be discharged in other ways which would have a less restrictive or distorting effect on competition. Further, that the application of the Competition Act 1998 prohibitions or Article 81 or 82 would require it to perform the task entrusted to it under economically unacceptable conditions.

The OFT has stated in its guidelines that it is sufficient for the performance, in law or fact, of the obligations on the undertaking would not be possible were the prohibitions to apply. It is not necessary that the survival of the undertaking itself is threatened for the exclusion to apply³¹. However the OFT considers that it would be insufficient to show that there is a mere possibility that the application of one or more of the prohibitions would lead to a situation where the prevailing economic conditions were unacceptable.

3.1 Undertakings having the character of a revenue-producing monopoly

The exclusions contained in paragraph 4 of Schedule 3 of the Competition Act 1998 and Article 86(2) EC also allow for tasks entrusted to undertakings which have the character of a revenue-producing monopoly to be excluded from the prohibitions of the Competition Act 1998 and of Articles 81 and 82 EC.

²⁷ Case C-159/94 *Commission v France (French Gas and Electricity Monopolies)* [1997] ECR I-5815.

²⁸ Communication from the Commission, Services of general interest in Europe, European Commission, 19 January 2001 OJ 2001 C17/4.

²⁹ Case C-157/94 *Commission v Netherlands*, Case C- 158/94 *Commission v Italy* [1997] and Case C- 159/94 *Commission v France* [1997] ECR I- 5815, ECR I-5699, 5789, 5815.

³⁰ Including Case C- 320/91 Criminal proceedings against *Paul Corbeau* [1993] ECR I-2533, and Case C- 266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. And Others* [1998] ECR I-3949.

³¹ Joined cases C- 157/94 *Commission v Netherlands*, C-158/94 *Commission v Italy* and C-159/94 and C- 160/94 *Commission v France* [1997] ECR I-5699, 5789, 5815.

The OFT considers that in order to benefit from the exclusion as a revenue-producing monopoly, an undertaking must have as its principal objective the raising of revenue for the state through the provision of a particular service. In addition, undertakings must have been granted an exclusive right to provide the service, and hence be the monopoly provider of that service. A revenue-producing monopoly must also show that the application of the prohibitions of the Competition Act 1998 or Article 81 or Article 82 EC would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

There are very few cases in the jurisprudence of the European courts or in the decisions of the European Commission in which the revenue-producing monopoly exclusion has been considered³² - the main reason being that there are very few monopolies established with the principal objective of raising revenue for the state.

3.2 *Conclusion*

The legal concepts of service of general economic interest and revenue producing monopoly offer ways of imposing proportionate restrictions on competition to the benefit of undertakings, whether state-owned or privately-owned, to the extent necessary to perform the tasks with which they are entrusted. They therefore allow for legitimate government interests to be taken into account and allow for solutions to be devised for each service of general economic interest or revenue producing monopoly by means of a proportionate exemption based on paragraph 4 of Schedule 3 of the Competition Act 1998 and Art 86(2) EC.

4. **Examining markets more broadly**

In addition to competition enforcement through the application of the prohibitions under the Competition Act 1998 and Articles 81 and 82 EC, the OFT can conduct market studies in order to examine a market more broadly, and for example to focus on the social costs of public restrictions on competition and to engage in advocacy and promote a competition culture in the public sector. The OFT has the power to refer a market to the CC for further investigation and report, and the CC has wide ranging powers to take remedies following a MIR. These powers to conduct market studies³³ and MIRs can be useful in addressing potentially anti-competitive restrictions where the competition enforcement rules do not apply.

The market studies/MIR regime is particularly well suited to assessing and addressing the effect of government intervention generally, including the activities of SOEs. Market studies/MIRs can cover markets subject to regulation as well as markets where they operate, including where SOEs are the only operators and where SOEs operate alongside privately owned firms, or where they are upstream/downstream. The OFT has specific powers to give advice and make proposals to the UK Government. Government has given a commitment to respond within 90 days to recommendations addressed to Government in market study reports from the OFT under these powers and also to recommendations from the CC following a MIR when these authorities do not have the necessary powers of remedy themselves, for example where legislative change is recommended.

³² The application of exclusion to the French and Italian match monopolies was considered and rejected in two Commission recommendations in 1962. (*Recommandation de la Commission à la République française au sujet de l'aménagement du monopole des allumettes* [1962] JO 48/1502; and *Recommandation de la Commission à la République italienne au sujet de l'aménagement du monopole des allumettes*[1962] JO 48/1505).

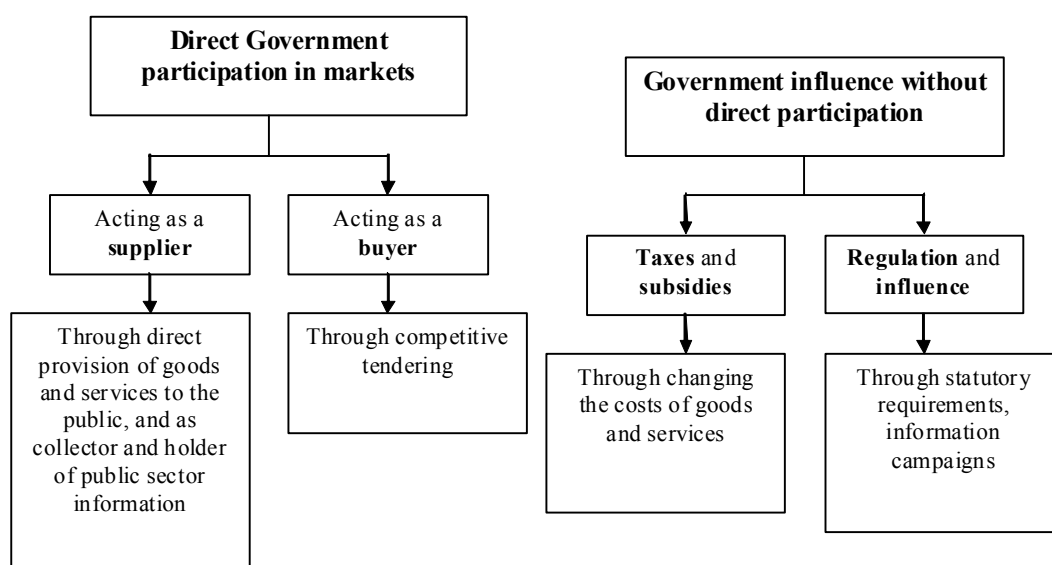
³³ OFT market studies are carried out under Section 5 of the Enterprise Act 2002 (EA02) which allows a market-wide consideration of both competition and consumer issues.

The OFT's market study into Commercial use of Public Information (see further below) is a good example. A number of MIRs in the recent past (ROSCOs³⁴, BAA³⁵) illustrate the type of analysis and issues that can be addressed. Although these particular examples were not concerned with SOEs directly, rather with former SOEs, the analysis would have been no different but there would have been no direct remedial power; the CC would have been able to make recommendations to Government, as explained above.

The OFT may also decide to use its powers under section 7 of the Enterprise Act 2002, to influence Government policy to promote competitive markets and to increase awareness amongst governmental policymakers on how government interventions in markets might be designed to minimise any distortions on competition. The OFT's recently published report on 'Government in Markets' for example is one example of how the OFT has used its advocacy powers to this effect.

Part of the value in market studies and advocacy is in addressing the variety of ways in which Government can affect markets. In many markets, Government participates directly as a provider or as a buyer (procurer) of goods and services. Where this is not the case, Government can also influence firms indirectly through taxes, subsidies and regulation, and increasingly through 'softer' forms of influence on businesses and consumers. This is summarised in Figure 1 below.

Figure 1: Ways in which Government participates in markets



The following sections outline the OFT's recent work in highlighting the costs and benefits associated with certain types of government interventions in a market. The OFT has published a practical guide to policymakers on how to consider *all* of the costs and benefits of a policy intervention.

There can be situations where governments' direct provision of goods and services is in the interests of consumers. However, as is highlighted in the OFT's 'Government in Markets' report, where it is the direct provider, Government needs to be aware of the costs of crowding out private sector activity.

³⁴ <http://www.competition-commission.org.uk/inquiries/ref2007/roscos/index.htm>.

³⁵ <http://www.competition-commission.org.uk/inquiries/ref2007/airports/index.htm>.

Similarly, governments should ensure that public bodies which compete alongside private firms do not distort the market unfairly (see the following section on competitive neutrality for further detail).

In some cases governments can open up new markets by freeing up access to monopoly services – for example by making it easier for private firms to access public sector information.

The OFT considers that where government is the only provider of a good or service, there may be opportunities to secure efficiencies through greater use of competition. Two options for example involve competitive tendering of services or making use of consumer choice in determining how spending is allocated within the public sector. Even in markets that were initially considered natural monopolies in the UK, competition has been effectively used to achieve significant cost savings, improve quality, foster innovation and to develop new products for consumers. In addition, through statutory monopoly schemes, the UK Government has provided the essential facilities and has allowed private firms to compete for the operation of these markets within a regulatory framework. This has been applied in the UK in sectors such as the postal service, broadcasting, transport and utilities.

In some cases, governments may also be able to generate greater economic benefits by allowing third party access to public sector assets. For example, the OFT's market study on commercial use of public sector information suggested that greater access to public sector data by commercial firms could generate benefits of at least £500m per year³⁶. The OFT's market study is discussed in further detail below.

5. Corporate governance and the principle of competitive neutrality for state-owned enterprises

Competitive neutrality can be defined broadly as ensuring a 'level playing field' between public and private enterprises where they compete alongside one another. More specifically, the concern is that no competitor should have an advantage resulting purely from whether it is state-owned or privately owned. Where competitive neutrality does not exist, the OFT would expect this to lead to allocative inefficiency. Perhaps more importantly, lack of competitive neutrality could also hinder the development of new markets where there is scope for greater involvement of private firms alongside existing public sector providers, with a dynamic cost in terms of lack of competitive pressure and innovation in future.

OFT considers that it is helpful to look at competitive neutrality from two perspectives: first, the behaviour of public and private sector suppliers in a market; and second, the behaviour of buyers (with buyer power) in mixed markets, particularly in markets involving significant procurement by the public sector.

The latter perspective has been particularly important in the recent UK debate, because of increased competitive tendering of contracts for some public services (e.g. some hospital treatments, prisons), creating the potential for entry by the private sector alongside existing public sector providers. Before considering these two perspectives, we briefly summarise some of the recent developments in the UK policy debate.

5.1 *Summary of recent discussion around competitive neutrality in the UK*

The recent debate around competitive neutrality in the UK has focused particularly on the provision of public services. The introduction of new forms of competition to foster innovation and choice in the delivery of some services, including competition in the delivery of some services – such as health, prisons,

³⁶ OFT861 The commercial use of public information (CUPI) (December 2006) available on the OFT website: <http://www.uk-legislation.hmsso.gov.uk/advice/poi/oft-cupi.pdf>.

and job centres – has led to the possibility of private sector involvement in new markets. A recent government review (the ‘Julius Review’) estimated that in 2007/08 the ‘public services industry’³⁷ generated revenues of £79bn, and value-added of £45bn.

At the same time, there have been concerns that lack of competitive neutrality acts as a barrier to entry by the private sector. For example, the Confederation of British Industry (CBI) has produced a series of reports on competitive neutrality starting with ‘A Fair Field and No Favours’³⁸ in 2006. More recently, ‘Counting the Cost’³⁹ focused particularly at the accounting issues in comparing public and private sector bids, for example in relation to pensions and tax treatment (see below for more detail).

In addition, the UK Government’s Julius Review identified a lack of competitive neutrality as one of the barriers to expansion of the public service industry. Although several government departments have taken steps to ensure greater competitive neutrality, at present there are no public moves by government to institute an overarching ‘competitive neutrality framework’ of the type that is used, for example, in Australia.

6. The supplier perspective: Behaviour of state owned enterprises and corporate governance issues

From the perspective of state-owned enterprises participating in a commercial market, competition law provides the basic framework for ensuring competitive neutrality. As stated above in the sections concerning the application of the Competition Act 1998 and Articles 81 and 82 EC to state-owned enterprises, the OFT would view UK competition law, in line with Articles 81 and 82 EC, applying to commercial activities of ‘undertakings’ regardless of the form of their ownership. Thus state-owned enterprises are subject to the same competition law framework as private firms where they engage in commercial activities.

In practice however, there are sometimes wider policy discussions about how best to increase productivity and efficiency in markets in which state-owned enterprises participate. In some cases this can go beyond simple compliance with competition law.

For example, the OFT’s market study on the commercial use of public information (CUPI) referred to below considered how value might be unlocked from information held by public bodies. In broad terms this might be seen as an issue of ‘market design’.

Where public sector bodies are engaged in mixed markets alongside private firms, it is important for the public bodies to ensure that they are not exploiting unfair advantages over the private sector - see below reference to the OFT’s market study into the commercial use of public information.

³⁷ The ‘Public Services Industry’ was defined as: ‘All private and third sector enterprises that provide services to the public on behalf of Government or to the Government itself’.

³⁸ CBI (2006), ‘A fair field and no favours – competitive neutrality in UK public service markets’, <http://publicservices.cbi.org.uk/reports/00199/>.

³⁹ CBI (2008), ‘Counting the cost: full cost comparison between public service providers’, <http://publicservices.cbi.org.uk/reports/00186/>.

Box 3. OFT market study on commercial use of public information⁴⁰

Many public bodies hold valuable information assets. For example, the UK Meteorological Office holds weather data, UK Ordnance Survey holds mapping data, and UK Land Registry holds land ownership information. All have significant potential in commercial applications. The underlying data is vital for businesses wanting to make value-added products and services such as in-car satellite navigation systems.

Public sector information holders (PSIHs) are usually monopoly providers (typically because of high fixed costs of collection, or statutory collection powers) for much of this data, and although some make this available to businesses for free, others charge. A number of PSIHs also compete with private firms in the downstream market, turning the data into value-added products and services. This could create incentives for PSIHs to restrict access to information provided solely by themselves.

In its 2006 market study, the OFT concluded that access to public sector data needed to improve, and estimated that the potential benefits of increased competition could include a doubling of the value added to the UK economy, contributing around £1bn. The OFT's study found that data is not as easily available as it should be, licensing arrangements are restrictive, prices are not always linked to costs and PSIHs may be charging higher prices to competing businesses and giving them less attractive terms than their own value-added operations.

The report also found that much of the legislation and guidance which aims to ensure access to information is provided on an equal basis, lacks clarity and is inadequately monitored. As a result the full benefits of public sector information are not being realised.

The OFT concluded that PSIHs should:

- make as much public sector information available as possible for commercial use/re-use
- ensure that businesses have access to public sector information at the earliest point that it is useful to them
- provide access to information where the PSIH is the only supplier on an equal basis to all businesses and the PSIH itself
- use proportionate cost-related pricing and to account separately for their monopoly activities and their value-added activities so that PSIHs can demonstrate that they are providing and pricing information fairly and in a non-discriminatory manner, and
- enable the regulator (Office of Public Sector Information) to monitor PSIHs better, with improved enforcement and complaints procedures.

Subsequent UK Government reviews, including a broad study called the UK Trading Funds Assessment, have set out principles of improving access to public sector information. These principles are:

- make information easily available – where possible at low or marginal cost;
- clear and transparent pricing structures for the information, with different parts of the business accounted for separately;
- simple and transparent licences to facilitate the re-use of information for purposes other than that for which it was originally created; and

⁴⁰

Ibid.

- clearly and independently defined – with input from customers and stakeholders – core purposes (public tasks) of the organisations.⁴¹

The UK CUI case exemplifies the potential for tension between trying to encourage the public sector body to be more commercial and innovative, while allowing third parties to access the data and create new products in a competitive market.

More generally, the OFT would agree that corporate governance arrangements of state-owned enterprises can play an important role in addressing competitive neutrality concerns. For example, the UK Government's guidance to central government departments notes that "In the case of companies or other entities in which the department has a controlling shareholding, the departmental board needs to distinguish between the department's role as a shareholder and any other business relationship it or other departments may have with the company (for example as customer). This is meant to improve the transparency of subsidies and clarifying conflicting policy objectives."⁴²

7. Competitive neutrality from the public procurement perspective

From the perspective of public procurement, the principal concern is that public procurers should take account of the full costs of public and private bidders. The concerns expressed, for example in the CBI's 'Fair Field' paper are that tender bids do not always fairly reflect the true cost differentials between private and state-owned firms.

The UK Government's Julius Review⁴³ commented:

'In one sense the term competitive neutrality is a misnomer in that there will always be inherent differences between different classes of providers and some of these differences may provide them with a comparative advantage (or disadvantage) in particular types of procurement. However, where these differences are created by government policies and where they act as a barrier to effective competition, government should take steps to remove or correct them as part of the bid comparison process.' (para 4.29)

Areas identified by the Julius Review as potential barriers to effective competition included⁴⁴:

- **Tax Treatment** - There are inconsistencies in how taxation is applied to public, private and third sector providers. Whilst these reflect their differing roles in the economy they may also be a source of unfair advantage.
- **Pension Obligations** - Private and third sector providers must explicitly recognise pension costs on their balance sheets whereas public sector providers do not; this can give public sector bid teams an advantage due to the different treatment they receive.
- **Pre-Qualification / Bid Criteria** - Government often restricts competitions to organisations with a clear track record in the area in order to ensure they have the appropriate expertise. This can limit the ability of new entrants to break into the market.

⁴¹ HM Treasury (2009), 'Operational Efficiency Programme: final report', April 2009, page 41.

⁴² HM Treasury (2005), 'Corporate governance in Central Government Departments: Code of good practice', July 2005.

⁴³ BERR (2008), paragraph 4.29.

⁴⁴ BERR (2008) p. 46-47.

- **Lack of Shared Information** - Where there is a lack of shared information on current service levels or the costs of providing them, incumbents are likely to have an advantage over other bidders
- **Ability to Manage Risk** - Private and third sector organisations can only take on financial risks up to the level of their balance sheets and should only be expected to shoulder risks that they can influence, such as cost overruns.
- **Transition Costs** - A challenger to the incumbent provider of a service will incur start-up or transition costs if it wins the bid. Where these are likely to be significant, they could outweigh other cost advantages and thereby limit competition.

8. Conclusion: minimising negative impacts on competition by government and state-owned enterprises

Competition law provides the basic framework for ensuring competitive neutrality and for minimising distortions of competition. The prohibitions of anti-competitive agreements and abuses of a dominant position, as set out in the UK Competition Act 1998 and Articles 81 and 82 EC, as relating to commercial activities of ‘undertakings’ apply regardless of the form of the enterprise’s ownership. Thus state-owned enterprises are subject to the same competition law framework as private firms where they engage in commercial activities. When the State acts as an undertaking, the OFT can and does apply the competition rules governing anti-competitive agreements and abuse of dominance.

The OFT also uses market studies and advocacy powers in order achieve its goal of ‘making markets work well for consumers’ for example by providing advice to government about the potential costs of different kinds of intervention, in particular where distortions on competition may be hard to identify or quantify because they tend to manifest in the long term, and to propose solutions.

To identify interventions more likely to distort or restrict competitive markets, the OFT has outlined the key points in its ‘Government in markets’ report in order for policymakers to consider:

- **Does the intervention affect the possibility of entry and exit in a market** – for example by granting exclusive rights to supply; limiting the number of suppliers; or significantly raising the cost to new firms of entering the market?
- **Does it affect the nature of competition between firms in a market**, either through direct restrictions (such as price or product regulation) or by reducing the incentive on firms to compete strongly?
- **Does it affect the ability of consumers to be shop around between firms and exercise choice** – for example, does it raise costs of switching?

Conducting competition assessments along these lines during the policy making process can be a useful way of identifying unintended consequences, and it is important that this assessment takes place during the early stages of policy development.

UNITED STATES

The commercial activities in which various levels of government in the United States – federal, state, and local – are involved traditionally have been quite limited. Competition among private entities has been and remains the current norm for the U.S. economy. It is through this competitive market-based economy that consumers receive the best, most innovative products at the lowest prices. At the same time, however, there is and has been a limited role in certain circumstances for so-called “state-owned enterprises.”

The term “state-owned enterprise” (SOE) is not used in U.S. law or legislation. A range of entities linked to the federal government exists, however, with varying degrees of government ownership, control, and participation in governance and funding. Most of these entities have responsibilities that are nearly indistinguishable from traditional government functions or pursue governmental policies where a market-based approach is not considered appropriate or has failed to achieve governmental objectives. In the U.S., the role of such enterprises is usually specialized and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. The applicability of constitutional and statutory rules, including antitrust law, and the availability of sovereign immunity defenses, vary depending on the nature of the entity.

Part I of this paper suggests some notional principles for effective management and regulation of SOEs, based on the 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* and our own national experience. Part II describes existing federal government enterprises and the applicability of antitrust rules to them, and Part III provides a brief discussion of sub-federal (state and local) entities, with a description of the “state action” immunity from federal antitrust laws for certain activities of such entities, and the limits on their conduct under the Commerce Clause of the U.S. Constitution. Part IV concludes with a brief discussion of the principle of competitive neutrality.

1. Notional principles for effective management and regulation of state-owned enterprises

The 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises*¹ are an important source of guidance for government corporations, and are consistent with much of our experience relating to federal government corporations. For purposes of the WP3 discussion of this topic, we suggest the following notional principles, based on the *OECD Guidelines* and the U.S. experience, to guide policymakers in this area.

First, an SOE’s legal status, as established by its corporate charter or statutory authorization, should clearly identify its relationship to the government, any exemptions from suit or regulatory frameworks, and any special privileges, for the benefit of other economic actors with which it interacts. In particular, any public service responsibilities assigned to an SOE should be clearly and transparently mandated by laws or regulations. For example, costs related to an SOE’s public service responsibilities should be covered in a transparent manner, enabling a ready determination as to whether public service activities are subsidizing the costs of any operations in markets where the SOE competes with private sector companies.

Second, governments should seek to ensure an equitable competitive environment in markets where SOEs compete with private sector companies, so as to avoid unnecessary market distortions and inefficiencies that reduce consumer welfare. In the same way, to the maximum extent consistent with an

¹ The guidelines are available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>.

SOE's public service responsibilities, governments should minimize favorable financial terms bestowed on the SOE.

Third, there should be a clear separation between the state's ownership function and other state functions that influence market conditions, particularly with regard to market regulation. To the maximum extent consistent with an SOE's public service responsibilities, government regulatory authorities should treat SOEs and their private sector competitors equally and the overall business framework (including antitrust laws) should apply equally as well. To that end, the government's ownership rights should be clearly identifiable, separated from any regulatory authority, divorced from day-to-day management of the SOE, and should not intrude on the SOE board's independent exercise of authority. To evaluate compliance with such principles, SOEs should be subject to an annual independent external audit and should be subject to the same accounting and auditing standards as publicly traded companies.²

Finally, government investment in private corporations necessitated by exigent circumstances should be transitory in nature and limited to the taking of investment positions that do not compromise the independent direction and management of the company. The United States has pursued these kinds of self-limiting policies during similar crises in the past. "In 1917 and 1918, Congress created, among others, the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation. These entities were dissolved after the war ended."³ Similarly, during World War II, the U.S. Government seized enemy-owned assets by taking controlling interests in the U.S. subsidiaries of German and Japanese corporations such as the predecessors of General Aniline & Film Corporation, Rohm & Haas Company, and Schering-Plough Corporation.⁴ The government's policy and practice was to sell the firms and return them to the private sector as soon as possible.⁵

2. Federal government enterprises and the applicability of antitrust rules

A series of recent Congressional Research Service (CRS) reports have classified existing federal government enterprises. Different types of federal government enterprises include "federal government corporations," so-called "quasi government" entities such as government-sponsored enterprises and federally funded research and development centers. These structures and the extent to which they are subject to federal antitrust laws are described below.

² Consistent with this principle, Congress enacted the Government Corporation Control Act (GCCA) in 1945. 31 U.S.C. § 9101. The GCCA required that specified corporations, both wholly owned and partially owned by the Government, be audited by the Comptroller General. Additionally, the wholly owned corporations were required to submit budgets that would be included in the budget submitted annually to Congress by the President. The GCCA also ordered the dissolution or liquidation of all government corporations created under state law, except for those that Congress chose to reincorporate, and prohibited creation of new Government corporations without specific congressional authorization.

³ *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 388 (1995) (citations omitted).

⁴ See Stacey R. Kole, *The Government as a Shareholder: A Case from the United States*, 40 J. Law & Econ. 1 (1997), for a study of the performance of firms seized by the U.S. government during World War II.

⁵ The government used business techniques that sped the process. A study of a sample of 17 of these firms found that most "were returned to the private sector via sealed bid auctions. In six cases, the highest bidder in the auction was either the president of the company at the time of vesting or a corporation in the same industry. The disposition of the larger firms, such as American Potash, General Aniline & Film, Rohm & Haas, and Schering, was intermediated by investment banking syndicates that offered the re-privatized shares to the public." *Id.* at 4.

2.1 *Federal government corporations*

The CRS defines a “federal government corporation” as “an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures.”⁶

The CRS notes that although “[n]o two federal government corporations are completely alike,”⁷ they share certain characteristics. They are agents of the federal government subject to constitutional limitations such as the First Amendment (freedom of speech); they generally are subject to and may initiate civil suits; and they do not enjoy the traditional sovereign immunity from suit that the United States government enjoys.⁸ Although government corporations are exempt from executive branch budgetary regulations, the Government Corporation Control Act of 1945 (GCCA) mandates that each wholly-owned government corporation prepare and submit to the President a “business-type budget,” after review and revision, the President submits these budget programs to Congress for its oversight and approval.⁹

The CRS notes that some government corporations are located within executive departments with employees who are actually employees of the parent government agency, while others are federally chartered corporations like Amtrak, the government-controlled national passenger rail service corporation.¹⁰ All but two government corporations have boards of directors; the governance format varies, with full-time boards, part-time boards (in some cases made up of Cabinet-level officials of other agencies; in others, mixed boards of governmental and private appointees), or a single administrator under an executive department secretary.¹¹ Federal corporations can also facilitate privatization of federally-owned assets, as occurred with Consolidated Rail Corporation (Conrail) and the U.S. Enrichment Corporation.¹² Finally, federal corporations can serve as a public utility, such as the Tennessee Valley Authority (TVA).¹³

⁶ Kevin R. Kosar, Federal Government Corporations: an Overview, Congressional Research Service Report RL30365 (2009) 2. The 17 federal government corporations included under this definition are: Commodity Credit Corporation, Export-Import Bank, Federal Crop Insurance Corporation, Federal Deposit Insurance Corporation, Federal Financing Bank, Federal Prison Industries, Financing Corporation, Government National Mortgage Corporation, Amtrak, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, Presidio Trust of San Francisco, Resolution Funding Corporation, St. Lawrence Seaway Development Corporation, Tennessee Valley Authority, U.S. Postal Service, and Valles Caldera Trust. All but five of these entities are included in the current GCCA enumeration of 28 government corporations.

⁷ *Id.* at 5.

⁸ *Id.* at 7.

⁹ *Id.* Government corporations must also submit annual management reports to Congress.

¹⁰ *Id.*

¹¹ *Id.* at 8-9.

¹² Conrail, a government corporation established in 1976 from bankrupt northeastern railroads, created a viable freight rail system that was eventually sold to private investors; the U.S. Enrichment Corporation (USEC) operated two Department of Energy uranium enrichment plants that were divested in an initial public offering in 1998. *Id.* at 12-13.

¹³ The TVA provides wholesale power to 158 municipal and cooperative power distributors and directly serves 58 large industries and government installations, thereby supplying the electricity needs of about nine million people. TVA no longer receives federal appropriations, and finances its operations through revenues of \$9 billion from energy sales and bond sales. TVA website, <http://www/tva.gov/abouttva/keufacts.htm#howfunded>. The United States also maintains the Bonneville, Southeastern, Southwestern, and Western Area Power Administrations within the Department of Energy

2.2 *Applicability of federal antitrust laws to federal government entities and corporations*

As a general matter, agencies and instrumentalities of the U.S. government (e.g., National Science Foundation, Small Business Administration) are not subject to liability under the federal antitrust laws, even when engaging in commercial activity.¹⁴ But the situation with respect to federal government corporations depends heavily on the facts and circumstances of the case. In 2004, for example, the U.S. Supreme Court held that the federal antitrust laws did not apply to the U.S. Postal Service (USPS).¹⁵ The Court's opinion in *Flamingo* noted that the USPS by statute was "an independent establishment of the executive branch of the Government of the United States."¹⁶ It discussed the USPS's monopoly over carriage of certain letters and its "significant governmental powers," along with Congress's explicit waiver of the USPS's immunity from suit, giving it the power to sue and be sued in its own name. Although the USPS did not benefit from sovereign immunity from suit, the Court held that for purposes of the federal antitrust laws, the USPS was no different from the United States, which has long been held not to be a "person" subject to federal antitrust laws.

*The [Postal Reorganization Act of 1971] gives the Postal Service a high degree of independence from other offices of the Government, but it remains part of the Government. The Sherman Act defines "person" to include corporations, and had the Congress chosen to create the Postal Service as a federal corporation, we would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment."*¹⁷

The Court observed that its decision was consistent with "the nationwide, public responsibility" of the USPS, which differs from private enterprise in not seeking profits, in its universal service and recent national security responsibilities, and in its possession of Government powers (state-conferred monopoly, eminent domain, power to conclude international postal agreements). The USPS also lacked certain powers available to private business, such as the power to set prices (a separate Postal Rate Commission was involved in setting prices, and price decisions were not governed by profitability, but rather subject to a long-run breakeven requirement).^{18 19}

(DOE). These Power Marketing Administrations (PMAs) market wholesale electricity generated at hydroelectric dams owned and managed by the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation, which also provide or manage water for such multiple purposes as irrigation, flood control, navigation, recreation, municipal water supply, and environmental enhancement. Bonneville is self-financed, while the other PMAs are funded primarily by DOE. World Trade Organization, Working Party on State Trading Enterprises, New and Full Notification Pursuant to Article XVII:4(a) of the GATT and Paragraph 1 of the Understanding on the Interpretation of Article XVII, United States, 23 June 2008 (G/STR/12/USA).

¹⁴ IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 252a (3rd ed. 2006).

¹⁵ *United States Postal Service v. Flamingo Industries (USA), Ltd.*, 540 U.S. 736 (2004).

¹⁶ 39 U.S.C. § 201.

¹⁷ *Flamingo*, *supra* n. 15, at 746.

¹⁸ *Id.* at 747.

¹⁹ In a post-*Flamingo* case, a federal Court of Appeals held that the TVA, because it was a federal corporation (unlike the USPS, an "independent establishment of the executive branch"), could not use its "public characteristics" to claim immunity from antitrust liability. *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399 (6th Cir. 2006). The TVA's conduct in that case enjoyed an implied exemption from the antitrust laws, however, "because the TVA's primary concern is to provide services,

Following the *Flamingo* decision, in an effort to promote “competitive neutrality” in postal markets open to competition and to clarify the status of the USPS with respect to the federal antitrust laws, Congress enacted the Postal Accountability and Enhancement Act (PAEA).²⁰ A new Postal Regulatory Commission (PRC) was established as the regulator of USPS’s rates for “market-dominant” services; USPS was empowered to set its own prices for “competitive” products, subject to publication and filing requirements.²¹ The PRC was also mandated to issue and enforce regulations to prohibit subsidization of competitive products by market-dominant products, ensure that each competitive product covers its attributable costs, and ensure that all competitive products collectively cover what the PRC determines to be an appropriate share of the USPS’s institutional costs.²² For competitive products, as well as market dominant products outside the scope of the letter monopoly, the PAEA explicitly provides that the USPS will be subject to the federal antitrust laws.²³

2.2.1 *FTC Study of the U.S. postal service and the effects of its governmental status*

The PAEA also required the Federal Trade Commission (FTC) to prepare “a comprehensive report identifying the Federal and state laws that apply differently to the [USPS] with respect to the competitive category of mail and to private companies providing similar products.”²⁴ The FTC’s report²⁵ concluded that “from the USPS’s perspective, its unique legal status likely provides it with a net competitive disadvantage versus private carriers” stemming largely from federally-imposed restraints regarding labor costs and constraints related to its operations network caused by the universal service and other requirements that increase USPS’s costs in providing competitive products.²⁶ At the same time, “because the USPS is a federal government entity, the USPS’s competitive products operations enjoy an estimated implicit subsidy [avoidance of costs associated with various federal, state, and local legal requirements, preferential interest rates, eminent domain powers, and limits on the extent to which it can be sued].”²⁷ Though the estimated costs associated with the restraints exceeded the implicit subsidy, the FTC report made a number of recommendations concerning options for eliminating some of the inefficiencies and market distortions resulting from the postal monopoly and the economic advantages and disadvantages discussed in the report.

and concerns about competition would conflict with the fulfillment of TVA’s purpose.” The Court noted that “[t]he TVA is authorized to enter into contracts for the purpose of ‘promot[ing] the wider and better use of electric power for agricultural and domestic use, or for small or local industries.’ 16 U.S.C. § 831i.” *Id.* at 414.

²⁰ Pub. L. 109-435, 120 Stat. 3189 (Dec. 20, 2006), *codified* at 39 U.S.C. §§ 101 *et seq.*

²¹ The PAEA defines “market-dominant” products as those for which the USPS exercises sufficient market power to raise price or decrease output without significant loss of business; “competitive” products, which accounted for 9% of USPS total revenue in FY2006, are defined as “all other products.” 39 U.S.C. § 3642(b)(1).

²² 39 U.S.C. § 3633(a).

²³ 39 U.S.C. § 409(e)(1)(A)-(B).

²⁴ PAEA § 703(a).

²⁵ Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors, FTC Report, December 2007.

²⁶ *Id.* at 8.

²⁷ *Id.*

2.3 *Quasi government entities*

The CRS reports refer to another category of “federally related entities that possess legal characteristics of both the governmental and private sectors” as “quasi government” entities.²⁸ These entities can vary widely in their structure, ranging from government-sponsored enterprises (GSEs) (e.g., Fannie Mae, Freddie Mac) to the federally funded research and development centers (e.g., Los Alamos National Laboratory). Within the quasi government category, GSEs have the greatest impact on the domestic economy.²⁹ The CRS identifies “four readily observable characteristics of GSEs: (1) private sector ownership, (2) limited competition, (3) activities limited by congressional charter, and (4) chartered privileges that create an inferred federal guarantee of obligations.”³⁰ Of the seven existing GSEs, the best-known are the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two of the largest financial institutions in the U.S.³¹ The theory behind the creation of such bodies is that the government “should use some of its sovereign powers (e.g., full faith and credit of the U.S. Treasury) to encourage the development of private financial intermediaries to serve selected markets.”³² Notably, GSEs are not agencies of the Government, and thus are exempt from general federal management laws and regulations (e.g., personnel, budgetary, procurement rules). Nonetheless, they may enjoy, according to their charters, some benefits associated with sovereign authority, such as immunity from state taxes.

3. **State enterprises related to states and their political subdivisions**

Beyond the federal level, U.S. states, counties, municipalities, and other sub-divisions of the states own, control, or participate in the management of entities that might be defined as SOEs. These entities play a significant role in the following sectors: transportation (including rail, urban transportation, airports and ports), energy (including electricity production and distribution), sports facilities, universities, hospitals, concessions in state-owned parks, buildings, and facilities, and distribution of alcoholic beverages. In some cases these entities compete with private firms offering the same or similar products or services, but in most cases the public offerings are differentiated and provided with a view to achieving a governmental, public service objective.

3.1 *The state action doctrine*

Under the state action doctrine, first set forth by the Supreme Court in *Parker v. Brown*,³³ the federal antitrust laws do not apply to “anticompetitive restraints imposed by the States ‘as an act of

²⁸ Kevin R. Kosar, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics, Congressional Research Service Report RL30533 (2008).

²⁹ Each GSE is created *sui generis* by Congress, which defines a GSE for budgetary purposes as a corporate entity created by a law of the U.S. that: has a federal charter; is privately owned; is under the direction of a board of directors, a majority of which is elected by private owners; is a financial institution with power to make loans or loan guarantees for limited purposes such as to provide credit for specific borrowers, and raise funds by borrowing; does not have certain sovereign Government powers; cannot commit the Government financially; and has employees paid by the enterprise who are not Federal employees subject to federal employee rules. 2 U.S.C. § 622(8).

³⁰ Kevin R. Kosar, Government-Sponsored Enterprises (GSEs): An Institutional Overview, Congressional Research Service Report RS21663 (2009) 2.

³¹ In September 2008, the U.S. Treasury placed Fannie Mae and Freddie Mac into government receivership.

³² Kosar, *supra* n. 30.

³³ 317 U.S. 341 (1943).

government.”³⁴ The state action doctrine immunizes acts of the highest levels of the state government itself, acting as sovereign; this includes actions of a state legislature and probably of the governor.³⁵ Application of the doctrine to subordinate instrumentalities of the state, on the other hand, such as political sub-divisions, agencies, and business enterprises, depends on whether the challenged restraint is undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition, and a clear delegation of that power to the subordinate entity.³⁶

The Supreme Court therefore held that the state action doctrine did not immunize a municipal electric utility from federal antitrust law in *City of Lafayette v. Louisiana Power & Light Co.*³⁷ The U.S. Department of Justice (DOJ) and FTC subsequently have challenged several mergers involving locally managed hospitals, and the DOJ successfully challenged a tying arrangement involving a city and its development authority that provided both electricity and water/sewer service.³⁸ The DOJ and FTC have also filed amicus briefs opposing application of the state action doctrine in cases involving state-level enterprises.³⁹

A 2003 FTC Staff Report⁴⁰ recommended that litigation, *amicus curiae* briefs, and competition advocacy be used to further clarify the state action doctrine and preclude it from being misapplied to grant overly broad antitrust immunity. In particular, the FTC State Action Report urged that quasi-governmental entities be subject to a requirement of active supervision by the state, in addition to requiring clear articulation of their powers. A supervision requirement will help ensure that any anticompetitive actions taken by such entities are truly in furtherance of state policy. Specifically, according to the Report, “[t]he category of entities subject to the active supervision requirement [sh]ould include either: (a) any market participant, or (b) any situation with an appreciable risk that the challenged conduct results from private actors’ pursuing private interests, rather than from state policy.”⁴¹

3.2 The Commerce Clause

The conduct of state government businesses is also governed by the Commerce Clause of the U.S. Constitution. “[B]y reading the Commerce Clause as a general charter for a free internal trade system, the Supreme Court decided very early that it implicitly forbade the states from enacting any legislation that either discriminated against interstate commerce or that placed an undue burden on interstate commerce. ... One would think, based on this theory, that a state would also be forbidden to use a state-owned company

³⁴ *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 370 (1991).

³⁵ ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) 1279.

³⁶ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Antitrust Law Developments*, *supra* n. 35, at 1273-83.

³⁷ 435 U.S. 389 (1978).

³⁸ *United States v. City of Stilwell, Oklahoma, and Stilwell Area Development Authority*, No. CIV 96-196-B (E.D. Okla., filed April 26, 1996), *see* <http://www.usdoj.gov/atr/cases/stilwe0.htm>.

³⁹ *See, e.g., Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999)(en banc); *Jackson, Tennessee Hosp. Co. LLC v. West Tennessee Healthcare, Inc.*, 414 F.3d 608 (6th Cir. 2005) for antitrust cases involving state-affiliated hospitals where DOJ and FTC filed joint amicus briefs.

⁴⁰ Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) (“FTC State Action Report”) *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

⁴¹ *Id.* at 3.

to hamper interstate commerce.”⁴² Where Congress has not directly controlled the state through positive legislation, however, a “market participant” exception to the Commerce Clause allows a state in some cases to favor its own citizens through the conduct of its state-owned businesses,⁴³ though there are limits to how far it can extend substantial regulatory effects outside its own territory.⁴⁴

4. Competitive neutrality

As noted in the notional principles in Part I above, governments should seek to ensure an equitable environment in markets where SOEs compete with private sector companies, so as to avoid unnecessary market distortions and inefficiencies that reduce consumer welfare. The 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* state that “[t]he legal and regulatory framework for state-owned enterprises should ensure a level-playing field in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions.”

The International Competition Network (“ICN”) has also done work in this area related to state-created monopolies. In this regard, the ICN issued a set of Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws.⁴⁵ Those Recommended Practices specifically urge that competition authorities should, to the extent there are no exemptions: (1) protect and promote competition by taking appropriate enforcement action against anticompetitive unilateral conduct by state-created monopolies; (2) treat state-created monopolies like private undertakings by using standard antitrust analysis to assess dominance/substantial market power, regardless of state ownership or legal status of the firm; (3) possess effective investigative tools and remedies to carry out successful enforcement of unilateral conduct rules regarding state-created monopolies; and (4) apply sound antitrust analysis and remedies when investigating potentially anticompetitive unilateral conduct of state-created monopolies and deciding whether enforcement action is appropriate.

5. Conclusion

The notional principles in Part I of this submission provide important guidance to governments in managing their SOEs. As detailed in Parts II and III, the rather limited U.S. experience with SOEs illustrates the broad range of issues related to the exercise of government control over these entities, managing them effectively, and ensuring that the public policies that justify governmental participation in the economy are properly focused to avoid distorting adjacent markets benefiting from competition among private firms. Antitrust agencies should be vigilant in their advocacy and law enforcement roles in monitoring the creation and conduct of SOEs.

⁴² Diane P. Wood, State Trading in the United States, in *State Trading in the Twenty-First Century* 211, 225 (Thomas Cottier and Petros Mavroidis eds., 1999).

⁴³ *Reeves v. Stake*, 447 U.S. 429 (1980).

⁴⁴ *See Wood, supra* n. 42, at 225-226.

⁴⁵ ICN Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws, available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_2.pdf.

EUROPEAN COMMISSION

1. Introduction

Competitive neutrality may be defined as policies undertaken by a competition enforcer and/or regulator to remove any unfair competitive advantages or disadvantages that public undertakings, which are involved in commercial activities, may experience over their privately-owned competitors, simply as a result of government ownership or involvement. The main rationale behind implementing competitive neutrality measures is to allow privately-owned businesses and government-owned businesses to compete on an equal footing. It is believed that the accompanying increase in competition would bring about greater efficiencies and better quality products and services at lower prices, leading to an increase in consumer welfare. Greater efficiencies in the public sector also mean a more effective use of taxpayers' resources. In essence, competitive neutrality thus involves the application to public enterprises of the incentives and regulations faced by private businesses.

The EU system is characterised by the fact that the principle of competitive neutrality between public and private enterprises is recognised in the Treaty establishing the European Community¹ (hereinafter the "EC Treaty") and that the Commission has operational tools to implement this principle.

2. The principle of competitive neutrality as enshrined in the EC Treaty

The EC Treaty guarantees the neutral treatment of all undertakings, irrespective of whether they are publicly or privately owned. This principle is enshrined in Article 295 of the EC Treaty, which provides that the Treaty shall "*in no way prejudice the rules in Member States governing the system of property ownership.*"

The neutrality principle is reflected in the application of EC competition rules: EC competition rules apply to all businesses or undertakings, irrespective of whether they are publicly or privately owned.

In particular, Article 86 of the EC Treaty prohibits Member States from maintaining in force any measure, in connection with public undertakings and undertakings to which it has granted special rights, which conflicts with the rules on competition, unless such a measure is necessary for the provision of a service of general economic interest.

In addition, Articles 87 and 88 of the EC Treaty allow the Commission to closely scrutinize any State aid which would confer a selective advantage to an undertaking (including a State-owned enterprise) and which could distort competition and affect trade between Member States.

As the Commission presents another paper on "the application of antitrust law to State-owned enterprises" (SOE), the present paper will focus on enforcement by the European Commission of the competitive neutrality principle through State aid control.

¹ *The Treaty establishing the European Communities*, Official Journal C 325 of 24 December 2002.

3. Application of the competitive neutrality principle through State aid control

State aid control, being based on the neutral treatment of all undertakings, ensures that private and public undertakings do not receive public aid which would distort competition and intra-community trade.

3.1 State aid control

Pursuant to Article 87(1) of the EC Treaty State, “Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.”

The European Court of Justice clarified the meaning of ‘undertaking’ in its Höfner/Marcottron² judgement where it held that: “It must be observed, in the context of competition law ... that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.” Therefore like any “undertaking”, SOEs which are engaged in an economic activity are not authorised to receive State aid unless the aid is authorised by the Commission.

As explained in box 1, State aid can take many forms: not just grants or interest rate rebates, but also loan guarantees, accelerated depreciation allowances, capital injections, tax exemptions etc. The aid can be granted by national, regional or local authorities or by public bodies.

Box 1. What is State aid?

A measure is qualified as a State aid only if it satisfies all of the conditions listed in Article 87(1) of the Treaty, and in particular:

- The aid involves a transfer of State resources. It includes transfer of resources from national, regional or local authorities. It may also include transfer of resources from public banks, foundations, SOEs, public and private intermediate bodies appointed by the State to the extent that the transfer is imputable to public authorities. Financial transfers that constitute aid can take many forms: not just grants or interest rate rebates, but also loan guarantees, accelerated depreciation allowances, capital injections, tax exemptions, etc.
- The aid should constitute an economic advantage that the undertaking would not have received in the normal course of business. It can be the case for instance when a firm buys/rents publicly owned land at less than the market price, when a company enjoys privileged access to infrastructure without paying a fee or when an enterprise obtains risk capital from the State on terms which are more favourable than it would obtain from a private investor.
- The aid must be selective and thus affect the balance between certain firms and their competitors. “Selectivity” is what differentiates State aid from so-called “general measures” (namely measures which apply without distinction across the board to all firms in all economic sectors in a Member State such as nation-wide fiscal measures).
- The aid must have a potential effect on competition and trade between Member States.

² Case 41/90, Höfner/Marcottron [1991] ECR I-1979.

Pursuant to Article 88 of the EC Treaty, the European Commission is given the task to control State aid and Member States are required to inform the Commission in advance of any plan to grant State aid. Implementing new State aid without notification leads to such State aid being considered ‘unlawful’ and the Commission, or a national judge, may request the Member State to suspend such aid, or to take all measures necessary to recover such aid from the beneficiary. The Commission also has the power to review existing State aid, that is aid granted to an undertaking by a Member State prior to such Member State’s accession to the European Union. The Commission may at any stage find that, due to changing market conditions, such State aid is no longer compatible with the common market and has to be terminated. Natural or legal person may, under certain conditions, institute proceedings against the Commission’s decisions in front of the Court of Justice.

The principle of incompatibility of State aid does however not amount to a full-scale prohibition. Articles 87(2) and 87(3)³ of the EC Treaty specify a number of cases in which State aid could be considered acceptable (the so-called “*exemptions*”). The existence of these exemptions also justifies the vetting of planned State aid measures by the Commission, as foreseen in Article 88 of the Treaty. The assessment of aid compatibility is essentially a balancing of the positive effects of aid (in terms of contributing to the achievement of a well-defined objective of common interest) and its negative effects (namely the resulting distortion of competition and trade). In order to be declared compatible, aid must be necessary and proportionate to achieve a particular objective of common interest. Aids which can be found compatible include for instance aid for environmental protection, aid for research and development and innovation or regional aid.

3.2 *Examples of application of State control to SOEs*

There are various examples where the Commission has found, specifically in respect of public undertakings, that the advantages granted to such undertakings by the government amounted to State aid and where it has subsequently implemented measures to ensure that competition is not distorted, thus ensuring a level playing field between public and private businesses

In its decision relating to *Electricité De France (EDF)*⁴, the Commission found that thanks to its public-law status⁵, EDF was enjoying an unlimited State guarantee and that this guarantee was an incompatible State aid. The decision required the guarantee to be removed on 01.01.2005 at the latest. EDF was incorporated (while remaining a public undertaking as more than 80% of the shares belong to the State), which removed the guarantee.

The Commission does not only control aids granted by public authorities to SOEs. As resources of SOEs can be considered as public resources, the Commission also checks that SOEs do not grant undue advantages to their subsidiaries through cross-subsidies (for instance by fixing too low transfer prices). This prevents SOEs from distorting competition on the markets on which their subsidiaries are active from

³ For the majority of State aid cases, the most relevant exemption clauses are those of Article 87(3)(a) and 87(3)(c) of the Treaty:

- Article 87(3)(a) covers “aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment”;
- Article 87(3)(c) refers to “aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions contrary to the common interest”.

⁴ OJ L 49, 22.2.2005, p.9.

⁵ EDF was an « établissement public, industriel et commercial ».

funds raised through activities reserved for them or from overcompensation to discharge public service obligations.

In *Syndicat français de l'Express international (SFEI) v La Poste*⁶, the ECJ stated that the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid within the meaning of Article 87 of the EC Treaty. The test is whether the remuneration received in return for this assistance is less than that which would have been demanded under normal market conditions.

In *Chronopost*⁷, the ECJ stated that, in the absence of market benchmark, the criterion, necessarily hypothetical, of "normal market conditions", must be assessed by reference to the objective and verifiable elements which are available. The costs borne by the undertaking when providing assistance can constitute such objective and verifiable elements. On that basis, there is no question of State aid to the subsidiary if, first, it is established that the price charged properly covers all the additional, variable costs incurred by the provision of that assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for the subsidiary's competitive activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion.

3.3 *The Transparency Directive*

In order to effectively apply EC competition policy and ensure that public undertakings are not granted more favourable treatment than their private counterparts, the Commission has to be able to ascertain what advantages these undertakings receive. For this purpose, the Commission issued the Transparency Directive in 1980.

The Transparency Directive (in its current version)⁸ has two objectives:

3.3.1 *Ensuring the transparency of financial flows between public authorities and public undertakings*

The Transparency Directive defines 'public undertakings' 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

The Transparency Directive recognises that, in order to ensure equal treatment of private and public undertakings through a fair and effective application of the Treaty rules, the complex financial relations between national public authorities and public undertakings must be made transparent.

Article 1.1 of this Directive thus provides that:

"The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:

(a) public funds made available directly by public authorities to the public undertakings concerned;

⁶ Case C-39/94, *Syndicat français de l'Express International v La Poste* [1996] ECR I-3547.

⁷ Joint cases C-83/01 P, C-93/01P and C-94/01P *Chronopost* [2003] ECR I-06993].

⁸ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p.17.

(b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions;

(c) the use to which these public funds are actually put.”

Some examples of financial relations existing between public authorities and public undertakings that have to be made transparent are⁹:

- the setting-off of operating losses;
- the provision of capital;
- non-refundable grants, or loans on privileged terms;
- the granting of financial advantages by forgoing profits or the recovery of sums due;
- the forgoing of a normal return on public funds used; and
- compensation for financial burdens imposed by the public authorities.

3.3.2 *Ensuring the transparency of the internal organisational and financial structure of (private and public) undertakings enjoying special/exclusive rights or entrusted with the operation of a service of general economic interest that receives public service compensation and that carries on other activities.*

The objective is to prevent those undertakings from cross-subsidizing commercial activities with funds raised through activities reserved for them or from compensation to provide public service obligations which would exceed the actual costs incurred in providing those obligations.

Article 1.2 of the directive provides that the

"Member States shall ensure that the financial and organisational structure of any undertaking required to maintain separate accounts is correctly reflected in the separate accounts, so that the following emerge clearly:

(a) the costs and revenues associated with the different activities and

(b) full details of the methods by which costs and revenues are assigned or allocated to different activities".

Pursuant to Article 2, "undertaking required to maintain separate accounts means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities".

The requirements imposed by the Transparency Directive have proven to be efficient means by which fair and effective application of the rules of competition to public undertakings can be assured. For instance, they allow the Commission to check that public service compensations do not exceed the costs

⁹ Article 3 of the Transparency Directive.

incurred in discharging the public service obligations and are not used to cross-subsidize commercial activities.

3.4 *Rules applicable to compensations to discharge public service obligations*

Article 86(2) of the EC Treaty provides that competitions rules are applicable to undertakings entrusted with the operation of services of general economic interest, as long as these rules do not obstruct the performance by the undertaking of the general interest tasks assigned to it. Article 86(2) recognises the fact that State intervention in the economy is sometimes necessary and justified in order to ensure the provision of services of general interest. Although in the vast majority of cases, the market ensures the optimum allocation of resources for the benefit of society at large, there are instances where services of general interest will not be provided adequately (or at all) if left solely to market forces. This may be, for instance, because their market price is too high for consumers with low purchasing power or because the cost of providing these services could not be covered by the market price. It is therefore the responsibility of public authorities to ensure that services of general interest are preserved when market forces cannot achieve this.

Following the adoption by the European Court of Justice of an important judgment (*Altmark*), the Commission has clarified the conditions under which a compensation to provide public service compensation can be authorised. As SOEs may be discharged to provide public service obligations, these rules are of particular interest for them, although pursuant to the neutrality principle, they apply the same way both to SOEs and private undertakings. These rules allow to ensure that public service providers engaged in economic activities do not enjoy undue advantages over their competitors.

In *Altmark*¹⁰, the European Court of Justice defined the conditions under which a compensation in order to discharge public service obligations escapes the qualification of State aid and is therefore not subject to Commission's scrutiny. Such a compensation escapes the qualification of State aid only if it does not have the effect of putting the recipient undertaking in a more favourable competitive position than the undertakings competing with it. This is considered to be the case only if four cumulative conditions are fulfilled:

- First, the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined.
- Second, the parameters on the basis of which the compensation will be calculated must be established in advance in an objective and transparent manner.
- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
- Fourth, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

¹⁰ Case C-280/00, *Altmark Trans*, 2003, ECR I-7747.

In 2005, the Commission clarified^{11 12} the conditions under which a public service compensation which does not escape the qualification of State aid can however be authorised by the Commission. In short, the conditions required correspond to the three first criteria of Altmark. It involves that no overcompensation is allowed: public service compensation used for the operation of a service of general economic interest, but actually used to operate on other markets, is not justified and constitutes incompatible State aid. It also involves that the public service provider does not have to be selected through a public procurement procedure; but in case the 4th criteria of Altmark is not fulfilled, the public service compensation is an aid which has to fulfil certain conditions to be authorised or block exempted. As most public service providers are not chosen through a public procurement procedure, most compensations to discharge public service obligations are considered to be State aid and therefore subject to Commission's scrutiny.

In summary, these rules:

- give an incentive to Member States to select the most efficient public service provider (which can be a public or a private entity) in particular through public procurement procedures;
- allow public service compensation when it is needed to provide the public service, while ensuring that this compensation is not used to cross subsidize commercial activities.

Although the Commission has been vigilant in controlling that SOEs do not receive State aid which would distort competition and trade, the Commission also estimates that pursuant to the neutrality principle, State aid control should not be applied to SOEs in a more stringent manner than it is applied to private businesses.

3.5 *The Market Economy Investor Principle (MEIP)*

The MEIP is the logical corollary of the competitive neutrality principle. Pursuant to the neutrality principle, the Commission may neither penalize nor favour public undertakings. Therefore, if a public intervention in favour of an SOE (for instance a capital injection) is in line with what a private investor would do, this intervention cannot be qualified as a State aid and is not subject to Commission's scrutiny. Conversely, if the terms of the transaction are more favourable than those observed on the market for similar transactions, there is normally an advantage to the SOE and the presence of aid cannot be excluded.

The market economy operator test will consist in comparing the price and conditions present in the case under examination, with the market price and conditions under which such a transaction is usually made for comparable undertakings in comparable situations (this is the "counterfactual analysis"). If the price and conditions present in the case under examination are in line with the market price and conditions, there is no advantage granted to the beneficiary and therefore no aid.

The MEIP is applicable to all forms of public interventions involving State resources, including the forgoing of income. For instance, it applies to:

- capital injections,

¹¹ Commission decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

¹² Community Framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p.4).

- granting of guarantees and loans,
- sale of land, buildings, public assets or public companies.

The MEIP is applicable to all companies and all sectors. Recipient undertakings can also be private businesses: for instance, if a public authority sells a land at market price to a private business, such a sale is not considered to be State aid.

The Commission's 1993 Communication to the Member States¹³ formally established the MEIP. In this communication, the Commission recognised that public undertakings can, in certain instances, derive an advantage from the nature of their relationship with public authorities through the provision of public funds, whether directly or indirectly, and stated that: *"To ensure respect for the principle of neutrality the aid must be assessed as the difference between the terms on which the funds were made available by the State to the public enterprise, and the terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market economy conditions (hereinafter 'market economy investor principle')"*¹⁴.

This principle has been applied by the Commission in establishing the presence of State aid in cases concerning capital made available by a public authority to public undertakings.

The judgement by the Court of First Instance in *Air France v The Commission*¹⁵ is one example of where the MEIP has been used in respect of a public undertaking. Air France, a limited company in which the French State at that time held 99% of the share capital, had been experiencing serious financial difficulties for some time. Capital was made available by the French State to Air France. The Commission took the view that this constituted State aid, inter alia on the basis that a rational private investor would not have injected the large amounts in question into Air France in view of its recent poor financial and operating performance. Ultimately, therefore, it considered the injection of capital in question to be State aid aimed at helping Air France temporarily to overcome its financial crisis. The Court upheld the Commission's finding that State aid was present and found that: *"...there is State aid within the meaning of Article 87 of the Treaty when a State makes a large investment...for the purposes of [Air France's] restructuring, where the restructuring envisaged is clearly incapable of improving, even in the long term, the undertaking's situation, characterised by a crushing volume of indebtedness and overwhelming losses. In such circumstances, a hypothetical private investor would not have been induced by signs and prospects of improvement which are insignificant in comparison with the undertaking's situation to inject the capital in question, since he would have hardly any prospect of the undertaking returning the funds invested."*

In *Westdeutsche Landesbank Girozentrale v Commission*¹⁶, the MEIP was again applied where the Court of First Instance stated that: "Normally, a private investor is not content merely with the fact that an investment does not cause him a loss or that it produces only limited profits. He will seek to achieve the maximum reasonable return on his investment, according to the particular circumstances and the satisfaction of his short-, medium- and long-term interests, even where he is investing in an undertaking of which he is already a shareholder. Thus, as regards the position of the Land as investor, the fact that the transaction at issue is reasonable for the Land does not preclude the application of Community law on State

¹³ Commission communication to the Member States of 1993 (1993 OJ C 307/3).

¹⁴ Paragraph 11 of the Commission's 1993 communication to the Member States.

¹⁵ Case 358/94, *Compagnie nationale Air France v Commission of the European Communities* [1996] ECR II-2109.

¹⁶ Case T-228/99, *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-00435 at par 314.

aid. It does not obviate the need to ascertain whether that transaction strengthens WestLB's position by giving it an advantage which it would not have obtained under normal market conditions.”

Another example of State measures to SOEs which might escape the qualification of State aid or be authorised are State measures which relieve public undertakings from structural disadvantages they have in relation to their private-sector competitors.

3.6 *Principles applicable to State measures which relieve public undertakings from structural disadvantages they have in relation to their private-sector competitors*

Certain public measures relieve SOEs (or former SOEs) from structural disadvantages (for instance pension liabilities) which their competitors do not bear. Such measures can escape the qualification of State aid when they are not aimed at conferring an advantage on the undertaking but rather at freeing it from the structural disadvantage burdening it compared to its private-sector competitors. In *Combus*¹⁷, the Court of First instance (CFI) found that the payment by a Member State of an amount of money to employees of a bus transport undertaking in order to finance their giving up their status as officials and accept being employed on a contract basis is not State aid within the meaning of Article 87(1) EC when the measure in question was introduced to replace the privileged and costly status of those officials with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with that undertaking. According to the CFI, such a measure, which could have also taken the form of a reassignment of the parties concerned within the public administration, is not aimed at conferring an advantage on the undertaking but rather at freeing it from the structural disadvantage burdening it compared to its private-sector competitors.

However, in most cases, such measures provide the recipient undertaking with an advantage and are considered to be aid. However they are authorised by the Commission, if they are limited to what is necessary to create a level playing field between the recipient undertaking and its competitors and do not distort competition and trade to an extent which would be contrary to the Community interests.

For instance, the Commission found that the reform of the financing of the pensions of the officials of La Poste¹⁸ was a compatible aid. The reform was designed to align gradually the costs borne by La Poste in respect of retirement pensions paid to its public-service employees on the pension costs of its private competitors.

4. Conclusion

EC State aid rules are based on the neutral treatment of all undertakings. Neutral treatment does not only mean that rules are applied the same way to SOEs and private businesses, involving that State aid to SOE is in principle forbidden unless the Commission finds the aid to be compatible with the common market. It also means that State aid rules are applied so as to create a level playing field between SOEs and private businesses: in particular, when public (or private) undertakings are not put on an equal footing with their competitors (for instance because of public service obligations or structural disadvantages), the Commission authorises aid under the condition that such an aid is limited to what is necessary to restore the level playing field. In addition, SOEs are not authorised to use public resources to cross-subsidise commercial activities and thus get an unfair advantage over their privately-owned competitors.

¹⁷ Case T-157/01, *Danske Busvognmænd v Commission of the European Communities* [2004] ECR II-00917.

¹⁸ Case C 43/2006, *Projet de réforme du financement des retraites des fonctionnaires de La Poste française*, OJ L 63, 7.3.08, p.16.

The Commission has the necessary powers, backed-up by stringent transparency requirements, to ensure that these principles are applied. This paper has given examples of cases where the Commission has found that an aid to a SOE was unlawful, the consequence being that the Commission, or a national judge, may request the Member State to suspend the aid, or to take all measures necessary to recover the aid from the beneficiary.

Being based on a transparent set of rules and effective implementing tools, the EC State aid policy has proven to be an efficient instrument to ensure that competition in the common market is not distorted through advantages that public undertakings, engaged in commercial activities, may enjoy over their privately-owned competitors.

BRAZIL

1. Corporate governance for SOEs

The Brazilian federal government established, through Decree n° 6.021 of 2007, an inter-ministerial committee on federal SOE corporate governance and on the administration of federal SOE shares held by the Union known (CGPAR). This committee is composed by the Minister of Finance, the Minister of Planning, Budgeting and Management and the Chief-Minister of the Presidential Staff Office. It is charged mainly with establishing directives and strategies related to federal SOE shares held by the Union with the aim of defending the Union's interest as a shareholder and promoting management efficiency - including the adoption of best practices in corporate governance (Article 3 of Decree n° 6.021 of 2007). In practice, the committee has aimed to established strategies and directives that are in line with those promoted by the "OECD Guidelines on Corporate Governance of State-Owned Enterprise."

Despite some delays in the committee's work, a recent empirical study by Da Silva (2008) has shown that, in general, Brazilian SOEs already display higher levels of corporate governance than their private sector counterparts. Bank of Brazil and Petrobras are among the best performers and have been upheld as benchmarks for other SOEs in a 2005 federal government seminary. BMF & BOVESPA, a leading stock market based in the city of São Paulo, has classified both companies as New Market, the top most category in good governance utilized by this institution. The Bank of Brazil follows an extensive personalized governance code which aims to: empower stock holders (including minority stock holders); safeguard high levels of transparency, responsible management, strict and independent supervision, ethical and socio-responsibility; and avoid conflicts of interest. The full code and other corporate governance information on the Bank of Brazil may be accessed in English in the Investor Relations section of the Bank's web site (www.bb.com.br). Petrobras, for its part, adopts very similar initiatives. More information on corporate governance for this firm may be accessed in English in the Investor Relations section of the company's website (www.petrobras.com.br).

The federal government, through the Brazilian Department of SOEs, also promotes good corporate governance in state enterprises through the organization of seminars and the publishing of good practices in corporate governance which SOEs may follow voluntarily. Furthermore, the Securities and Exchange Commission of Brazil (CVM) has published a list of good practices which it recommends to both private and state companies. In these cases, there are no legal requirements for firms to adopt government recommended practices or to explain why they do not adopt them. But the CVM is studying the possibility of adopting the "comply or explain" system for its recommendations for both private and state enterprises.

2. Competitive neutrality policies

There is no legal exigency that Brazilian SOEs must follow commercial or non-commercial goals. But of the two types of Brazilian SOEs¹, public companies do tend to have more non-commercial roles than joint capital companies since the former is 100% state owned and the latter has a mix of private and public investments with government having the majority share. This can be clearly observed from SOEs' mission statements which are publicized in their own websites. The Brazilian National Economic and Social Development Bank (BNDES), for example, is a public company with a clear non-commercial mission of promoting the sustainable and competitive development of the Brazilian economy and reducing

¹ Please refer to the beginning of Annex I for a description of each type of Brazilian SOE.

unemployment and social and regional inequalities. The Bank of Brazil on the other hand is a joint capital company with a much more commercial mission of being a solution in financial services and intermediation, attending client and shareholder expectations, strengthening commitment between employees and the company and contributing to the development of the country.

There are also no restrictions on the markets which Brazilian SOEs may conduct their operations. But in practice, federal, state and municipal SOEs are strongly focused on sectors that governments consider strategic for economic and social development as well as for national security, such as: arms supply; infrastructure; finance; and applied research - as noted in Annex I.

Also, as mentioned in Annex I, Brazilian SOEs are treated by the law much the same manner as private companies in that they are subject to antitrust enforcement and cannot have fiscal privileges that do not apply to private companies, unless if their activities are of a purely non-economic nature. Furthermore, state owned banks are not legally obligated to favor SOEs over private companies. Rather, state owned banks with a more commercial mission tend to simply focus on profits while state banks with more social missions tend to focus on the economic and/or social development of their region, which does not necessarily entail favoring state over private enterprises. On the other hand, as was noted in Annex I, SOEs can receive state money but, in doing so, become subject to more strict financial regulations, and SOEs can seek central government aid to cover deficits through statute granted authorization.

3. Monitoring and enforcement

The federal Attorney-General's Office is responsible for making sure that the strategies and directives established by CGPAR are adopted by federal SOEs. The Brazilian System for Economic Defense (SBDC) – which is composed of the Secretariat for Economic Defense (SDE), the Secretariat for Economic Monitoring (SEAE) and the Administrative Council for Economic Defense (CADE) – is responsible for applying antitrust norms equally to state and private enterprises. Such application may not be reviewed within the Executive Branch but may be reviewed by the Judiciary branch. In such cases CADE's Attorney General represents the institution in the courts. The Judiciary, when provoked, is also responsible for ensuring that private and state enterprises, that pursue economic activities, receive equal treatment in terms of fiscal privileges.

4. Conclusion

In sum, the Brazilian federal government has established a high level committee on SOE corporate governance. This has occurred along with interesting news from a recent study that showed that Brazilian SOEs display higher levels of corporate than their private sector counterparts. The Federal Department of SOEs has been contributing to further success. Furthermore, Brazilian SOEs are faced with relatively high competitive neutrality and are subject to antitrust policy in the same measure as private firms.

BIBLIOGRAPHY

- BOVESPA & BMF. *Governança Corporativa*. Available at:
<www.bovespa.com.br/Empresas/GovernancaCorporativa.asp> Accessed on 2 July 2009.
- BRAZIL. Ministry of Justice. Administrative Council for Economic Defense. Commissioner Vinícius de Carvalho's vote on Concentration Act no. 08012.002820-2007-03, pertaining to Petrobras and Ipiranga. Available at: <www.cade.gov.br> Accessed on 2 July 2009.
- BRAZIL. Ministry of Finance. Bank of Brazil. *Corporate Governance*. Available at investor relations section of following website: <www.bb.com.br> Accessed on 2 July 2009.
- BRAZIL. Ministry of Planning, Management and Budget. Available at state owned enterprises section of following website: <www.planejamento.gov.br> Accessed on 2 July 2009.
- BRAZIL. Ministry of Finance. National Treasury. *Glossário*. Available at:
<www.tesouro.fazenda.gov.br/servicos/glossario/glossario_a.asp> Accessed on 2 July 2009.
- BRAZIL. Ministry of Finance. Securities and Exchange Commission. *Recomendações da CVM sobre Governança Corporativa*. 2002. Available at: <www.ecgi.org/codes/documents/cartilha.pdf>
Accessed on 2 July 2009.
- DA SILVA, André Luiz Carvalho. *A Governança Corporativa das Firms Privadas é Realmente Melhor do que a das Empresas Estatais? Curiosas Evidências do Mercado Brasileiro*. Third prize winner of the Fourth Brazilian Department of SOEs dissertation contest. 2008.
- FORBES. *The World's Biggest Companies*. Edited by Scott DeCarlo. 2009. Available at:
<www.forbes.com/> Accessed on 2 July 2009.
- FORBES. *The Forbes Global 2000*. Edited by Scott DeCarlo. 2005. Available at: <www.forbes.com>
Accessed on 2 July 2009.
- THE ECONOMIST INTELLIGENCE UNIT. *The Next Oil Giant? Brazil's Oil Industry has Big Hurdles to Clear*. 10 March 2009. Available at:
<www.economist.com> Accessed on 2 July 2009.
- VISCUSI, Kip W., Joseph E. Harrington Jr., John M. Vernon. *Economics of Regulation and Antitrust*. Cambridge, Massachusetts and London England: MIT Press. 2005.

ROMANIA

1. Corporate governance for SOEs

The experiences of the developed countries reveals that a good corporate governance could reduce risk, stimulate performance, improve access to capital markets, enhance the marketability of goods and services, improve leadership, increase the value of the corporations, enable the corporation to acquire external finances more easily and at a lower cost.

In the case of developing and emerging economies the need for corporate governance extends beyond resolving problems resulting from the separation of ownership and control. Developing and emerging economies are constantly confronted with issues such as lack of property rights, abuse of minority shareholders or contract violations. But in order for corporate governance measures to have a strong impact in the economy, a set of democratic, market institutions and legal system should be set up.

The Romanian governance system follows the patterns of the Continental European model based on internal control of the employees and the management but with some particularities due to specific economic, political, cultural conditions.

The main factor that generated certain particularities of this system was the massive privatization process that took place ever since the 90s. The main methods of privatization were: management-employee buyouts (MEBOs), mass privatization program and sale of shares to private investors.

From a corporate governance point of view, MEBOs were important for two reasons. First, as a general matter, employees were likely to have objectives other than profit maximization. Second, the specific design of the MEBO privatization in Romania was such that the company's employees had to form an employees' association that was entitled to execute the ownership rights of the shares obtained by the employees, at least during the repayment period. MEBO privatizations usually involved transfers of large stakes, thus the MEBO organization is still a major type of shareholder in Romanian listed firms.

Other peculiar owners of the Romanian firms in general and of the listed firms in particular were the five financial organizations established in 1991, by the first law of privatization (Law 58/1991). Called Private Ownership Funds (POFs), they received 30 percent of the shares from each corporatized state-owned company, while the other 70 percent was given to the State Ownership Fund (SOF), a more conventional state holding. Although private in name, the POFs were until after the Mass Privatization Program (1995-96) very dependent on the government: they had as owners approximately 18 million citizens, which had neither real possibility nor incentives to control the POFs management, while their boards were appointed by the government with the approval of the Parliament. Finally, in 1996 the five SIFs were transformed into joint-stock commercial companies and in September 1999 were listed on the Bucharest Stock Exchange.

Taking into account the public body governing the SOE and SOE's legal status, the state participation in economic activities takes the following forms:

- enterprises entirely state-owned or where the state holds majority stakes (*regies autonomes* or national companies), under the authority of either line ministries or local administrations;

- joint-stock commercial companies, under the authority of either line ministries or local administrations;
- joint-stock commercial companies where the state holds majority or minority stakes, under the portfolio of the Authority for State Assets Recovery; these companies are either due to be privatized or were recovered from privatization in cases when the acquirer did not fulfill his contractual obligations with the state.

In 1993 the government established clear policies limiting the range of activities appropriate for the *regies*; the status of “*regies*” was limited to state enterprises that were “natural monopolies or essential for national defense and security”. Lately in 1997 a new regulation imposed the transformation of all non-essential *regies* or ancillary operations into joint-stock commercial companies/national companies, in the end open for privatization¹.

In 1990 *Law no.15/1990 on the reorganization of state undertakings as regies autonomes and commercial companies* marked the fundamental change in legal relations between SOEs in a planned economy and instituted the application of the principle of contractual liberty to legal relations between SOEs.

In parallel, for all commercial companies on the market, the main governance principles were instituted by *Law no.31/1990 regarding commercial companies* (the “Company Law”).

The Company Law provides the regulatory framework for the establishment and management of commercial companies (either joint stock or limited liability). The Company Law was amended in 2006 by Law no. 441/2006, and again in 2007 by Government Emergency Ordinance 82/2007. The changes to the Company law were intended to incorporate the European *acquis communautaire* and OECD corporate governance principles. The objectives were to clarify the rights and duties of directors, improve shareholder protection and synchronize regulations governing mergers and acquisitions with EU law. As a 2008 EBRD assessment on commercial laws of Romania notes, these amendments introduced a new general shareholders' meeting convocation quorum and the choice between the one-tier and two-tier governance systems for joint stock companies. According to the 2004 ROSC assessment, the 2002 and 2004 revisions to the Capital Markets Law are the most pertinent to protecting minority shareholders of publicly held companies.

At the beginning, the *regies* were not included in the scope of the Company Law. Later on, many of the *regies* were transformed into either commercial or national companies, all joint stock, which fall under the general provisions of the Company Law. In 2008, the Government decided also that a parallel management system and criteria for undertakings, whether private or state-owned is not justified; moreover a special regime of management for *regies autonomes* and national companies where the state holds majority stakes would impair the activity of such companies. As a result, the respective SOEs must now all observe the provisions of Law no.31/1990.

Following the conclusions of several official documents regarding Romania's progress (such as: EC Report on Romania's progress in 2004 regarding the EU accession process, Monitoring Report of preparation stage for EU accession – October 2005, the conclusions of World Bank in evaluating the compliance of Romania's legislation with OECD Corporate Governance Principles ROSC-2004), Romanian authorities started a process of revising legislation related to companies.

¹ See also our contribution on “Application of antitrust laws to state-owned enterprises”.

The legislation reform intended to adjust national legal framework on governance both to the standards imposed by the EU acquis regarding the companies and to OECD standards on Corporate Governance. In analyzing compliance to OECD Corporate Governance principles, the main changes brought by the reform related to:

- reconfiguring the structure of the Board, choice between the “one-tier” and the “two-tier” model, making distinction between the executive and non-executive positions;
- defining the executive and non-executive positions and the liability of executive and non/executive administrators;
- criteria to ensure the independence of non-executive administrators;
- revising the administrators’ statute, by enforcing the due diligence obligation,
- the obligation of loyalty towards the company, the “business judgement rule”;
- improving minority shareholders’ protection by new regulations on general assemblies
- meetings, quorum and majority requirements, enforcing the right to vote, to information and disclosure, dividend payments, etc.;
- appointment of financial auditors, etc.

The principles of corporate governance were also included in the capital market legislation. A first step was made in August 2001 when the Bucharest Stock Exchange (BSE) elaborated a Code of Corporate Governance and introduced a virtual tier, the Plus tier, for listed companies agreeing to implement the principles. In 2003 BSE founded the Institute of Corporate Governance that has as main goal to increase professional standards for managers and staff of public enterprises. In 2008 BSE issued a new Code of Corporate Governance², more complex and more adapted to the European legislation. Listed companies, including SOEs, may adopt and comply with the code on a voluntary basis; however, companies that adopt the code must issue yearly statements on their observance, on the principle “comply or explain”.

Public authorities may exercise a dominant influence on the behavior of public undertakings not only where they are the proprietor or have majority participation but also by virtue of powers they hold in management or supervisory bodies as a result either of the rules governing the undertaking or of the manner in which the shareholdings are distributed.

Public authorities that have the right to exercise state ownership rights do so by appointing representatives in the General Shareholders Assembly and the Board of the undertaking. The state representatives act according to a mandate including strategy elements approved by the Government.

For example, in case of *regies autonomes*, the Board compulsorily includes an official from the Ministry of Finance, and, as the case may be, officials from other relevant Ministries and a representative from the Ministry in charge. The other members will be appointed from among educated professionals specialized in the field of the respective *regie*.

²

<http://www.bvb.ro/info/Rapoarte/Diverse/20090122%20Corporate%20Governance%20Code.pdf>.

The Board of Directors carries on its activities in accordance with its own structure and operating regulations and decides on all the matters concerning regular activity, excepting those which, by law, are under other bodies' competence.

The Board members:

- are appointed for a 4 year period, and half of them may be replaced every 2 years;
- cannot sit on more than two Boards or they cannot participate in a commercial company with which the regie has business relations or conflicting interests;
- maintain their position at the institution or unit they came from and all the rights and duties resulting from this position;
- are paid a salary established by the Board for their activity.

The Board of Directors may forward the proposition to replace an inadequate member to the body that appointed him.

In the first month of each year, the Board of Directors makes a report to the Ministry in charge or, as the case may be, to the local administration, on the activity carried out in the previous year and on the activity program for the current year.

The *regie*'s current activity is managed by a general manager appointed by the Board, with the advice of the Ministry in charge or, as the case may be, of the local authority. From 2001 to 2008, when main divergences between managements systems of private enterprises/commercial companies vs. *regies autonomes* and national companies were eliminated, the management of the latter was performed according to a performance contract. Performance contracting was adopted as a holding strategy for controlling selected public enterprises and improving performance where the state intended to retain ownership. The performance contract was a negotiated agreement between the management of a SOE and its owner (government or local body) with respect to: future goals of the enterprise, measure of performance for each goal, management incentives, autonomy of management and defined limits, accountability etc. Currently, the management for all companies, whether joint stock or regies, state-owned or private, is performed according with the provisions of a mandate contract.

In the Governance Programme 2009-2012, one of the objectives related to SOEs is to increase financial performance of all public undertakings, by organizing them as profit centers and employing legal persons as managers by inviting competitive bids for the top management of the enterprise. One reason why such an approach might be preferred over the current management system is that an individual chief executive thrown into an organization, however good the business plan, is likely to meet resistance from incumbent middle management. A management contract which establishes a harmonious and integrated team is more likely to succeed.

In 2009, Romania concluded a Stand-By Arrangement with the IMF whereby the government took upon itself the obligation to implement an improved system of financial monitoring of decentralized fiscal entities (including public enterprises) and to increase the net revenue from these entities through tighter control on their expenditures and reduced subsidies. In 2010, once the enhanced monitoring is in place, an indicative target on the financial balance of the largest public enterprises will be included in program conditionality. Public enterprises will not be allowed to accumulate new arrears, but they will have to restructure to reduce existing arrears. During the program period, public enterprises making losses will not

be allowed to raise compensation; those earning profits will only be allowed to increase compensation in line with inflation and productivity growth.

2. Scope and application of competitive neutrality policies

One way to reduce the scope of competition neutrality issues in an economy is to reduce government involvement in the economy. Competitive neutrality problems may also be addressed in a number of other different ways, such as: design and implementation of procurement policies, ensuring public authorities are fully subject to competition law, equal fiscal treatment of public and private undertakings etc.

The legislation currently governing the public procurement sector in Romania states as its main objectives: promotion of competition between undertakings; guarantee of equal treatment and non-discrimination; ensuring the transparency and integrity of the public procurement process; efficient use of public funds.

As a rule, competitive neutrality principles are embedded also in all normative acts that govern the activity of SOEs (establishment, statutes, governmental strategies and multi-annual governing policies) in various forms.

For example, even before the enactment of the Romanian Competition Law in 1996, art.36 of Law no. 15/1990 on the reorganization of state undertakings as *regies autonomes* and commercial companies forbade “all agreements between commercial companies or *regies autonomes*; any decision or concerted practice that is susceptible to harm trade between undertakings and that has as object or effect the prevention, restriction or distortion of the competition game; the abusive exploitation of a dominant position on the market or a substantial part of it”.

Since 1997, Competition Law no.21/1996 applies to all undertakings, whether public or private. The Law applies also to central and local public administration bodies to the extent in which they intervene on the market, influencing directly or indirectly the competition.

Competition policy has to guarantee the unity, uniformity and viability of the market, also by preventing the distortion of competition by those central or local authorities which, by means of State aid measures, support on a discriminatory basis certain undertakings in the disadvantage of others. Since Romanian transition economy required rigorous mechanisms for State aid control, the Romanian competition policy was completed with Law no.143/1999 amended and completed by Law no.603/2003 in order to fully transpose the Community rules.

Since accession, the competitive neutrality principles embedded in the EC Treaty fully apply to Romania as well. Article 295 of the Treaty provides that there should be no unjustified discrimination between public and private undertakings in the application of the rules on competition. Article 86 provides that the services performed by government entities, or private entities on behalf of the government, should be subject to the competition provisions of the EC Treaty unless this would undermine the provision of ‘services of general economic interest’. The Transparency Directive requires public companies to transparently and separately report commercial and non-commercial activities, in order to avoid cross-subsidization.

3. Monitoring and enforcement activities of the RCC

3.1 Advocacy

Consistent with RCC’s competition policy strategy, the national competition authority has formal mechanisms for policy advocacy in its relations with sectoral regulators, Government, Parliament and other

public authorities. A RCC representative participates in preparatory governmental meetings at technical level in order to identify potential anticompetitive effects unforeseen by the legislator and most adequate solutions to correct or eliminate such effects. For the same objective, a competition inspector takes part in Advisory Committees of regulatory authorities.

Since 2004, the competition law was amended, giving the national competition authority the power to give “binding” opinions on draft laws which may have an anticompetitive impact. Under article 27 (k) of the law, the Competition Council acquired the competence to address binding advisory opinions (“*aviz conform*”) on draft normative acts that may have an anticompetitive impact and to propose amendments. This new provision strongly increased the profile of the Competition Council in Romania before the Romanian legislative power.

RCC currently manages 21 cooperation protocols with national public institutions, including regulatory authorities, governmental agencies and professional associations. In the framework of these protocols, over 17 exchanges of information took place in 2008 alone, ensuring a correct interpretation and application of competition rules.

In 2004, at the initiative of RCC, an Inter-Ministerial Working Group was created. The WG aims to promote competition in all sectors and ensure the prevalence of the competition legislation over other normative acts. Within the Group, the institutions involved are represented at the level of Secretary of State.

The Inter-Ministerial Working Group on competition issues is an unincorporated body, that works besides the Competition Council and whose permanent members are: Competition Council, Ministry of Economy and Commerce, Romanian Presidency, The Prime Minister, Ministry of Justice, Ministry of Public Finance, Ministry of Communications and Information Technology, Ministry of Transport, Constructions and Tourism, Ministry of Environment and Waters Management, Ministry of Health, Ministry of Education and Research, Ministry of European Integration, Ministry of Agriculture, Forests and Rural Development, Ministry of Administration and Internal Affairs.

The meetings of the Inter-Ministerial Group are held on a monthly basis. Depending on the subject approached, representatives of other public administration authorities, organizations and non-governmental associations, representatives of entrepreneurs, manufacturers or other undertakings may participate as guests in its reunions.

The main working instrument within the Inter-Ministerial group is the *Regulatory Impact Analysis*, which ensures that the decision-making process is based on clear and accurate information regarding the costs and benefits of the regulation, with a view to identify and prevent in due time any distortive consequences of the regulating process.

During accession negotiations, the Government recognized that different sectoral policies may have a substantial impact on the competitive environment and also that adequate coordination between commitments taken by Romania in different chapters of the Community *acquis*; therefore a representative of RCC was involved in the activities of sectoral teams for chapters on agriculture, transportation, taxation, energy, regional policy, industrial policy etc.

3.2 *State aid*

The national State aid legislation in force in Romania prior to the January 1, 2007 provided for the obligation of notification to the Competition Council of all State aid measures so to be granted only following their authorization by the competition authority.

After accession, the responsibility for State aid authorization passed from the Romanian Competition Council to the European Commission. However, RCC retained a very important role of contact authority in the relations with the European Commission as concerns State aid matters and continues to have the following attributions:

- provides assistance to the State aid grantors so to ensure the elaboration of high quality State aid notifications and the fulfillment of the commitments assumed by Romania in this field as member of the European Union;
- monitors State Aid granted in Romania and annually updating the national State aid Inventory and Report, as well as the EU State Aid Scoreboard.

The fact that the RCC currently has a central coordinating position for all State aid cases is positive, as the know-how acquired in previous years is not lost but rather put to good use. It also represents a challenge, since the national competition authority must be able to deliver very rapidly high quality advice to State aid grantors, otherwise it will only be perceived as an additional bureaucratic hurdle.

3.3 *Financial transparency*

Even before accession, recognizing that a fair and effective application of the aid rules to both public and private undertakings would be possible only if these financial relations are made transparent, the legal framework included the obligation to distinguish clearly between the role of the State as public authority and its role as proprietor. In 2004 RCC adopted a Regulation that transposed the provisions of the EC Directive on financial transparency. Later on, the Regulation was amended in accordance with the European legal provisions in the matter.

RCC was given the task to supervise financial relations between public authorities and public undertakings and financial transparency within certain undertakings, to request further explanations in cases where inconsistencies occurred and to compile a report illustrating the national level of compliance for with relevant legal provisions. Thus, since 2005, this monitoring activity takes place on a yearly basis and is concluded by a report that is available to the EC on request.

The financial relations between public authorities and public undertakings must be transparent, so that the following may result clearly:

- that public funds have been made available directly, by the public authorities, to the public undertakings envisaged;
- that public funds have been made available, through other public undertakings or financial institutions, by the public authorities, to the public undertakings;
- the effective use of public funds received by the public undertakings.

The public authorities have the obligation to submit information concerning their financial relations with public undertakings and to keep evidence of their financial relations with the public undertakings.

In order to ensure the transparency of the financial relations, the public undertakings have the following obligations:

- to keep evidence of their financial relations with public authorities;

- to store for a period of 5 years, starting with the closure of the financial year in which public funds were made available to the public undertakings, the information regarding their financial relations with the public authorities;
- to submit information concerning their financial relations with public authorities, within 15 working days following the request of the Competition Council;
- to communicate to the Competition Council, within 60 days from the closure of the financial exercise, the fulfillment of the conditions of qualification as a public undertaking.

Special rights are granted by a public authority to a limited number of undertakings, through any legislative, regulatory or administrative instrument, within a given geographical area. Exclusive rights are granted by a public authority to one undertaking, through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or to carry out an activity within a given geographical area. Services of general economic interest are services performed under market conditions for which there are obligations imposed by public authorities regarding non-discriminatory access of consumers and/or other imposed obligations.

In their turn, the undertakings benefiting of special or exclusive rights or providing services of general economic interest have the following obligations:

- to provide, at the request of the Competition Council, the information regarding the costs and the revenues obtained from different activities, complete details concerning the methods for ear-marking the costs and revenues to different activities;
- to store for a period of 5 years the information regarding their financial relations with public authorities, respectively and the information concerning financial structure and organization chart;
- to communicate to the Competition Council, within 60 days from the closure of the financial exercise, the fulfillment of the conditions of qualification as undertaking benefiting of special or exclusive rights, or which provides services of general economic interest.

CHINESE TAIPEI

1. Introduction

In preparing the present submission, the Fair Trade Commission (the FTC) consulted with various government agencies responsible for motivating the corporate governance for state-owned enterprises, including the Council for Economic Planning and Development (CEPD), the Ministry of Finance (MOF), the Ministry of Economic Affairs (MOEA), and the Ministry of Transportation and Communications (MOTC). This submission focuses on issues related to corporate governance policies, practices and regulations for state-owned enterprises (SOEs). In addition, Chinese Taipei points out how to promote fair competition among SOEs and private enterprises through competition law enforcement.

SOEs play an important role in the economic development of Chinese Taipei. Pursuant to the Administrative Law of State-Owned Enterprises, the purpose in establishing SOEs has been to develop national capital, promote economic development, and improve the livelihood of the people.

The initiative for economic liberalization and internationalization started in 1984, and in 1989, the Cabinet adopted the recommendations of the Economic Reform Council to reduce the scale of SOEs, implement liberalization and accelerate the opening up of domestic markets. On 25 July 1989, the Cabinet established the “Inter-ministerial Working Group for Promoting the Privatization of SOEs” to allow important steps needed for the privatization of SOEs to be taken. Its members included the CEPD, the MOF, the MOEA, the MOTC and the heads of relevant agencies of the provincial government.

The Group consequently drafted the Statute for the Privatization of State-owned Enterprises which was passed by Parliament and promulgated in June 1991. This was a milestone because, since then, not only has the privatization of SOEs gained a groundswell of support but it has also had a stronger legal basis.

Between 1989 and 2008, thirty-seven SOEs in Chinese Taipei were privatized, including the state-owned steel, petrochemical, marine transport, telecommunications, ship-building, engineering industries and commercial banks, as well as insurance companies. Seventeen small-scale enterprises or factories, most of them subordinated to the Veterans Affairs Commission, were shut down after a careful review. A number of SOEs still remain, but most are public utilities and large-scale SOEs in different fields, including electricity, water, petroleum, railways, postal services, sugar, wine, and tobacco, and have been appended to the list of enterprises currently undergoing privatization.

2. Corporate governance for SOEs

In January 2003, the Cabinet established the “Taskforce for Reforming Corporate Governance” that was charged with speeding up the progress in carrying out domestic corporate governance reform. The Taskforce drafted the Policy Agenda and Action Plan to Strengthen Corporate Governance which was passed by Cabinet meetings in November 2003 to serve as the basis for government agencies to promote corporate governance. The financial service enterprises, SOEs, and publicly-traded companies (TSE/GTSM listed companies) are a first priority in the reform of corporate governance. Therefore, the experience gained in carrying out the reforms of the publicly-traded companies will be applied to all financial service enterprises under the MOF and SOEs under the MOEA and the MOTC.

In October 2004, the Cabinet approved the Performance Report on the Corporate Governance of SOEs under the MOF, the MOEA, and the MOTC submitted by the CEPD. Meanwhile, it also studied the feasibility of introducing a system of independent directors for SOEs. In August 2005, the Finance and Economic Meeting of the Cabinet approved a proposal entitled “Establishment of a System of Independent Directors for SOEs.” At this meeting, it was resolved that corporate governance is a key policy at present, and that independent directors lie at the core of corporate governance. In particular, SOEs play leading roles in supporting government policies. Thus, SOEs under the MOF, the MOEA, and the Veterans Affairs Commission were requested to introduce a system of independent directors in order to serve as good examples for promoting corporate governance.

To promote corporate governance, the Financial Supervisory Commission (the competent authority responsible for the financial sector, hereinafter the “FSC”) in March 2006 issued an interpretation, stating that “pursuant to Article 14-2 of the Securities and Exchange Act, a financial holding company, bank, bills finance company, insurance company, or integrated securities house subordinate to the publicly-traded company or financial holding company subsidiary that has issued stock in accordance with this Act, and has a capital stock of more than 50 billion New Taiwan Dollars of a publicly traded company in a non-financial industry, may appoint independent directors in accordance with its articles of incorporation; the independent directors shall not be less than two in number and not less than one-fifth of the total number of directors.”

Until now, most SOEs have appointed at least two independent directors to implement corporate governance, except for specific SOEs with responsibility for carrying out government policy goals. The specific SOEs include Central Deposit Insurance Corporation (which is not a public company whose policy goal is to safeguard the rights of depositors in financial institutions, maintain an orderly credit market, and further the sound development of financial business), the Export-Import Bank of the ROC (an unincorporated organization that aims to facilitate the export and import trade of Chinese Taipei in line with its economic and trading policy), and Chunghwa Post Co., Ltd.

Chinese Taipei would like to provide some examples to illustrate the current practices of the SOEs’ corporate governance as follows:

2.1 SOEs under the MOF

Appointing directors and supervisors: The Taiwan Financial Holdings Co., Ltd. (TWFHC), Land Bank of Taiwan (Land Bank), the Export-Import Bank of ROC (EXIM Bank), the Central Deposit Insurance Corporation (CDIC), and the Taiwan Tobacco & Liquor Corporation (TTL) are all SOEs solely owned by the MOF. The MOF is their only shareholder. Pursuant to the Company Act, the MOF has appointed representatives to serve as directors and supervisors in the aforesaid enterprises and to perform their duties

Appointing independent directors: Both TWFHC and Land Bank have appointed 3 independent directors according to relevant regulations. CDIC and EXIM Bank have not appointed independent directors due to their policy goals. In addition, TTL is only a public company but not a publicly-traded company; thus, it is not obliged to establish independent directors. However, to carry out the government’s policy, TTL has now appointed 2 independent directors.

2.2 SOEs under the MOEA

To effectively implement the policies for the strengthening of corporate governance, the State-owned Enterprise Commission of the MOEA (SEC) has adopted the following six principles for five SOEs under

the MOEA. The five SOEs are the Taiwan Power Company, CPC Corporation, Aerospace Industrial Development Corp., Taiwan Sugar Corporation, and Taiwan Water Supply Corporation.

Improving the internal control and internal audit systems: An internal control system has been built up in each SOE; the SEC organizes a team to conduct internal due diligence in Each SOE every year.

Creating a sound accounting system to ensure the independence of Certified Public Accountants (CPAs): Each SOE has established an accounting system and implemented a rotation system of certification of the CPAs to ensure the independence of these CPAs.

Strengthening the function of the board of directors and the efficiency of meetings of boards of directors/supervisors and shareholders: To strengthen the liabilities and function of the board of directors, the SEC published a Directive on Strengthening the Function of the Board of Directors/Supervisors for SOEs under the MOEA and Directive on Enforcing the Independent Directors System for SOEs under the MOEA. Scholars or professionals are recruited to be independent directors to ensure the independence of the board of directors; there are functional committees under the board of directors to implement its supervision and management functions. In addition, the SEC regularly evaluates the directors and supervisors representing state-owned shares for each SOE in each year to ensure the quality of decision-making.

Disclosure and transparency of material information: All SOEs regularly publish corporate governance-related information on the Market Observation Post System for the disclosure and transparency of business information.

Protecting the rights of shareholders and improving the supervisors' function: Each SOE holds annual shareholder meetings regularly. The shareholders can participate in making material corporate decisions to protect their rights. In addition, a supervisor contacting mechanism is established to understand the operating information in a timely manner.

Respecting stakeholders' rights: Each SOE has established an external client complaint system, compiles customer service pamphlets, and issues directives for handling customer complaints. Internally, communication channels such as an employee complaint system and a proposal system for improvements have been established to protect the rights of employees.

2.3 *SOEs under the MOTC*

The postal service used to be monopolized by the Directorate General of Posts (DGP). On 1 January 2003, the DGP was reformed as the state-owned Chunghwa Post Co., Ltd, under the Ministry of Transportation and Communications' portfolio.

Strengthening the structure of the board of directors: On 1 January 2003, the Directorate General of Posts was reformed as Chunghwa Post Co., Ltd. (Chunghwa Post), and then it established a board of directors with 15 directors, among which there are three professionals and three labor representatives. Thus, the 15 directors included professionals and labor representatives each accounting for a 1/5 share as well as three supervisors. Each director's opinions and judgment according to his/her expertise and experiences make the board of directors more professional, independent, and effective. In addition, the board of directors of Chunghwa Post issued the Regulations for the Chunghwa Post Board of Directors Meetings to help make meetings more efficient.

Improving internal auditing: Since January 1, 2003, Chunghwa Post has upgraded its Auditing Division so that it is directly under the board of directors. Thus, the Auditing Division can operate independently and implement the organization's internal auditing system. In addition, in response to the

business needs, it has revised the relevant regulations which fit into the Chunghwa Post Internal Auditing Manual and has proceeded with the cyclical auditing of business in order to establish an internal auditing system and operational regulations. Since January 1, 2003, Chunghwa Post has adopted a CPA certification system and has had its financial statements audited and certified by a CPA firm at the end of April in each year as well and has then sent its financial statements to the MOTC, the FSC, and the Central Bank for a review.

In order to familiarize employees with relevant regulations, Chunghwa Post conducts educational programs and convenes workshops that focus on business-related regulations, and builds a compliance system for savings, remittances, and simple life insurance. Chunghwa Post publishes an Annual Compliance Plan for its simple life insurance business in each year. To implement the aforesaid plan, each unit performs a semi-annual self-evaluation, and regularly reviews and amends the Compliance Plan Enforcement Plan and the Annual Compliance Plan for its simple life insurance business. Those plans will be effective after being approved by the board of directors. In addition, Chunghwa Post also implements training programs on savings/remittances auditing and internal control.

Building a corporate legal system: There are 10 staff with a legal background in the General Manager's Office who handle all legal affairs for Chunghwa Post and its branches. Their duties are to review contracts, provide legal counseling services, handle litigations and formulate relevant regulations and amendments.

Strengthening disclosure of business information to make it more transparent and reliable: Since 2003, Chunghwa Post has published its financial information on-line each quarter and updates its annual financial information on its website pursuant to the audit and certification performed by its CPAs in order to make the financial information more transparent. The annual statement in its internal control system is published in its annual report and on its website each year. Pursuant to the Regulations Governing the Public Disclosure of Information by Life Insurance Enterprises, Chunghwa Post discloses material information related to the public interest to make its life insurance-related information more transparent. In addition, a link to "Statutory Disclosed Items" is also included on the entry website.

Chunghwa Post established the Risk Management Section in May 2004. This section is responsible for risk control, establishing a risk management mechanism and developing an information system for Chunghwa Post. It reports regularly to the general manager and the board of directors regarding risk management affairs.

3. The scope of competitive neutrality policies

Article 4 of the Administrative Law of State-Owned Enterprises states, "state-owned enterprises shall be operated in a manner befitting a business so that they may be able to support themselves, achieve continued development, and increase the national income without incurring losses." Article 6 of the same law states that "unless otherwise specified in applicable regulations, the rights and responsibilities of state-owned enterprises shall be the same as those of private enterprises of similar categories." Accordingly, SOEs shall comply with ordinary business laws and regulations, such as the Company Act and the Fair Trade Act, as the private businesses do, in addition to individual laws which regulate specific sectors, such as the Electricity Act and Petroleum Administration Act. The government does not regulate the way in which SOEs compete with the private sector; thus, a SOE's operations shall be no different from those of a private enterprise.

Take the postal sector as an example. The scope of services of Chunghwa Post includes mail delivery, postal saving, postal remittances, postal simple life insurance, philately and relevant commodities and postal capital operations. According to Article 6 of the Postal Act, Chunghwa Post has exclusive rights to

the delivery of letters, postcards or any papers conveying a message. Thus, Chunghwa Post is obliged to provide mail delivery services so that the general public can benefit from a universal, fair, and reasonable service. Although Chunghwa Post's exclusive rights in mail delivery services arise from government policy and social responsibility, the government has not provided subsidies in terms of budget or tax exemptions for its universal service.

The exclusive rights to mail delivery are granted to Chunghwa Post and are limited to letters, postcards, and other correspondence. Other high-fee packages, express mail, or non-correspondence related mail can be freely handled by private enterprises. The government does not restrict competition between Chunghwa Post and the private sector.

Chunghwa Post also operates the business of postal simple life insurance, including pure endowment insurance, mortality insurance and endowment insurance. In addition, insurance carriers may offer health insurance and accident insurance in the form of riders. According to the Simple Life Insurance Act, the MOTC and FSC shall jointly set the maximum and minimum limits amount for postal simple life insurance as well as the total insured amount for which an individual may be covered. However, it is difficult for Chunghwa Post to compete with the private sector in the field of postal simple life insurance. The reasons for this are as follows:

- the types of insurance are limited, and therefore it is difficult to satisfy clients' diversified needs;
- the total insured amount for which an individual may be covered is currently limited to NTD 4 million and that makes it hard to meet clients' needs;
- the use of capital is restricted.

4. The application of competitive neutrality policies

With regards to the allocation of costs, SOEs shall comply with the Budget Act, Financial Statement Act, and related regulations. The "statutory profit target" is determined by way of the budgeting/financial statement system and is discussed by the Legislative Yuan. Then, the performance in relation to the statutory profit requirement will then be evaluated according to the Directives for Evaluating the Performances of State-Owned Enterprises. The head of the SOE will be evaluated in the same way in order to improve the performance.

As for the tax regime, with the exception of some of Chunghwa Post's business that is exempted from taxes, the same tax regime applies to both SOEs and private sector enterprises, and SOEs shall pay various taxes pursuant to tax laws, such as income tax, business tax, commodity tax, customs duty, stamp duty, etc. Besides, SOEs do not receive subsidies, favorable regulatory treatment, or easier access to finance. The aforesaid business is, however, exempted from the following taxes:

- Chunghwa Post is charged with universal service obligations for mail delivery, and thus it is exempted from taxes according to the law.
- Prior to the establishment of Chunghwa Post on January 1, 2003, any profits generated from the postal simple life insurance contracts were to be exempted from taxes.

By contrast, under special conditions (for example, when there is an increase in international material prices or a financial crisis), in order to stabilize the prices of materials in the domestic market and protect consumers' rights, the SEC may adopt certain measures according to policy instructions (for example, the increase in the petroleum or electricity prices may not fully reflect the costs, or there may be controls over

demand and supply in the market for pigs). Profit maximization is not the only concern of SOEs; and thus their profitability is suppressed. Furthermore, SOEs are subject to a variety of regulations. For instance, all SOEs shall comply with the Government Procurement Act as they engage in procurement business. Under some circumstances, SOEs are more regulated than private enterprises.

5. Monitoring and enforcement

Chinese Taipei used to have a number of SOEs, especially in financial institutions and public utilities, for example, in the field of electrical power and water, that had sectoral regulatory schemes, being granted permits for certain operations and being supervised by the relevant competent authorities.

During the drafting of the Fair Trade Act, there was little consensus as to whether to apply competition policy to SOEs right from the time that the Act was passed or whether to grant them a certain transition period. Many strongly held the view that some transitional arrangements were necessary. Paragraph 2, Article 46 of the Fair Trade Act thus provided a five-year grace period for specific SOE activities on the condition that they were approved by the highest administrative authority. However, the types of conduct that were entitled to such an exemption were rather few in number.

It is worth noting that since the expiry of the transition period on 4 February 1996, the SOEs in question have been subject to the Fair Trade Act and are on an equal footing with private firms. This of course means that any problems that may arise from anti-competitive actions on the part of former SOEs are now regulated by competition law.

The SOEs shall comply with ordinary business laws and regulations, such as the Company Act and the Fair Trade Act, just as the private businesses do, in addition to individual laws which regulate specific sectors. However, since SOEs are owned by the state, they are also subject to laws designed for government agencies. For example, SOEs must engage in procurements activities in accordance with the Government Procurement Act. If there are any disputes arising between the SOE and private enterprises in regard to the tendering procedure, tender evaluation, or award of the contract, the aggrieved firm shall petition or complain to the Public Construction Commission pursuant to the Government Procurement Act.

Other than that, where a member of the public or a competitor wishes to present his/her opinion on a SOE's business activities, he/she may forward such an opinion to the respective competent authority or the disputed SOE.

Currently, Chunghwa Post has certain exclusive rights regarding mail delivery service. Pursuant to Article 6 of the Postal Act, Chunghwa Post has exclusive rights with regard to the delivery of letters, postcards or any papers conveying a message. The delivery of business documents or articles has, however, been opened to competition. On the other hand, since Chunghwa Post has a duty to make its services accessible everywhere, its operation is supervised by the MOTC. As for the long-term development of the postal market, if private postal service providers undertake to meet the same standards and criteria as those for Chunghwa Post, such as not refusing to receive or deliver mail at will, and adopt a unified fee standard, Chinese Taipei will study the feasibility of abolishing the exclusive right on the delivery of letters, postcards or other correspondence in the future in order to enhance competition and implement the competitive neutrality policy.

ANNEX 1

PRIVATIZED SOES (1989~2008)

Original Competent Authorities in the Central Governments	Privatized SOEs
Ministry of Economic Affairs (MOEA)	China Petrochemical Co., BES Engineering Co., China Steel Co., Steel Factory of Taiwan Machinery Co., Shipbuilding Factory of Taiwan Machinery Co., Alloy Steel Factory of Taiwan Machinery Co., Taiwan Fertilizer Co., Ltd., Chung Hsing Paper Corporation, Taiwan Machinery Co., Transportation Division of Tang Eng Co., Steel Factory of Tang Eng Co., Road Vehicle Business Division of Tang Eng Co., Railway Vehicle Business Division of Tang Eng Co., Agricultural and Industrial Co., Taiwan Salt Industrial Co., Tang Eng Iron Works Co., Ltd., CSBC Corporation..
Ministry of Finance (MOF)	Chung Kuo Insurance Company, Farmers Bank of China, Chiao Tung Bank, Central Reinsurance Co., Taiwan Cooperative Bank
Ministry of Transportation and Communications (MOTC)	Yang Ming Marine Transportation Co., Taiwan Motor Transport Co., Taiwan Railway Freight Co., Chunghwa Telecom Co., Ltd.
Veterans Affairs Commission	Liquefied Petroleum Gas Supply Division, Veteran Gas Plant, Gangshan Plant, Food Production Plant, Veteran Pharmaceutical Factory, Lungchi Plant "Area for Waste Disposal"
Government Information Office	Shin Sheng Newspaper Co.
Local Governments	
Taiwan Province	Chang-Hwa Bank, Hua-Nan Bank, First Bank, Taiwan Business Bank, Taiwan Fire & Marine Insurance Co., Taiwan Navigation Co., Taiwan Life Insurance Co., Taiwan Development & Trust Co.
Taipei City	Taipei Bank, Printing Office
Kaohsiung City	Kaohsiung Bank

Source: The Council for Economic Planning and Development, 2008

ANNEX 2

SOES CURRENTLY UNDERGOING PRIVATIZATION

Competent Authorities	SOES
Ministry of Economic Affairs (MOEA)	Taiwan Power Co., Chinese Petroleum Co., Aerospace Industrial Development Co., Taiwan Sugar Co., Taiwan Water Supply Co.
Ministry of Finance (MOF)	Taiwan Tobacco & Liquor Co.
Ministry of Transportation and Communications (MOTC)	Taiwan Railways Administration, Chunghwa Post Co., Ltd.
Veterans Affairs Commission	RSEA Engineering Co.

Source: The Council for Economic Planning and Development, 2008

BIAC

1. The application of antitrust law to state owned enterprises

1.1 *State owned enterprises generally*

State Owned Enterprises (SOEs) exist for a variety of reasons. Some are historical, created in view of what were believed to be “natural monopolies” or a need to stimulate other infrastructure projects deemed at the time too big for private industry, while others, such as many of the recent government investments, reflect decisions to rescue domestic businesses faced with potential failure. Although SOEs are more common in some jurisdictions than others, most governments involve themselves to some degree in their national economies through state ownership of, investment in, or sponsorship of particular businesses. In each case, SOEs reflect an overarching governmental policy choice wherein other policy considerations are deemed paramount to the free operation of the marketplace. Thus, in making these choices, a government arguably has considered the relative costs and benefits and determined that public intervention is appropriate, inclusive of the potential adverse effects on competition.

Economists, however, generally agree that SOEs are often less efficient than privately-held firms and in many cases may actually reduce consumer welfare. Indeed, from a pure microeconomic-theory perspective, market participation by SOEs, like other forms of state intervention, should be limited to instances of market failure.¹ Absent some structural defect or systematic crisis that prevents economic forces from allocating resources, allocative efficiency is theoretically maximized by allowing the market to work.

Nevertheless, as the most recent financial crisis has demonstrated, state involvement in the marketplace is necessary in some instances, whether by regulation, incentive programs, direct market participation, or other measures. The level of state involvement is a policy decision that tends to be based on a number of factors that reach beyond considerations of effective competition. Goals such as universal service, higher employment, national defence, and the like all play an important role in shaping the decision making in this area. BIAC recognizes that in many cases SOEs reflect a conscious choice by a government to promote various policy goals above free trade and free competition.

SOEs, however, can have very different effects on the market than private enterprises. Often, the stated purpose of an SOE goes beyond simple profit maximization. Moreover, in contrast to virtually all other privately held or publicly traded enterprises, SOEs are not subject to the same rigours of valuation and the ability to raise capital or otherwise merit investment. Because of these differences and a tendency for governments to prioritize non-competition policy objectives, SOEs can create a potentially deleterious impact on free trade, free competition, and consumer welfare.

Decisions on the creation and structure of SOEs generally fall outside the realm of competition law enforcement. Indeed, it would make little sense to suggest that a state’s competition laws should be used as a tool to attack another of the state’s duly enacted legislative policies. By the same token, it would make little sense to allow SOEs to thwart the objectives of one of the state’s duly created enforcement agencies. Therefore, to the extent that the creation or maintenance of SOEs threatens competition and

¹ See, STEVEN G. BREYER, REGULATION AND ITS REFORM 15 (1982); Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COMM. L.J. 105, 106 (2006).

consumer welfare within a jurisdiction, competition enforcement agencies should take an active role, either through advocacy or enforcement measures, in an effort to limit or remedy the anticompetitive consequences of state action. BIAC strongly supports the presence of competition authorities at the SOE decision-making table, both at the initiation of state investment and in confining the potential adverse competitive effects on an ongoing basis.

Although competition laws are not designed to abrogate other state policy objectives, they do have an important role to play in protecting consumer welfare in markets where SOEs operate. Notably, while justifications may exist for creating SOEs in particular instances, it is frequently the case that SOEs harm domestic and foreign consumers, and hinder growth.² For this reason, it is important for a government to strike a balance that limits the role that SOEs play in the economy to the extent necessary to reach the policy goals the state is seeking to achieve, and for competition agencies to take an active part in meeting this objective.

Through competition law enforcement, agencies have the ability to oversee markets where SOEs compete and create a check on any distortion of competition beyond that which necessarily flows from the choice to create the SOE in the first instance. The interplay between private companies and SOEs can create a real risk of misapplication of competition laws and regulations. For instance, where potential competition to an SOE comes from abroad, a state may be incentivized to use competition laws in ways that protect the domestic SOE from private competition. Such action deprives consumers of the benefits of competition by perpetuating, and at times extending, any inefficiency associated with the SOE. At the same time, SOEs often attempt to use their market power to influence customers, competitors and joint venture partners in ways that prevent the market from becoming competitive. Thus, proper enforcement strategy involves aspects of both vigilance and restraint on the part of antitrust enforcers: vigilance in limiting the exclusionary conduct of SOEs and promoting competition; restraint in acting against rivals to the SOE in ways that foreclose competition.

For purposes of these comments, it is worth pointing out a few factual distinctions that affect the analysis. One can differentiate between instances where a state intentionally and completely occupies a field of commerce and instances where the state takes an investment position in a company that is otherwise privately controlled.³ On one hand, state ownership of universal service providers, such as power companies, telephony providers, and postal services, is generally long-term and significantly affects the competitive landscape in these markets. These situations often reflect this historical development of a marketplace, and often result in sole control of a market, or a dominant position in a market. Often, these types of investments result from a perceived need to build infrastructure, sometimes where the costs are so significant that it initially is (or was) difficult to justify private investment of a sufficient magnitude. But these investments can also reflect other objectives. For instance, some have suggested that Venezuela nationalized its oil industry in 1976 largely to increase its status in international politics.⁴ Likewise, many states have created sovereign wealth funds ostensibly as a means of securing financial stability and promoting economic development, but arguably also as a protectionist measure for domestic industry.⁵

² See, William Blumenthal, "The SOE Challenge and America's Competitiveness," Remarks Before the U.S. Chamber of Commerce (July 7, 2009); Peter Hettich, *Governance by Mutual Benchmarking in Postal Markets: How State-Owned Enterprises May Induce Private Competitors to Observe Policy Goals*, 32 U. DAYTON L. REV. 199, 210-11 (2006).

³ See generally, Andrei Baev, *Is There a Niche For the State in Corporate Governance?*, 18 HOUS. J. INT'L L. 1, 12-13 (1995).

⁴ See, Daniel Hellinger, *Venezuelan Oil: Free Gift of Nature or Wealth of a Nation?*, 62 INT'L J. 55 (2006).

⁵ See, International Working Group of Sovereign Wealth Funds, "Sovereign Wealth Funds: Generally Accepted Principles and Practices" (Oct. 2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

Where these objectives exist, the risk of governmental interference with free competition – either through non-enforcement against a dominant domestic firm or targeted actions against would-be rivals to the SOE – is high.

In contrast, government intervention into markets where free competition exists and where the government does not attempt to occupy the field of commerce are less likely to create a risk of harm to competition. One arguable example is the Automotive Industry Financing Program – and its counterpart in Europe – through which the United States government provided loans and equity investments to domestic auto manufacturers to help them avoid bankruptcy. These initiatives were developed as means to provide financial support to domestic businesses that otherwise might have failed in the midst of the economic crisis. These actions were not intended to occupy the field of commerce and may be much more competition-neutral given their shorter intended duration and more limited direct involvement.⁶ Moreover, while such initiatives may skew the competitive contest of separating more efficient companies from less efficient companies, the direct harm (putting aside the burdens of taxation, etc.) is not likely to impact consumers.

Indeed, in the wake of the recent financial crisis, we have seen a wave of such examples, in the US, EC and elsewhere, including in the banking and automotive sectors. Despite the fact that these financial rescues are usually competitively neutral, in some cases, the crisis has led to state intervention that creates a potential for anticompetitive effects.⁷ Yet, such investments can be made mindful of the effect of the transaction on competition. For instance, in October 2008, PNC Financial Services Group announced its intent to acquire National City Corporation using funds from the U.S. government's \$250 billion capital initiative under the Troubled Asset Relief Program (TARP). Just seven weeks after announcement, the Department of Justice approved the acquisition in December 2008, requiring divestiture of 61 National City branch locations.⁸

1.2 *Application of competition law to SOEs*

Competition law does not normally concern itself with the creation of an SOE or in defining its fundamental objectives, as these reflect a broader public policy decision made by the government. However, given their ownership and (in some cases) governance structure, the operation of SOEs can often lead to outcomes that run counter to the objectives of competition laws. The “costs” to consumers associated with SOEs potentially come from many different sources including increased taxation, static efficiency losses, and in some cases supracompetitive prices. Importantly, they also can discourage private sector investment from both domestic and foreign enterprises. One of the most significant sources of potential harm is the reduction in, or foreclosure of, innovation. While economic theory indicates that all dominant firms have decreased incentives to innovate, the problem can be amplified where SOEs have the incentive to choose inefficient technology, as the Secretarial note aptly points out.⁹ It is well established that the dynamic efficiency gains resulting from innovation often can be the most important forces for

⁶ U.S. Treasury Dept., Automotive Industry Financing Program (Updated: Sept. 4, 2009) <http://www.financialstability.gov/roadtostability/autoprogram.html>.

⁷ For example, U.K. competition authorities approved the acquisition of HBOS plc by Lloyds TSB Group plc as a crisis measure despite significant concerns about the likely reduction in competition. See, Press Release, Office of Fair Trading, Anticipated Acquisition by Lloyds TSB plc of HBOS plc (Oct. 24, 2008), available at http://www.offt.gov.uk/shared_offt/press_release_attachments/LLlloydtsb.pdf.

⁸ Press Release, U.S. Dep't of Justice, U.S. Dep't of Justice Requires Divestitures in Acquisition of National City Corporation by the PNC Financial Services Group (Dec. 11, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm.

⁹ See, Background Note ¶ 49.

increasing consumer welfare. By contrast, reduced or stagnant innovation associated with SOEs compounded with government sponsorship of the SOE can result in significant consumer harm, including by eliminating the possibility of so-called “creative destruction” that might otherwise occur where a dominant firm exists.¹⁰

Although competition law enforcement may not directly impact innovation in markets where the SOE occupies the field, it can be an essential tool for ensuring long run efficiency in markets where SOEs compete with private enterprises. In theory, less efficient SOEs should be overtaken in the long run by more efficient competitors as long as there is at least some level of innovation that can be brought to bear on the market.¹¹ However, in many cases the efforts of innovative rivals may be thwarted either by an SOE’s anticompetitive conduct or by governmental policies designed to protect an SOE from competition by private firms.¹² In other words, whether you believe in the principles of Schumpeterian economics or not, state sponsorship of SOEs, including through selective competition law enforcement, ensures that creative destruction will not occur.

To promote maximization of consumer welfare, competition policy should focus on establishing a model where innovation is permitted to have its full effect on the market. *Ex ante*, this means that competition authorities should focus efforts on advocating removal of barriers to competition, including statutory and regulatory hurdles, foreign investment restrictions, standards setting, etc. This is particularly critical where the hurdles are likely to dampen incentives to innovate by private firms. *Ex post*, authorities should recognize that while SOEs are not inherently anticompetitive, the conditions that accompany an SOE are frequently anticompetitive, and agencies should enforce the competition laws to reign in abuses. Given the importance of innovation in promoting consumer welfare, competition law enforcement against dominant SOEs is a prerequisite to achieving long run dynamic efficiency.

Indeed, the creation of “national champions” arguably has a similar impact to the creation of an SOE. Such enterprises can result in significant distortions to competition and elevate the interests of the individual enterprise above the interests of the consumer. As with SOEs, where the creation or promotion of national champions has the effect of sheltering the domestic competitor from competition, consumers are harmed and such market distortions should not be overlooked.¹³

¹⁰ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d ed. 1950).

¹¹ See, Jonathan A. Baker, *Beyond Schumpeter v. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007).

¹² See, RICHARD GEDDES, COMPETING WITH THE GOVERNMENT: ANTICOMPETITIVE BEHAVIOR AND PUBLIC ENTERPRISES 35 (2004).

¹³ See, Neelie Kroes, European Commissioner for Competition Policy, “Global Europe – competing and cooperating,” Address Before the Women in European Business” (WEB) Conference (Oct. 11, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/618&format=HTML&aged=0&language=EN&guiLanguage=en> (“The “national champion” logic, artificially sheltering European undertakings from competition, is as flawed today as it always was. I have never seen any company leap to the defence of anyone else than its shareholders. And quite rightly so: companies have to care about return on investment. We can only expect national champions to champion themselves. This is why protecting “national champions” is doomed to fail.”). See also, OECD, Global Forum on Competition, Competition Policy, Industrial Policy and National Champions, Contribution by BIAC, DAF/COMP/GF/WD(2009)24 (Feb. 12, 2009), available at <http://www.oecd.org/dataoecd/6/42/42170012.pdf>.

1.3 *Enforcement actions and policies involving SOEs*

Proper enforcement of competition laws should include direct enforcement against SOEs to maintain a level playing field for private enterprises to the greatest extent permissible under the law. Different jurisdictions have adopted enforcement strategies that accomplish this goal to differing extents. Although there are historical and political reasons for the divergence, on a going-forward basis each competition agency should focus on enforcing its antitrust laws with respect to SOEs and remedying violations by SOEs, especially those likely to diminish long term competition and innovation. At the same time, care must be taken to avoid application of antitrust laws in ways that disadvantage private firms in order to benefit SOEs.

Perhaps because US policy historically has disfavoured the creation and maintenance of SOEs, the current law in the United States has had only limited application to SOEs. In the past, U.S. courts have been deferential to other government policies, including in cases that otherwise would constitute anticompetitive conduct.¹⁴ The state action doctrine in the United States also places restrictions on the ability of antitrust enforcers to challenge certain state-authorized conduct. The doctrine is rooted in *Parker v. Brown*, in which the Supreme Court addressed the application of federal antitrust laws to a California law that sought to maintain inflated prices for raisins by restricting competition among growers. Attempting to reconcile the notion of state sovereignty with the application of the Sherman Antitrust Act, the Court stated, “[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”¹⁵

In subsequent history, the Supreme Court has also held that where the state itself is acting in an anticompetitive manner, it is immune from challenge under federal antitrust laws.¹⁶ The same principle applies to actions authorized by the states but undertaken by private companies or SOEs. For example, based on principles of federalism, the Supreme Court has held in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, that the states allow private actors to engage in anticompetitive conduct through enactment of legislation promoting such conduct. For immunity to attach for private actors, the *Midcal* Court imposed a high standard, requiring that the conduct at issue was both authorized by state law and was actively supervised by the state.¹⁷ The Court has also sought to distinguish actions taken by “persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition.”¹⁸ Application of competition laws to such individuals, even when acting in a quasi-governmental role, as in a standards-setting body, is appropriate, according to the Court.

Despite these limitations, in practice the Supreme Court has been very reluctant to strike down SOE conduct. Most commonly, this is apparent in cases dealing with municipal governments. For example, in *Town of Hallie v. City of Eau Claire*, the Supreme Court addressed a situation where Eau Claire had constructed a sewage treatment plant and sold sewage collection and disposal services.¹⁹ The city

¹⁴ See, e.g., *Hammons v. Alcan Aluminum Corp.*, 1996 WL 438605 (C.D. Cal. July 1, 1996), *aff’d* 132 F.3d 39 (9th Cir. 1997), where the court dismissed a challenge brought by an aluminum distributor against several U.S. aluminum companies alleging collusive conduct. The conduct at issue involved the Department of Justice negotiating with each of the aluminum producers to restrict output in connection with an attempt to accommodate Russian concerns about low prices. The court found that this conduct was insulated from antitrust challenge under the Political Question doctrine and the Noerr-Pennington doctrine.

¹⁵ *Parker v. Brown*, 317 U.S. 341, 350 (1943).

¹⁶ See, *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).

¹⁷ See, *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-6 (1980).

¹⁸ See, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988).

¹⁹ 471 U.S. 34, 44 (1985).

subsequently refused to provide sewage treatment to residents of nearby towns unless they agreed to use the city's collection services as well. The nearby towns, which had no other option for sewage treatment, sued the city alleging this constituted an illegal tying arrangement. The Supreme Court found that this conduct was immune from challenge. Notably, the Court held that a municipality is presumed to act in the public interest absent evidence to the contrary and will receive immunity from antitrust challenge as long as it is operating within the scope of a state policy favouring some other objective over free competition. While the Court's position follows from its earlier precedents, it is evident in this situation that a more restrictive application of the State Action Doctrine would be more conducive to curbing potentially anticompetitive activities by SOEs, despite their limited presence in U.S. markets.

The US agencies, however, have vigorously sought to ensure that the scope of immunity in the US is not extended further than required by existing precedent. In 2003, the FTC convened a State Action Task Force to re-examine Supreme Court precedent and make recommendations to "ensure that the state action exemption remains true to its doctrinal foundation of protecting the deliberate policy choices of sovereign states and is otherwise applied in a way that promotes competition and enhances consumer welfare."²⁰ The FTC fulfilled that objective, *inter alia*, testifying before state legislatures in opposition to specific exemptions that would further expand the doctrine and bringing actions against several parties that sought to use state action immunity as a shield for anticompetitive conduct.²¹

Europe, which generally encounters a larger number of SOEs than the United States, also has greater latitude in addressing competition issues relating to SOEs. Largely due to its extensive history of state ownership and the need to break down barriers to the functioning of the common market, Europe has a much more established body of law regarding "state aids". The state aids body of law is targeted at the aid itself, rather than the character of ownership. It is indifferent as to whether the recipient is a public or private enterprise.

The EC also has tools for competition law enforcement against SOEs through Articles 81 and 82. The EC Treaty specifically recognizes that SOEs can distort the common market and should be subject to competition laws. Europe has demonstrated a willingness to apply that framework to predatory SOE conduct. For example, in its *Deutsche Post Predatory Pricing Decision*, the Commission analyzed the conduct of Germany's postal monopoly, and found that Deutsche Post had abused a dominant position, in violation of Article 82 of the EC Treaty.²² Specifically, the Commission responded to a complaint by UPS that Deutsche Post was using its profits from its state-granted letter mail monopoly to subsidize its sales of parcel delivery services, where it competed with private enterprise. After investigating the situation, the Commission determined that Deutsche Post was offering its parcel delivery services at prices that were below its incremental costs, violating the predatory pricing rule laid down earlier by the European Court of Justice in *AKZO Chimie BV v. Comm'n*.²³ As a result, the Commission imposed a fine of €24 million on Deutsche Post.

²⁰ Timothy J. Muris, Chairman, Federal Trade Commission, "State Intervention/State Action – A U.S. Perspective," Comments Before the Fordham Annual Conference on International Antitrust Law and Policy (Oct. 24, 2003), available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

²¹ *Id.*; see also, *South Carolina State Board of Dentistry*, Docket No. 9311 (Sept. 12, 2003) (complaint) available at <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>; *Indiana Household Movers and Warehousemen, Inc.*, Docket No. C-4077, (Apr. 25, 2003) (consent order) available at <http://www.ftc.gov/os/2003/04/ihmwdo.htm> at ¶ II.

²² Case COMP /35.141, *Deutsche Post AG*, 2001 O.J. (L 125) 27.

²³ Case C-62/86, [1991] E.C.R. I-3359.

Canadian competition law enforcement with respect to SOEs has primarily focused on review of activities of state-owned Crown corporations which are regarded as agents of the Crown. Canada has amended its laws to more fully encompass activity by SOEs. In *R. v. Eldorado Nuclear Ltd.; R. v. Uranium Can. Ltd.*, [1983] 2 S.C.R. 551 (“*Eldorado Nuclear*”), the Supreme Court of Canada held that the Combines Investigations Act, the predecessor of the Competition Act, was not binding on an agent of the Crown when that agent was acting “within the scope of the public purposes it is statutorily empowered to pursue.” This Canadian case was part of the international proceedings in various jurisdictions related to the uranium cases of the late 1970s and early 1980s.

Three years after the *Eldorado Nuclear* judgement, the modern Canadian Competition Act came into force, including section 2.1. which states: “This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.” Section 2.1 made it clear that the Act potentially applies to Crown agents in respect of commercial activities where the agents engage in competition with private entities.

In Canada, where agents of the Crown (or private sector corporations) engage in commercial activities in competition with other persons, it is still possible to escape scrutiny from competition legislation by making use of the Regulated Conduct Defence (the “RCD”). This doctrine was introduced in *Reference Re: The Farm Products Marketing Act* [1957] 1 S.C.R. 198, which established that any marketing scheme within the authority of the provincial legislature cannot be against the public interest when the legislature is seized of the power and obligation to take care of that interest in the province.²⁴ However, it should be noted that most of the cases involving the RCD deal with allegations of joint conduct including with respect to pricing, advertising and other commercial activities; it is not yet settled whether the RCD applies in the case of unilateral conduct (e.g., abuse of dominance).

Finally, the Competition Bureau, through the Commissioner of Competition (the “Commissioner”), can also influence the activities of an SOE by advocating for pro-competitive sector specific regulation. Sections 125 and 126 of the *Competition Act* outline an advocacy role for the Commissioner in front of federal and provincial boards, commissions or other tribunals that carry on regulatory activities (which may include overseeing an SOE) and are expressly charged pursuant to an Act of Parliament or a legislative enactment of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product. Notably in Canada, Commissioners have advocated for the introduction of competition into certain segments (such as telecommunications, transportation) pursuant to the powers under these sections.

Each of these jurisdictions has sought to provide a framework that balances the need to enforce competition laws to prevent abuses by SOEs against the needs of a given state to promote policies that may impact the free market. Thus, many of the above policies are designed to avoid “underenforcement” of competition laws when SOEs are involved. However, it is often equally important to avoid overenforcement against competing enterprises. For example, in the area of merger enforcement, there are occasionally suggestions that a government may attempt to enforce its competition laws in ways that favour local companies over outsiders. While in the past, this type of overenforcement has typically involved private companies, it can just as easily raise concerns when the acquisition target is an SOE or

²⁴

The Regulated Conduct Defence has been applied more recently in a number of other case such as: *Industrial Milk Producers Association v. B.C. Milk Board* (1988), 47 D.L.R. (4th) 710; *A.G. Can. v. Law Soc. of B.C.*; *Jabour v. Law Soc. of B.C.*, [1982] 2 S.C.R. 307 and *Garland v. Consumers' Gas Co.* [2004] S.C.R. 25. See also, Canadian Competition Bureau, Technical Bulletin on Regulated Conduct (June 29, 2006), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02141.html>.

national champion. One salient example is the Spanish government's effort to block the acquisition of Endesa by the German company E.ON. This interference, which occurred despite the Commission's approval of the deal, resulted in the Commission referring Spain to the Court of Justice.²⁵ The Commission's challenge to the acquisition of McDonnell Douglas by Boeing raised similar concerns when U.S. leaders suggested that the Commission's objective was to insulate Airbus from competition.²⁶ When considering the proper application of competition laws to SOEs, regulators should be careful to avoid similar actions that are directed to favour national companies over other competitors.

An effective competition policy requires that competition agencies enforce their laws equally against SOEs and private entities. This may require a conscious effort on the part of enforcement agencies to coordinate among governmental agencies to avoid conflict in SOE and competition law policies, or instead for competition agencies to challenge what in fact may be little more than another government ministerial department acting in its own interests rather than in the interests of consumers. In some countries, this process is already underway and should continue.²⁷

Likewise, enforcers should maintain vigilance in areas of formerly state-owned or heavily regulated industries, which tend to face large challenges when moving to a competitive world. Historically, for example, the airline and telephone industries have witnessed numerous antitrust actions brought by both states and private parties as these firms move from a state-controlled world to what should be a free market. Some of this may be due to a corporate culture or other holdover from the days when these companies operated in a world without antitrust scrutiny. Enforcement in this context is often appropriate, especially when the conduct involves horizontal agreements.

2. Corporate governance and the principle of competitive neutrality for state-owned enterprises

The potential inefficiencies of SOEs, especially with respect to the reduction in or foreclosure of innovation, can often be traced back to corporate governance problems. In fact, the defects in an SOE's corporate governance structure often play a greater role in producing inefficiency than the state's regulatory intervention in a given industry. This issue was identified well before the current economic crisis, which has shed a new light on the proper role of SOEs.

In 2005, the OECD issued its "Guidelines on Corporate Governance of State-Owned Enterprises" (the Guidelines). This document was meant as a complement to the OECD Principles of Corporate Governance (the Principles), which were first issued in 1999 and revised extensively in 2004. Closely following the Principles, the Guidelines set forth a number of recommendations to address the specific challenges faced by SOEs. The main challenges were recognized to be:

- the sometimes passive attitude of the state in the exercise of its ownership responsibilities and/or undue political interference with company management;

²⁵ Press Release, European Commission, Mergers: Commission Refers Spain to Court for Not Lifting Unlawful Conditions Imposed on E.ON's Bid for Endesa (Mar. 28, 2007), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/427>.

²⁶ See, Allison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, NEW YORK TIMES, July 18, 1997, *available at* <http://www.nytimes.com/1997/07/18/business/clinton-warns-europeans-of-trade-complaint-on-boeing-deal.html?scp=2&sq=clinton%20boeing%20mcdonnell%20douglas&st=cse>.

²⁷ For instance, in Brazil, recent enforcement with respect to Petrobras signals a change in policy in favor of enforcement. See, Global Competition Review, "Brazil Stalls Energy Merger," (Apr. 23, 2007), *available at* <http://www.globalcompetitionreview.com/news/article/7888/brazil-stalls-energy-merger/>.

- the softness of budget constraints resulting, in particular, from SOEs being spared the risk of bankruptcy and the threat of takeovers; and
- the complex chain of accountability.

These characteristics were perceived as having significant negative consequences. As shown by the proceedings of the June 2004 Competition Committee Roundtable on Regulation Market Activities by the Public Sector, corporate governance specificities may directly result in distortions of competition. Acknowledging this, several national authorities have based their policy for the administration of SOEs on the principle of competitive neutrality. With its “Commonwealth Competitive Neutrality Policy Statement” of 1996,²⁸ Australia is one of the earliest and most accomplished examples. There was also a strong concern as to the sheer economic inefficiency of SOEs due to the specificities of their corporate governance set-up. In several countries this had prompted reports exposing the inadequacy of the model to the globalization of the economy.²⁹ In other words, faulty corporate governance of SOEs could harm the citizen both as a consumer and as a taxpayer.

As explained by the OECD staff,³⁰ the issuance of the Guidelines was prompted by the pressure deriving from globalization and liberalization, accompanied by a strong demand from non-OECD economies. Indeed, while SOE issues were important in several OECD countries, the Guidelines were also, and perhaps mainly, directed at Central and Eastern Europe and Latin America. This direction is hinted at by the choice of languages other than the Organization’s official languages into which the Guidelines were translated.³¹

The Guidelines identified three priorities:

- reinforcing the exercise by governmental (or local) authorities of their ownership functions (this had been facilitated in the previous years in several OECD countries by the formation of dedicated agencies);
- strengthening and empowering the boards of directors, so that they operate as in “normal” companies; and
- imposing transparency on the SOEs’ objectives and performance.

²⁸ Australian Government, *Commonwealth Competitive Neutrality Policy Statement* (June 1996), available at <http://www.treasury.gov.au/documents/275/PDF/cnps.pdf>. This followed the adoption of the *Competition Principles Agreement* between the Australian States in 1995 (Australian Government, *Competition Principles Agreement* (Apr. 11, 1995, amended Apr. 13, 2007), available at <http://ncp.ncc.gov.au/docs/cpa%20amended%202007.pdf>; see also, Australian Government, The Treasury, Dept. of Finance & Administration, *Australian Government Competitive Neutrality Guidelines for Managers* (Feb. 2004), available at http://www.finance.gov.au/publications/finance-circulars/2004/docs/AGCN_guide_v4.pdf.

²⁹ For instance, the French government report on “*L’Etat actionnaire et le gouvernement des entreprises publiques*” (Barbier de La Serre Report, 24 Feb. 2004) and parliamentary report on “*La gestion des entreprises publiques afin d’améliorer le système de prise de décision*” (Dousté-Blazy Report, 3 July 2003).

³⁰ Mathilde Mesnard, Administrator, Corporate Affairs Division, Directorate for Financial and Enterprise Affairs, OECD, “The OECD Guidelines on Corporate Governance of State-Owned Enterprises,” (July 6, 2005), available at http://www.icps.com.ua/doc/RT_stateprop_OECD_eng.ppt.

³¹ Bosnian-Croatian-Serbian, Polish, Slovenian and Portuguese.

Today, this subject, like many others, deserves to be revisited in light of the financial and economic crisis. Recognizing that failures in corporate governance played a clear role in some of the larger financial firms at the centre of the crisis, the OECD undertook to review its general policy on corporate governance. Its Steering Group on Corporate Governance analyzed weaknesses in the fields of executive remuneration, risk management, board practices and the exercise of shareholder rights, and it concluded that “at this stage, there is no immediate call for a revision of the OECD Principles. In general, the Principles provide for a good basis to adequately address the key concerns that have been raised. A more urgent challenge for the Steering Group is to encourage and support effective implementation of already agreed standards.”³²

The OECD’s position with respect corporate governance on SOEs in the context of the financial and economic crisis is similar, “[M]any firms have received public funds or are owned by governments, and important conflicts of interest may arise. During this period, they should be run in line with the OECD Guidelines on Corporate Governance of State Owned Enterprises. Before governments exit from their role as owners, it would be desirable to strengthen the implementation by financial institutions of the OECD Principles of Corporate Governance”.³³

The Guidelines were initially established with a view to promoting competitive neutrality and economic efficiency in respect of companies which were state-owned either because of public service requirements or for historic legacy reasons (in a general context where privatization was encouraged). Given this, some may question whether they are still applicable to newly-acquired ownership positions motivated by a specific “service of general interest”, that of rescuing failing industries. However, BIAC believes that the sets of recommendations to be found in the Guidelines are indeed fully applicable in the new circumstances.

The Guidelines’ first recommendation is “ensuring an effective legal and regulatory framework for SOEs”. The injection of capital by public authorities has been a necessity and in many cases has deterred the disastrous systemic effects of the failure of strategically positioned firms, but the requirement not to distort competition with the healthier companies which did not call for assistance remains fully relevant. This means in particular avoiding confusion between the state’s ownership responsibilities and its market regulation functions (which have taken a paramount importance in financial markets), not providing any form of immunity from the jurisdiction of courts and regulatory authorities (including with respect to the rights of creditors to initiate insolvency procedures) and ensuring that there is no competitive distortion as to the further access to finance (even though the sheer presence of the state as a shareholder is in itself a strong factor of confidence for lenders and investors). As discussed above, in Europe the regulation of state aid provides a valuable safeguard on some of these issues.

The recommendations applying to the state acting as an owner are also relevant to the handling of interests taken for rescue purposes. It is more important than ever that the state acts as a responsible shareholder, since the whole purpose of the government’s stake is to drive the companies back to economic health. This implies in particular a well structured and transparent process for the nomination of state-appointed directors, allowing the selection of candidates on the basis of competencies and strict ethical standards rather than political reward or administrative rank criteria. Exercise of the ownership responsibility by a co-coordinating agency facilitates transparency and accountability. A particular concern may arise in the case where the shareholder is a municipal or local government, which is likely to have less competencies and technical support at its disposal.

³² OECD, “Corporate Governance and the Financial Crisis: Key Findings and Main Messages” (June 2009), available at <http://www.oecd.org/dataoecd/3/10/43056196.pdf> at 7.

³³ OECD, “The Road to Recovery - Update on the OECD’s Strategic Response to the Financial and Economic Crisis” (Mar. 27, 2009), available at <http://www.oecd.org/dataoecd/40/14/42528786.pdf>.

It is legitimate that financial aid by the state is conditioned upon the restoration of adequate corporate governance where it is clear that past governance has failed, especially with respect to risk control.³⁴ But letting the boards of directors fully exercise their responsibilities first implies non-interference by the legislator or regulator, even in politically sensitive areas. For instance, while it is clear that the excesses in executive compensation that played a part in the formation of the crisis are even more unacceptable in companies where taxpayer money has been injected, this subject cannot be dealt with by decree. It should remain the responsibility of the boards, which are indisputably best placed to appraise the specificities of each company's situation on its market, and are accountable to the shareholders and other stakeholders in this now highly-scrutinized matter.

Preserving the independence and empowerment of the boards also implies that the mandate of the state-appointed directors should remain to act in the best interest of the company. Again, this may pose difficult issues where politically sensitive situations are at stake, especially the preservation of employment in certain sectors or geographic areas. While the companies have a clear responsibility to their employees who are not only prime stakeholders but often also their prime resource, the boards should not be forced to take positions which encourage the preservation of non-viable situations.

The Guidelines' recommendations relating to transparency are also fully transposable to post-crisis situations. Preserving the rights of other shareholders (whether minority or not) and ensuring impeccable disclosure of financial information are essential, especially in listed companies because of the urgent need to restore and maintain the stability of financial markets.

3. Conclusion

BIAC does not favour heavy-handed regulation of SOEs. Rather, BIAC supports a level playing field between SOEs and private companies, including with respect to the enforcement of competition laws. Thus, BIAC favours the regulation of SOEs on the same terms as regulation of private industries. In addition, BIAC opposes the use of antitrust laws as a shield by governments seeking to protect domestic SOEs (or other "national champions"). BIAC also acknowledges that in some instances, it may be appropriate to deal with alleged unfair practices of SOEs through the use of trade laws, including state aid analysis and the WTO dispute resolution mechanism.

BIAC further believes that the OECD's Guidelines should continue to apply in the wake of the recent financial crisis. The Guidelines provide appropriate criteria for running SOEs, and they seek to promote adequate oversight without unnecessarily hindering the management of SOEs in ways that will reduce efficiency.

³⁴ See, OECD, "Finance, Competition and Governance: Priorities for Reform and Strategies to Phase-Out Emergency Measures" (June 2009), at 52-54.

SUMMARY OF DISCUSSION

The Chair opened the session and noted that the discussion on corporate governance and the principle of competitive neutrality for SOEs is closely linked to the roundtable on the application of antitrust rules to state-owned enterprises (SOEs), which took place in the morning. In addition, the discussion also offers an opportunity to bring up to date the conclusions of a 2004 roundtable on regulating market activities by the public sector.

In many countries, the public sector carries out a variety of commercial activities and SOEs can represent a significant part of important markets. Due to their government ownership, SOEs often enjoy a number of advantages when compared with their private counterparts. These include but are not limited to lower costs of capital, lesser tax burdens, and lower risks of takeover and bankruptcy, which are not necessarily addressed through competition law enforcement. Therefore, some OECD countries have adopted measures focused on corporate governance and competitive neutrality, which are aimed at levelling the playing field between public and private firms. This roundtable should serve as a catalyst for clarifying many of these issues.

There are three speakers who will introduce the discussion, Prof. Damien Geradin, professor of competition law and economics at Tilburg University in the Netherlands, Dr. Howard Shelanski, Deputy Director of the Bureau of Economics at the US Federal Trade Commission and Gary Sturgess, Executive Director of the Serco Institute.

Mr. Shelanski and Prof. Geradin jointly presented some of the issues that the principle of competitive neutrality raises with respect to SOEs.

In terms of what competitive neutrality is Prof. Geradin outlined two possible ways of thinking about its meaning and how to achieve it. First, there may be a common legal regime for private firms and SOEs, which eliminates the various statutory advantages that SOEs may enjoy. Corporatization of SOEs partly achieves this goal as corporations, regardless of whether private or public, are generally subject to the same rules. Since this process often requires legislative changes, competition agencies should focus on competition advocacy and promotion of the principle of competition neutrality. A second possible meaning of neutrality is to ensure a level playing field for SOEs and private enterprises. However, states should be able to invest in their corporations just as a private investor can. In this respect, EU law has developed the principle of market economy investor, under which states should be free to provide funds to state-owned corporations provided they do so as a private investor would in a market economy.

Mr. Shelanski pointed out that while there is often the implicit assumption that government involvement brings only competitive advantages, it may also have negative consequences. Therefore, neutrality does not necessarily mean limiting as much as possible the government's role in SOEs.

The case of France Telecom is an example of the possible disadvantages that government ownership may entail. In this case of France Telecom, the amount of information about its costs and operations it shares with the government exposes it to greater government scrutiny and regulation if compared with private operators. As regards incentives, it may perhaps be a bit of an overstatement to say that an SOE has zero incentives to innovate, however its incentives are weaker than those of a private company due to the differences in management compensation schemes between public-owned and private corporations. Thus many SOEs work with an institutional and incentive structure that may make them weaker and less competitive than private enterprises. The public goods and other social objectives that SOEs are often

mandated to achieve can also impose disadvantages on SOEs. When discussing cross-subsidization, the common perception is that an SOE uses its monopoly rent in one area to subsidize its activities in a competitive market. However, regulated functions of an SOE are often costly while the unregulated functions are sources of profit. Hence an SOE may cross-subsidize regulated functions. These examples show that whether non-neutrality is an advantage or not is a complicated question and therefore it is useful to keep it in mind when considering the issue of competitive neutrality.

Prof. Geradin highlighted that while neutrality is a valid objective, there are circumstances in which staying neutral and achieving objectives, such as universal service obligations, will be difficult. Governments need to find the right balance between providing universal services of good quality at affordable costs and avoiding distortions in the market. An important question in this respect concerns the funding of universal service obligations. For example, the postal service has to ensure delivery to all areas of the country, and there are areas that are scarcely inhabited where complying with this obligation is very costly. Unless one wants to eliminate such services in unprofitable areas, there has to be some system of compensation. The question however is how to compensate, as it is very difficult to know the real cost of universal services. One option is to use auctions or reverse auctions, which have in fact often been used for public transportation services contracted by local authorities. It is conceivable to solicit bids from market actors for providing a public service obligation. Bidding, however, is only the beginning of the whole process. The government would then have to ensure that the services are properly defined and that there are effective mechanisms for monitoring performance and enforcing the contracted obligations.

Government ownership is not the only factor relevant for neutrality considerations, and as Mr. Shelanski pointed out, government as a customer can also play an important role. There are many ways in which this can play out. One example may be the doctrine of derivative Crown immunity mentioned by the Australian delegation in the morning roundtable on application of antitrust rules to SOEs. By contracting with the government a private corporation can get immunity from antitrust laws with respect to some of its activities, which puts it at an advantage in relation to its competitors. Eliminating distortions such as this one is therefore very important. There are, however, other ways in which having the government as a customer can confer an advantage to a private corporation. One of the most obvious is a hidden subsidy through pricing, where a price for a product or service is above competitive levels. In this respect it is important to ensure that procurement policies prevent such distortions. But hidden subsidies are not the only ways that can lead to non-neutrality. Contracting with a government can confer advantages of economies of scale on a winning bidder that are not replicable by others. It can also bring major reputational advantages to a firm. It is thus important to keep in mind that there may be neutrality concerns in areas where the government acts as a customer as well as a provider.

Another question that the presentation of Prof. Geradin and Mr. Shelanski focused on whether neutrality is always desirable or even possible. They focused on three issues. First, whether state intervention may be needed in times of crisis and whether there should be limits to such intervention. Second, whether state intervention is appropriate to solve some market failures, and third, showing some examples about the education market.

Mr. Shelanski addressed the first two issues. Concerning state intervention in times of crisis, good examples are the bank bailouts in the current financial crisis. When banks begin to fail and demand public funds to survive, the government has to decide, in view of its resource limitations and keeping in mind various factors, such as the systemic importance of each bank for the financial system, which banks to bail out and which to allow to fail. To require complete neutrality in such circumstances would be very limiting on the government's ability to respond effectively to an economic crisis.

With respect to market failures, there may be instances of market structures that do not function well because private enterprises are protected through a variety of rules. In such scenarios, government

intervention on non-neutral terms can greatly enhance consumer welfare. One such example is the US health care system where the introduction of a government funded health insurance option is currently discussed. The insurance companies' often voiced concern is that such an option would drive their prices down. However, that is precisely the point, that a government intervention would drive prices down, which does not mean that it is non-neutral or undesirable. Therefore, government action through a state enterprise has the possibility of improving market structures.

As regards the education system, Prof. Geradin discussed whether there are also possibilities of market solutions to the provision of education, which is not a universal service but still is an essential good for a number of citizens. The education market has both private and public actors and the state may wish to further intervene. Under EC law, some of these activities may fall outside the scope of competition law if they do not fit within the notion of an undertaking as defined by the European Court of Justice. It is, however, possible to ask whether it is necessary for states to create public universities or schools at all. One may consider again a system of reverse auctions whereby education providers would submit bids relating to the cost of education per student. Such a system, coupled with vouchers given by the government to students for use in private universities, could produce competition and lead to cheaper and more effective results than investing in public schools. However, a proper balance must be found in order to achieve the overarching goal of offering the best service at the lowest price.

The Chair thanked Prof. Geradin and Mr. Shelanski for their very interesting contribution, which resonated with a recurring question on how best to achieve the goals that a society values: through state intervention or through market mechanisms? He then turned to Mr. Sturgess and invited him to comment.

Mr. Sturgess noted that over the past decade the United Kingdom had sought to create a mixed economy in public services where the public, private and voluntary sectors would compete to supply public services. This process is very complex and raises a number of level playing field concerns. A range of newly competitive markets has been created where public, private and voluntary providers did not previously compete. Although the former public monopolies are often at an advantage, there are also instances in which the advantages lie with the private sector. Where the advantages lie may often depend on rather small details, for example, the way in which services are provided. Another issue that will have to be addressed, in which competitive neutrality plays an important role, is the recent emergence of hybrid enterprises, combining public, private and voluntary elements.

The reason why competitive neutrality is required as a policy issue is that in the process of creating markets in areas dominated by public monopoly providers, it is often unclear to what extent competition law and regulation can apply. Often the question is how to break up the existing public monopolies and that is where the government's active involvement is necessary to enable the emergence of competitive structures. An example where competition law showed its deficiencies when faced with emerging markets is the prison management system in the UK. About seven years ago 8% of prisons were managed by private companies, the remaining 92% by a public provider. There was a merger of two companies within that 8%, which was subjected to a competition inquiry. This seemed extraordinary to the two merging parties in view of the presence of another provider with a 92% market share, which in their view, had behaved anticompetitively in the past.

Mr. Sturgess said that the private sector believed that there were several remaining sources of unfair advantage that public companies enjoy in the UK public services market. The principal concern at present is public pensions. These are greatly subsidized and public providers do not fully account for that subsidy when submitting bids. That leads to an obvious advantage over their private sector competitors. A second distorting factor is taxation, both corporation and value added tax. There are instances of markets that have disappeared following a ruling by a tax authority that public authorities who contract with public providers were not exempt from value added tax. Other potential distortionary factors include lack of objective cost

comparison, since public providers often do not have a good understanding of the cost of providing a particular service, and public procurement policies, which may historically favour public providers.

Concerning the policy framework, an overall approach to competitive neutrality is lacking in the UK, according to Mr. Sturgess. The principles are addressed in different policies, largely in a reactive fashion, which results in gaps. The main area in which competitive neutrality is addressed is public procurement. However, important competitive neutrality issues such as pensions and taxation are not being addressed through this policy framework. In the recent past this has begun to change and there has been an increased focus on how to design markets to ensure neutrality. The Office of Fair Trading (OFT) has undertaken several reviews and identified, in particular with respect to public service markets, competitive neutrality as one of the major issues that needs to be addressed. The UK treasury also prepared a report, which is not public yet. However, it appears to be reluctant to squarely look at issues of pensions and taxation, which both fall within its portfolio. On the other hand, a lot of work has been done in the Department of Health, which has a statement of principles that includes fair competition. The Ministry of Justice has also looked at the issue in relation to prison management where private and public providers will begin to compete fully very soon.

Mr. Sturgess concluded his overview of the situation in the UK by pointing out that an area that will need attention in the near future is the municipal sphere and the provision of social services. There appears to be an uneven playing field between the newly established social enterprises, formerly public, and private providers, which has not been widely looked at so far. He concluded by noting that the issue of competitive neutrality is very important in discussions in the UK because of its inherent importance for the government's chosen policy of creating a mixed economy.

The Chair thanked Mr. Sturgess for his interesting presentation. He asked the panellists to comment on the often implicit assumption among competition enforcers that competition and competitive neutrality are the most important goals, in particular, in view of what has been mentioned in relation to the US health services market, which although private appears not to be functioning well.

Mr. Shelanski commented that one issue is liberalising a traditionally government function, where the preconditions for its existence have disappeared and where it is very important to have a coherent neutrality policy. Another issue is the instance of non-functioning private markets dominated by oligopolies, such as the health services market in the US. There, it may be in the consumers' interest that the government intervenes. However, it should do so on neutral terms in order not to displace private providers, which could lead to the recreation of public monopolies that would have to be confronted again in the future.

In response to the Chair's question as to whether there are ever instances where neutrality is not desirable, Mr. Shelanski noted that one example may be that of government intervention in times of crisis, which had been discussed earlier with respect to bank bailouts. There, strict neutrality may hamper the government's ability to act effectively. Another example is where firms have an inefficient, legacy type technology and in an oligopolistic market structure may not have the incentives to invest in new infrastructure. A government-induced creation of state-of-the-art facilities, which existing firms may not build as quickly, can greatly benefit the consumer. It is thus clear that there are areas in which complete neutrality is not always desirable. Those are, however, exceptions to the general rule of the desirability of competitive neutrality.

On these points Prof. Geradin commented that breaking up an oligopoly by stimulating public entry may often be the only alternative as tacit collusion is very difficult to establish. However, his concern was that this could be potentially problematic in the absence of a limiting principle, which would define the boundaries of when such intervention would be permissible. Markets for essential goods like health

services may fall within such boundaries but the situation is not as clear with respect to other markets, for example electricity or bread. Concerning crisis interventions, Prof. Geradin noted that while it is indisputable that in such cases the government needs to intervene it should still do so under certain limitations to minimize distortions to the market. In this respect the EC Treaty provides useful rules in Articles 86 and 87 on state aids.

The Chair asked Mr. Sturgess to comment on the usefulness and the limits of the principle of competitive neutrality in the framework of the transition to a mixed economy in the UK that he had discussed earlier.

Mr. Sturgess noted that the present situation is that of gradual emergence of competitive markets in areas that were, until recently, dominated by public monopolies. There are still large swaths of the economy where the government has a monopoly or monopsony. In this setting, it is his opinion that it is premature to discuss limitations on competition.

The Chair thanked the panellists for their very interesting presentations and opened the floor for discussion among the delegates on their experiences with competitive neutrality and corporate governance, focusing on three themes: (i) competitive neutrality policies and their scope, (ii) monitoring of competitive neutrality policies and (iii) rules of corporate governance of SOEs. He turned to the EC delegation to present its contribution.

1. Competitive neutrality policies and their scope

The EC delegation explained the legislative framework within which it operates. First with respect to general antitrust rules it uses Article 86 EC relating to public monopolies in combination with Article 82 EC, which deals with abuse of dominance. The theory of harm being that a member state would infringe these articles if a public monopoly, merely by exercising its monopoly right, was unable to avoid or was induced to abusing its dominant position. Legislation could lead to abuse of dominance in many ways, for example, through giving incentives to cross-subsidization, leveraging of monopoly upstream or exploitation through supply limitation. The European Commission used these articles in the area of liberalisation of certain markets in the 80s and 90s, in particular with respect to transport, energy, telecom and postal services. Since liberalisation has greatly progressed since then, there has been lesser need for intervention, and consequently the Commission is less active in that arena. However, when there is a problematic situation, the Commission does not hesitate to act. For example, in 2008 it adopted a decision against the Slovak Republic concerning its decision to extend the postal monopoly to the area of hybrid services, in which there had already been effective competition from private actors.

Concerning state aid discipline the EC delegation pointed at Article 86(2) EC, which dictates that public or private entities that are entrusted with the operation of services of general economic interest (SGEI) or have been granted a monopoly shall be subject to competition rules in so far as the application of these rules do not obstruct the performance of the particular tasks assigned to them. In particular, entities which are entrusted with a SGEI should not be overcompensated for providing public services. The Commission has developed a number of rules aimed at preventing overcompensation. Public authorities are obliged to define what the public service obligations are, determine in advance objective parameters to calculate compensation and establish mechanisms to ensure the recovery of overcompensation if there are deviations. One interesting aspect is that overcompensation will be deemed not to occur where public procurement procedures are used to select the provider. This is a powerful incentive for public authorities to select the most efficient provider of public services. Despite these rules there may still be overcompensation and the EC delegation pointed to the powers of the Commission to pronounce such overcompensation illegal state aid and demand its recovery.

As regards general conclusions from these rules, the EC delegation pointed out that much of their efficacy is derived from the supra-national character of the EU system. The rules may be transplantable to a federal system as well, but in a more unitary setting, their implementation may be more difficult. However, even absent such strong enforcement powers, authorities may still wish to look, before granting monopoly rights or engaging in compensation for services of public interest, at the same issues that the Commission looks at in application of these rules. The questions to focus on may be whether the monopoly is strictly necessary, whether it is proportionate or whether the compensation is fair.

The Chair thanked the EC delegation for its contribution and asked Turkey, which has no separate competitive neutrality policy in place, to describe how its liberalisation and privatisation policies are working to level the playing field for SOEs and private enterprises.

According to the Turkish delegation there has been a significant privatisation effort since the late 1980s through which the government withdrew from most manufacturing sectors and private enterprises have been given the opportunity to compete. State involvement in strategic industries, such as steel, telecom, electricity, petroleum and port operations has also been reduced by privatisation of majority shares of public enterprises. As a result, the SOE share of GDP has fallen from 23% in 1985 to 8% in 2007. It is expected to fall further to 3% by the year 2013. In areas where public capital remains a determinative factor, liberalisation has taken place and independent bodies have been created to take over the regulatory functions from former state monopolies. Liberalisation efforts in the area of public services, such as postal service and railways, are also under way. The Turkish delegation stressed that in its opinion these policies will help to achieve at least part of the competitive neutrality principles outlined in the Secretariat's Background Paper.

2. Monitoring of competitive neutrality policies

With respect to how competitive neutrality principles may work in practice, the Chair turned to Spain, which had recently introduced a royal decree on competitive neutrality between private and public enterprises, and asked to describe its provisions and application.

The Spanish delegation explained that the decree implemented a law adopted three years ago. However, as it has not yet entered into force and, therefore, there is no experience with its application so far. The goal of this legislation is to promote efficiency, good management and competition in markets where public enterprises operate. Public enterprises are obliged not to leverage their monopoly position from certain areas where they provide public services to areas where they compete in the market. Furthermore, the law aims at increasing transparency by requiring public enterprises to make public all relevant non-confidential information about their business activities, annual accounts and activities linked to the provision of public services. Under the recently adopted royal decree, the Ministry of Economy will have the authority to oversee public enterprises, determining the additional costs associated with the provision of public services, estimating the advantages with respect to access to finance and the income that the state should receive from SOEs as compensation for the amounts invested and taking account of the public service obligations and the financial and regulatory advantages previously calculated.

The Spanish delegation emphasised that since this legislation is not yet in effect, it is hard to estimate its impact. However, it stressed that it believes that the new law will contribute positively to achieving a level playing field. It also remains to be seen what the role of the competition authority will be in this area. In terms of further steps, the Spanish delegation noted that obliging public enterprises to separate their accounts related to public services from those related to the activities in which they compete in the market would be welcome.

The Chair observed that the experience of the UK may be of particular interest in this respect, since the Office of Fair Trading recently undertook a study on the use of information by public sector entities and whether it leads to advantages over private enterprises with which they compete. He invited the UK delegation to comment.

The UK delegation explained that it had conducted this study in response to a number of complaints by private organizations about the difficulties they faced when trying to access a variety of data held by public agencies with the aim of commercializing them. In the UK various public bodies collect and hold vast amounts of information. For example, mapping data collected by a body called Ordnance Survey, driving license details collected by the Driver and Vehicle Licensing Agency and real property data collected by the Land Registry. The holders of the information often did not appreciate its value nor understand how to commercialize it, while private entities could not gain access to it. The report found the market to be worth 500 million pounds annually, and if properly commercialized, up to 1 billion. The report also found that if private parties had access to this data, they could be expected to offer new services and products to consumers. The report proposed certain principles for ensuring more effective access to this information. Under these principles, private parties should have access to raw data that the holder chooses to commercialize, there should be at a minimum an accounting separation within the collecting body between data provision and any commercial use of that data, access should be granted on a non-discriminatory basis and prices for the data should be no more than full cost recovery including any rate of return applicable both to refined and raw data. The UK delegation noted that there has been a significant follow-up to the report as this topic is of particular relevance due to the fact that a number of data collecting public bodies are being considered for privatisation.

The Chair turned to Norway, where the government has the authority to draw attention to anticompetitive measures and to encourage entry into markets, and asked its delegation to describe its experience in this respect.

The Norwegian delegation explained that in Norway competition law applies fully to both public and private enterprises. With respect to public measures the Competition Authority is authorized to supervise competition in various markets and to draw attention to anticompetitive effects of public measures in writing and orally to the respective public bodies. If the Competition Authority considers it necessary to promote competition in specific markets, it can propose that the Ministry of Government Administration and Reform intervene against terms, agreements or actions that constrain or may constrain competition. The Norwegian delegation mentioned an example of waste management in the Bergen area where a letter of concern issued by the Competition Authority led to positive changes in the way the local public waste management authority operated. Following the letter, the company made a clear distinction between its activities in areas where it did not face competition and those where it did so that the risk of cross-subsidization was removed.

The Chair asked Sweden to comment on the recently adopted rules to ensure competitive neutrality between the public and private sector.

According to the Swedish delegation, there have been many complaints about public interventions in recent years, which is likely at least in part due to a fairly extensive public sector in Sweden. While competition law applies to both public and private entities, it is sometimes not sufficient to deal with certain issues of concern, for example on the municipal level where demonstrating dominance can be very difficult. To remedy this situation, the Swedish government has proposed a bill amending the Competition Act which contains provisions aimed at achieving competitive neutrality. The bill is expected to be adopted in November 2009. Under these provisions the Stockholm district court can, on application by the Competition Authority, or in its absence by application of the enterprises concerned, prohibit measures and

conduct by municipal and local authorities that may impede or distort competition, unless they are justified by public interest.

The Chair turned to Romania and asked its delegation to describe some of the measures outlined in its contribution that deal with public procurement and are meant to address competitive neutrality.

The Romanian delegation explained that with respect to public procurement there is developing cooperation with the public procurement agency, which will in the future also include exchange of information. Furthermore, the OECD Guidelines for Fighting Bid Rigging in Public Procurement have been very helpful and were distributed to all public authorities. Directly concerning competitive neutrality, the Competition Authority is engaged in active advocacy of its principles. A related issue is that of financial transparency where the Competition Authority is responsible for monitoring financial relations between public authorities and enterprises that provide public services. In cases of inconsistencies it can request explanations; however, it has no power to impose sanctions.

3. Rules of corporate governance for SOEs

The Chair asked Brazil to describe its institutional and legislative framework with respect to corporate governance of SOEs.

The delegation from Brazil explained how the important functions on state-owned enterprises are assigned to the relevant ministry, which ensures that the companies operate in line with the government policies applicable in that area. Further, in January 2007 the Brazilian government established the Inter-ministerial Commission on governance. Among other things, it has the power to implement strategies for the state's corporate ownership, to establish criteria to appoint the director and government representative on the board, and to establish standards of ethical conduct. The government believes it can be an active and informed owner while at the same time promote transparency and accountability and protect minority shareholders. The Bank of Brazil and Petrobras are examples of this model of governance. One key remaining issue is the allocation of voting power among shareholders. Best practices recommend 'one share one vote' but Brazilian law allows two classes of shareholders with disproportionate voting rights. Converting would be problematic because it is the current system that allows the state to maintain majority control. In contrast, Brazilian corporate law recommends the participation of minority shareholders through, for example, a system of cumulative voting.

The Chair then turned to the US delegation for its views on the principles necessary for effective governance of SOEs.

The US highlighted four. First, it must be clear and transparent to competitors what privileges SOEs enjoy due to their government ownership. Second, the government should strive for competitive neutrality such that when favourable treatment is occasioned by a public policy goal, distortions in the market are minimized to allow for full and fair competition. Third, such policy goals should be advanced by the government in its capacity as a regulator and not as a market participant. This long-standing distinction should be maintained to the extent possible. Finally, when exigent circumstances call for government ownership, that ownership must be limited in scope and duration to its original purpose.

The Chair thanked the US delegation and asked Chinese Taipei to explain its approach to corporate governance of SOEs.

The delegation from Chinese Taipei explained that in 2003 a task force was established to reform corporate governance, particularly with respect to SOEs. Its efforts resulted in the adoption of six principles, which are, in short, strengthening internal audit systems, creating sound accounting systems,

increasing the efficiency of governing bodies, improving supervisory functions, enhancing transparency, and promoting the rights of shareholders and stakeholders.

The Chair invited Finland, which has both principles and a government resolution with respect to corporate governance of SOEs, to comment on their application.

With respect to governance the Finnish delegation observed that the current government policy with respect to SOEs is to act as any other shareholder. Consequently, it expects dividends comparable to those that would be received by shareholders of a private corporation. Accordingly if an SOE carries a public service obligation, its costs should be fairly compensated. As regards competitive neutrality specifically, there is a bill pending that would ban the use of the state enterprise corporate model in competitive markets. Municipalities and local governments have taken a step in a similar direction by adopting a memorandum that aims at achieving the same end with respect to entities created by them.

Before turning to the panellists for their concluding remarks the Chair invited any interested delegation to add to this topic.

The delegation from New Zealand mentioned two issues. First, New Zealand has gone through extensive privatisation and liberalisation underpinned by the principle of competitive neutrality. However, recently the government used state ownership as a means of intervention in the retail banking market, which was perceived as not contributing to consumer welfare due to the fact that banks competed on quality and not price. It therefore founded a state-owned bank to compete with the existing banks. This has been quite successful. However, there is an ongoing debate as to whether there is an implicit subsidy in the rate at which the state-owned bank can borrow. Second, while electricity markets are unbundled, some of the state-owned electricity generation companies enjoy positions of market power. Thus, there have been discussions as to whether to shift assets between the actors in the generation market to improve competitiveness at the retail level. However, concerns were voiced about the message such an action would send to the markets and the debate is therefore still ongoing. In its concluding remarks, the New Zealand delegation stressed that while there are ongoing discussions about the appropriate role of government in markets, the importance of the principle of competitive neutrality is widely accepted.

The BIAC delegation drew the delegates' attention to the OECD Guidelines on Corporate Governance of State-Owned Enterprises adopted in 2005, whose recommendations were, in its opinion, still valid for the topic of this roundtable. They were reaffirmed by the OECD in its paper on Corporate Governance and the Financial Crisis issued earlier this year. In particular, as state ownership has been necessitated by deficiencies in the corporate governance of private enterprises, exemplary corporate governance is more important than ever. BIAC recognized that organizing corporate governance of SOEs is not within the scope of activities of competition authorities; however, it emphasized the important advocacy role they can play in promoting the principles recognized in the aforementioned OECD documents.

4. Panellists' closing remarks

Mr. Shelanski observed that from the various delegations' presentations it is clear that there is a common set of problems that countries face with respect to neutrality. He noted from the discussion a positive general trend towards competitive neutrality and sound principles of corporate governance of SOEs.

Prof. Geradin noted that this discussion showed the importance of experience sharing between jurisdictions as most are confronted by the same problems and try different ways of countering them. Gradually, best practices will shape and be possibly applied across the globe. He went on to observe that competitive neutrality is the responsibility of the state, which should look at creative solutions for ensuring

provision of public services outside the framework of traditional public involvement as had been noted in his and Mr. Shelanski's earlier presentations. Concerning the role of competition authorities, some are better equipped to deal with problematic issues, such as the EU. However, even those with more limited powers can play an important role in promoting competitive neutrality, for example, by applying strictly competition rules to all private or public enterprises, by assisting other government agencies in adopting appropriate measures, by assessing the competitive effects of various subsidies, by helping the appropriate agencies craft suitable responses and last but not least by engaging in public advocacy.

Mr. Sturgess observed that his presentation had been concerned with public services, since the manufacturing and utilities sectors had been largely privatised in the UK and competitive neutrality issues were no longer an issue. The public service industry – that part operated by private and voluntary providers - covers a significant part of the UK's, (and some other countries') GDP. However, this is an area where competitive neutrality is not yet in place. There has been much work done so far, but the process is ongoing and requires continued effort and attention.

The Chair thanked the panelists and the participants and closed the roundtable discussion.

COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la session et fait observer que la discussion sur le gouvernement d'entreprise et le principe de neutralité concurrentielle pour les entreprises publiques est étroitement liée à la table ronde sur l'application du droit de la concurrence aux entreprises publiques, qui s'est tenue le matin même. De plus, cette discussion est l'occasion d'actualiser les conclusions d'une table ronde de 2004 sur la réglementation des activités marchandes du secteur public.

Dans de nombreux pays, le secteur public se livre à toute une palette d'activités commerciales et les entreprises publiques peuvent représenter une part considérable de certains marchés importants. Étant détenues par les pouvoirs publics, elles bénéficient souvent d'un certain nombre d'avantages par rapport à leurs concurrentes privées. Parmi ces avantages, on notera, entre autres, un coût du capital moins élevé, une charge fiscale réduite et un risque plus faible de prise de contrôle et de faillite, dont l'application du droit de la concurrence ne tient pas toujours compte. Certains pays de l'OCDE ont donc pris des mesures axées sur le gouvernement d'entreprise et la neutralité concurrentielle, afin de mettre en place des règles du jeu équitables pour les entreprises publiques et privées. Cette table ronde devrait faire office de catalyseur pour clarifier bon nombre de ces questions.

Trois intervenants vont lancer la discussion : M. Damien Geradin, Professeur de droit de la concurrence et d'économie à l'Université de Tilburg, aux Pays-Bas, M. Howard Shelanski, Directeur adjoint du Bureau of Economics de la Federal Trade Commission américaine et M. Gary Sturgess, Directeur exécutif de l'Institut Serco.

M. Shelanski et M. Geradin présentent conjointement certains des problèmes que pose le principe de neutralité concurrentielle appliqué aux entreprises publiques.

M. Geradin propose deux raisonnements possibles pour définir le concept de neutralité concurrentielle et la manière d'y parvenir. Premièrement, les entreprises privées et publiques peuvent être soumises à un régime légal commun, ce qui élimine les divers avantages dont les entreprises publiques peuvent bénéficier. La constitution des entreprises publiques en sociétés permet d'atteindre en partie cet objectif, puisque les sociétés, qu'elles soient privées ou publiques, sont en général soumises à la même réglementation. Ce processus nécessite souvent des modifications de la législation, et les autorités de la concurrence devraient donc orienter leurs efforts sur la défense de la concurrence et la promotion du principe de neutralité concurrentielle. La notion de neutralité peut aussi impliquer la mise en place de conditions de concurrence équitables entre les entreprises publiques et privées. Pour autant, les États devraient pouvoir investir dans leurs sociétés de la même façon que les investisseurs privés. À cet égard, le droit de l'Union européenne a défini le principe de l'investisseur en économie de marché, selon lequel les États devraient être libres d'apporter des fonds aux sociétés publiques, à condition qu'ils le fassent de la même manière que le ferait un investisseur privé dans une économie de marché.

M. Shelanski souligne que, s'il est souvent admis implicitement que l'implication des pouvoirs publics comporte uniquement des avantages concurrentiels, elle peut néanmoins avoir aussi des conséquences négatives. La neutralité ne se résume donc pas nécessairement à une limitation maximale du rôle des pouvoirs publics dans les entreprises publiques.

L'exemple de France Telecom illustre les inconvénients possibles de l'actionnariat public. Dans le cas de France Telecom, la somme d'informations que l'entreprise partage avec les autorités sur ses coûts et ses activités l'expose à une plus grande surveillance et à une réglementation plus stricte que les opérateurs

privés. Pour ce qui est des incitations, il serait peut-être un peu exagéré de dire qu'une entreprise publique n'a aucune incitation à innover, mais il est vrai que ses incitations sont moins fortes que celles d'une entreprise privée, et ce en raison des différences entre leurs systèmes de rémunération. De nombreuses entreprises publiques se dotent ainsi d'une structure institutionnelle et d'un régime d'incitations susceptibles de les affaiblir et de les rendre moins compétitives que les entreprises privées. La fourniture de biens publics et la réalisation d'autres objectifs sociaux que les entreprises publiques se voient souvent confier peuvent aussi les désavantager. S'agissant des subventions croisées, le raisonnement habituel est qu'une entreprise publique utilise sa rente de monopole dans un domaine donné pour subventionner ses activités sur un marché concurrentiel. Cela étant, les fonctions réglementées d'une entreprise publique sont souvent coûteuses, tandis que ses fonctions non réglementées sont génératrices de bénéfices. Par conséquent, une entreprise publique peut recourir à des subventions croisées pour soutenir ses fonctions réglementées. Ces exemples montrent combien il est difficile de déterminer si l'absence de neutralité constitue un avantage ou non, et il convient de ne pas l'oublier lorsque l'on se penche sur la question de la neutralité concurrentielle.

M. Geradin souligne que, si la neutralité est certes un objectif valable, il sera difficile, dans certaines circonstances, d'atteindre certains objectifs, tels que les obligations de service universel, tout en restant neutre. Il incombe donc aux pouvoirs publics de trouver un juste équilibre pour assurer des services universels de bonne qualité à un prix abordable sans créer de distorsions sur le marché. Une question importante à cet égard est celle du financement des obligations de service universel. Par exemple, le service postal suppose la distribution du courrier dans tout le pays, et dans certaines régions très peu peuplées il est très onéreux de satisfaire à cette obligation. À moins de vouloir supprimer ces services dans les zones non rentables, des compensations sont indispensables. La question reste de savoir comment indemniser les opérateurs, étant donné qu'il est très difficile de déterminer le coût réel des services universels. Le recours à des enchères ou à des enchères inversées est une option qui a en fait souvent été retenue pour les services de transports publics sous-traités par les autorités locales. Il est envisageable de lancer un appel d'offres auprès des acteurs du marché pour assurer une obligation de service public. Cela étant, l'appel d'offres n'est que le début du processus. Ensuite, les pouvoirs publics devront en effet veiller à ce que les services soient correctement définis et à ce que des mécanismes efficaces soient en place pour assurer un suivi des performances et faire appliquer les obligations externalisées.

L'actionnariat public n'est pas le seul facteur à prendre en considération dans les questions de neutralité, et comme M. Shelanski le fait remarquer, l'État peut aussi jouer un rôle important en tant que client. Cela peut se traduire de différentes manières. On citera par exemple le principe de l'immunité de l'État par ricochet, évoqué par la délégation australienne pendant la table ronde du matin sur l'application des règles de concurrence aux entreprises publiques. En concluant un contrat avec les pouvoirs publics, une société privée peut, en effet, échapper au droit de la concurrence pour certaines de ses activités, ce qui la place dans une position avantageuse face à ses concurrents. Il est donc très important d'éliminer toute distorsion de cette nature. Cependant, le fait d'avoir les pouvoirs publics pour clients peut conférer d'autres avantages à une société privée. Parmi les plus évidents, on notera les subventions cachées dans la tarification, qui consistent à fixer le prix d'un produit ou d'un service au-dessus des niveaux concurrentiels. Il est donc important de veiller à ce que les politiques de passation des marchés publics empêchent de telles distorsions. Cela étant, les subventions cachées ne sont pas les seules sources de non-neutralité. En concluant un contrat avec les pouvoirs publics, un adjudicataire peut se voir conférer des avantages en termes d'économies d'échelle impossibles à reproduire pour d'autres acteurs. L'attribution d'un tel contrat peut également apporter à une entreprise des avantages non négligeables en termes de réputation. Il convient donc de ne pas oublier que des problèmes de neutralité peuvent se poser dans les domaines où les pouvoirs publics agissent en tant que clients et en tant que fournisseurs.

Dans leur présentation, M. Geradin et M. Shelanski posent également la question de savoir si la neutralité est toujours souhaitable, voire possible. Ils se concentrent sur trois aspects. Premièrement,

l'intervention de l'État est-elle nécessaire en temps de crise, et devrait-elle être limitée ? Deuxièmement, l'intervention de l'État est-elle appropriée pour remédier à certaines carences du marché ? Troisièmement, M. Geradin et M. Shelanski se proposent de citer certains exemples concernant le marché de l'éducation.

M. Shelanski aborde les deux premiers points. S'agissant de l'intervention de l'État en temps de crise, les sauvetages des banques pendant la crise financière actuelle illustrent bien ce processus. Lorsque les banques approchent de la faillite et font appel aux deniers de l'État pour survivre, les pouvoirs publics doivent décider de renflouer telle ou telle banque et de laisser telle ou telle autre déposer son bilan, au vu des ressources dont ils disposent et compte tenu de divers facteurs, tels que l'importance systémique de chaque banque pour le système financier. Exiger une neutralité totale dans de telles circonstances restreindrait nettement la capacité des pouvoirs publics d'apporter des réponses efficaces à une crise économique.

Pour ce qui est des carences du marché, il se peut que certaines structures de marché ne fonctionnent pas correctement du fait que les entreprises privées sont protégées par une série de règles. Dans de tels scénarios, une intervention de l'État dans des conditions qui ne sont pas neutres peut promouvoir considérablement le bien-être du consommateur. On citera par exemple le système de santé des États-Unis, où l'introduction d'une assurance maladie financée sur fonds publics est actuellement à l'examen. Les entreprises d'assurance ont souvent exprimé leur crainte qu'une telle assurance fasse baisser leurs prix ; or, il s'agit justement du but recherché, à savoir que l'intervention d'un gouvernement fasse baisser les prix sans pour autant être non neutre ou indésirable. Par conséquent, l'action des pouvoirs publics par l'intermédiaire d'une entreprise publique peut améliorer les structures de marché.

Concernant le système éducatif, M. Geradin aborde la question de savoir si des solutions de marché pourraient être trouvées pour la fourniture de services éducatifs, qui ne sont pas des services universels, mais sont néanmoins essentiels pour un certain nombre de citoyens. Le marché de l'éducation compte des acteurs privés et publics, et l'État pourrait souhaiter intervenir davantage. Selon la législation européenne, certaines de ces activités peuvent ne pas relever du droit de la concurrence si elles ne sont pas conformes à la notion d'entreprise telle que définie par la Cour de justice européenne. On peut néanmoins se demander s'il est même nécessaire pour les États de créer des universités ou des écoles publiques. Là encore, on pourrait imaginer un système d'enchères inversées dans lequel des prestataires de services d'enseignement soumettraient des offres sous forme de coût d'enseignement par étudiant. Un tel système, complété par des chèques-études de l'État à faire valoir dans les universités privées, pourrait faire naître une concurrence et produire de meilleurs résultats à un coût moindre qu'un investissement dans des écoles publiques. Cela étant, il convient de trouver un juste équilibre afin de parvenir à l'objectif fondamental, offrir le meilleur service au prix le plus bas.

Le Président remercie M. Geradin et M. Shelanski pour leur contribution très intéressante, qui fait écho à une question récurrente sur la façon de réaliser au mieux les objectifs auxquels une société est attachée. Convient-il de privilégier l'intervention de l'État ou de laisser œuvrer les mécanismes de marché ? Le Président invite ensuite M. Sturgess à faire part de ses commentaires.

M. Sturgess rappelle que, ces dix dernières années, le Royaume-Uni s'est employé à créer une économie mixte dans les services publics, où les secteurs public, privé et associatif se livraient concurrence pour la fourniture de services publics. Ce processus est très complexe et suscite un certain nombre d'interrogations concernant l'égalité des conditions de concurrence. Toute une série de marchés, ont été ouverts à la concurrence entre les fournisseurs publics, privés et associatifs. Bien que les anciens monopoles publics soient souvent avantagés, c'est dans certains cas le secteur privé qui l'est. Ces avantages tiennent souvent à des aspects plutôt accessoires, par exemple la manière dont les services sont fournis. Un autre problème étroitement lié à la question de la neutralité concurrentielle, et qu'il conviendra

de régler, est l'émergence récente d'entreprises hybrides qui combinent des éléments publics, privés et associatifs.

L'exigence de neutralité concurrentielle est devenue un problème de politique publique en raison du flou qui entoure souvent l'application du droit et des règles de concurrence dans le processus de création de marchés dans des secteurs dominés par des monopoles publics. Souvent, le problème est de déterminer comment mettre fin aux monopoles publics existants, et c'est à ce moment que l'implication active des pouvoirs publics est nécessaire pour permettre l'émergence de structures concurrentielles. Au Royaume-Uni, par exemple, le droit de la concurrence a ainsi montré certaines carences lorsqu'il a été confronté à l'émergence d'un nouveau marché, celui de la gestion des prisons. Il y a sept ans environ, 8 % des prisons étaient gérées par des entreprises privées, et les 92 % restants par un prestataire public. Les deux entreprises représentant ces 8 % ont fusionné, ce qui a déclenché une enquête de concurrence. Les deux parties à la fusion ont jugé cette décision incompréhensible, vu la présence d'un autre prestataire détenant une part de marché de 92 %, qui, selon elles, s'était livré dans le passé à des agissements anticoncurrentiels.

M. Sturgess explique que, de l'avis du secteur privé, les entreprises publiques continuent de bénéficier d'avantages indus sur le marché des services publics au Royaume-Uni. Les pensions du secteur public constituent aujourd'hui le principal problème. Elles sont largement subventionnées, et les prestataires publics n'en tiennent pas compte lorsqu'ils soumissionnent à des appels d'offres, ce qui leur confère un avantage évident sur leurs concurrents du secteur privé. Un deuxième facteur de distorsion est la fiscalité, c'est-à-dire à la fois l'impôt sur les sociétés et la taxe sur la valeur ajoutée. Certains marchés ont disparu suite à la décision d'une autorité fiscale de ne pas exempter de la taxe sur la valeur ajoutée les autorités publiques qui font appel à des fournisseurs publics. Parmi les autres facteurs possibles de distorsion figurent, d'une part, l'absence de comparaison objective des coûts, étant donné que les fournisseurs publics méconnaissent souvent le coût de fourniture d'un service donné et, d'autre part, les politiques de passation de marchés publics, qui tendent traditionnellement à favoriser les fournisseurs publics.

S'agissant du cadre d'action des pouvoirs publics, selon M. Sturgess, une approche globale de la neutralité concurrentielle fait défaut au Royaume-Uni. Les principes liés à ce concept sont traités dans les diverses politiques, en grande partie de manière réactive ; d'où des lacunes. Le principal domaine dans lequel le problème de neutralité concurrentielle a été traité est celui des marchés publics. Cependant, ce cadre d'action laisse de côté les questions importantes de neutralité concurrentielle qui concernent les retraites et la fiscalité. Ces derniers temps, cette situation a commencé à changer, et l'accent a été mis sur la conception de marchés garantissant la neutralité. L'Office of Fair Trading (OFT) a entrepris plusieurs examens et a classé la neutralité concurrentielle parmi les principales questions à régler, notamment sur les marchés des services publics. Le Trésor du Royaume-Uni a également rédigé à ce sujet un rapport qui n'a pas encore été rendu public. Néanmoins, il semble réticent à l'idée de prendre à bras-le-corps le problème des retraites et de la fiscalité, qui relèvent toutes deux de son portefeuille. D'autre part, un travail considérable a été accompli au sein du département de la Santé, qui s'est doté d'un ensemble de principes, dont celui de concurrence équitable. Le ministère de la Justice s'est également penché sur la question dans le domaine de la gestion des prisons, où les fournisseurs publics et privés vont pouvoir d'ici peu se livrer une pleine concurrence.

M. Sturgess conclut son tour d'horizon de la situation au Royaume-Uni en indiquant que l'un des domaines qui nécessiteront une attention accrue dans un avenir proche est celui de la fourniture des services municipaux et des services sociaux. Il semble en effet que les conditions de concurrence ne soient pas toujours équitables entre les anciens fournisseurs publics récemment transformés en entreprises à vocation sociale et les fournisseurs privés, et que ce problème n'ait pas été pleinement pris en compte jusqu'à présent. Pour finir, M. Sturgess fait observer que la question de la neutralité concurrentielle tient

une place très importante dans les discussions menées au Royaume-Uni, ce qui s'explique par le choix du gouvernement de créer une économie mixte.

Le Président remercie M. Sturgess pour sa présentation intéressante. Il invite les experts à donner leur avis sur l'hypothèse implicite des instances chargées de faire respecter les règles de concurrence, à savoir que la concurrence et la neutralité concurrentielle sont les objectifs qui priment. Le Président demande aux experts de s'exprimer plus particulièrement au vu de ce qui a été dit sur le marché américain des services de santé qui, bien que privé, ne semble pas fonctionner correctement.

M. Shelanski fait observer que l'une des difficultés est de libéraliser une fonction attribuée traditionnellement aux pouvoirs publics lorsque les conditions justifiant son existence ne sont plus réunies, et il précise qu'il est dans ce cas très important d'articuler une politique de neutralité cohérente. Les marchés privés qui sont dominés par des oligopoles et qui fonctionnent mal, comme le marché des services de santé aux États-Unis, constituent une autre difficulté. Dans ce cas, une intervention des pouvoirs publics peut servir les intérêts du consommateur, mais elle doit être neutre, afin de ne pas évincer les fournisseurs privés, ce qui risquerait d'aboutir à la reconstitution de monopoles publics, lesquels poseraient à nouveau problème à l'avenir.

En réponse à la question du Président, qui demandait s'il y avait des cas où la neutralité n'est pas souhaitable, M. Shelanski cite pour exemple l'intervention des pouvoirs publics en temps de crise, qui a déjà été évoquée à propos des sauvetages de banques. Dans ce cas, une neutralité stricto sensu peut diminuer la capacité des autorités de réagir efficacement. Un autre exemple est le cas des entreprises dont la technologie est dépassée et inefficace, et qui, dans un marché de structure oligopolistique, n'ont peut-être pas les incitations nécessaires pour investir dans de nouvelles infrastructures. La création, à l'initiative des pouvoirs publics, d'installations ultramodernes que les entreprises en place ne pourraient peut-être pas construire aussi rapidement, peut bénéficier considérablement au consommateur. Il existe donc de toute évidence des domaines dans lesquels une neutralité totale n'est pas toujours souhaitable. Cela étant, il s'agit d'exceptions à la règle générale selon laquelle la neutralité concurrentielle est effectivement souhaitable.

À ce propos, M. Geradin explique que la seule solution pour mettre fin à un oligopole est souvent de stimuler l'entrée d'acteurs publics, étant donné qu'il est très difficile de prouver l'existence d'une collusion tacite. Mais il craint que de telles interventions soient problématiques si elles ne sont pas encadrées par des principes définissant dans quelles limites elles peuvent être tolérées. Ces interventions sont peut-être légitimes sur les marchés des biens et des services essentiels tels que les services de santé, mais la situation est moins claire s'agissant d'autres marchés tels que celui de l'électricité ou du pain. Pour ce qui est des interventions en temps de crise, M. Geradin indique que s'il est indéniable que les pouvoirs publics se doivent d'intervenir dans de telles circonstances, ils doivent néanmoins agir en respectant certaines limites, afin de minimiser toute distorsion du marché. À cet égard, les articles 86 et 87 du traité de l'UE sur les aides d'État fixent des règles utiles.

Le Président demande à M. Sturgess de faire part de son point de vue quant à l'utilité et aux limites du principe de neutralité concurrentielle dans le cadre de la transition - qu'il a évoquée plus tôt - du Royaume-Uni vers une économie mixte.

M. Sturgess fait remarquer que l'on constate aujourd'hui une émergence progressive de marchés concurrentiels dans des domaines dominés encore récemment par des monopoles publics. Dans certains pans importants de l'économie, l'État demeure en position de monopole ou de monopsonne. Dans ce contexte, M. Sturgess juge prématuré de discuter de restrictions de la concurrence.

Le Président remercie les experts du Groupe de travail pour leurs présentations très intéressantes et invite les délégués à faire part de leurs expériences de la neutralité concurrentielle et du gouvernement d'entreprise, en se concentrant sur trois thèmes : (i) les politiques de neutralité concurrentielle et leur portée, (ii) le suivi des politiques de neutralité concurrentielle et (iii) les règles de gouvernement d'entreprise des entreprises publiques. Le Président invite la délégation de la Commission européenne à présenter sa contribution.

1. Les politiques de neutralité concurrentielle et leur portée

La délégation de la Commission européenne décrit le cadre législatif dans lequel elle opère. Tout d'abord, pour ce qui est des règles générales de concurrence, elle s'appuie sur l'article 86 du traité de l'UE concernant les monopoles publics, en combinaison avec l'article 82 du même traité, relatif à l'abus de position dominante. Il y a préjudice dès lors qu'un État membre ne respecte pas ces articles si, par le simple exercice de son droit de monopole, un monopole public est incapable d'éviter l'exploitation abusive de sa position dominante ou est incité à un tel abus. À de nombreux égards, la législation peut aboutir à des abus de position dominante, par exemple en incitant à l'utilisation de subventions croisées et en permettant de tirer parti d'un monopole en amont ou d'exploiter un monopole en limitant l'offre. La Commission européenne a utilisé ces articles pour libéraliser certains marchés dans les années 80 et 90, en particulier dans le transport, l'énergie, les télécommunications et les services postaux. Étant donné que la libéralisation a depuis largement progressé, les interventions sont devenues moins nécessaires, et la Commission est par conséquent moins active dans ce domaine. Cela étant, face à une situation problématique, la Commission n'hésite pas à agir. Par exemple, en 2008, elle s'est prononcée contre la décision de la République slovaque d'étendre le monopole des services postaux aux services hybrides, pour lesquels une concurrence efficace avait déjà été instaurée par des acteurs privés.

S'agissant de la discipline en matière d'aides d'État, la délégation de la Commission européenne évoque l'article 86(2) du traité de l'UE, aux termes duquel des entreprises publiques ou privées chargées de gérer des services d'intérêt économique général (SIEG) ou qui se sont vu confier un monopole sont soumises aux règles de concurrence, dans la limite où l'application de ces règles ne fait pas échec à l'accomplissement de la mission particulière qui leur a été impartie. Plus spécialement, les entreprises auxquelles est confié un SIEG ne devraient pas être dédommagées de manière excessive pour les services publics qu'elles assurent. La Commission a défini un certain nombre de règles visant à empêcher toute compensation excessive. Les pouvoirs publics sont tenus de définir les obligations de service public, de déterminer à l'avance des paramètres objectifs pour calculer la compensation et d'établir des mécanismes de nature à garantir la récupération de toute surcompensation en cas d'entorse à la règle. Il est intéressant de noter qu'on ne considérera pas qu'il y a eu surcompensation si des procédures de passation de marchés publics sont utilisées pour sélectionner le fournisseur. Il s'agit là d'une forte incitation pour les pouvoirs publics à sélectionner le fournisseur de services publics le plus efficace. Malgré ces règles, il peut toutefois exister des cas de surcompensation, et la délégation de la CE rappelle que la Commission a le pouvoir de déclarer que de telles surcompensations sont des aides d'État illégales et d'en exiger la récupération.

Pour conclure de manière générale sur ces règles, la délégation de la Commission européenne souligne que leur efficacité tient en grande partie au caractère supranational du système de l'UE. Elles peuvent également être appliquées dans un système fédéral, mais leur mise en œuvre peut s'avérer plus difficile dans un contexte unitaire. Cela étant, même si certaines autorités ne disposent pas d'autant de pouvoirs d'exécution que la Commission, elles peuvent néanmoins souhaiter procéder aux mêmes vérifications que cette dernière avant d'octroyer des droits de monopole ou de verser des compensations au titre de services d'intérêt public. Les questions suivantes mériteraient d'être étudiées de plus près : le monopole est-il vraiment nécessaire, est-il proportionné, et la compensation est-elle adéquate ?

Le Président remercie la délégation de la Commission européenne pour sa contribution et invite la Turquie, qui n'a introduit aucune politique de neutralité concurrentielle à proprement parler, à expliquer comment elle garantit des conditions de concurrence équitables aux entreprises publiques et privées par le biais de ses politiques de libéralisation et de privatisation.

Selon la délégation turque, un effort de privatisation considérable a été accompli en Turquie depuis la fin des années 1980. Les pouvoirs publics se sont ainsi retirés de la plupart des secteurs manufacturiers, et les entreprises privées ont pu avoir accès à ces secteurs. L'implication de l'État dans les industries stratégiques telles que l'acier, les télécommunications, l'électricité, le pétrole et les services portuaires a également été réduite par la cession des participations majoritaires de l'État dans les entreprises publiques. En conséquence, la part des entreprises publiques dans le PIB est tombée de 23 % en 1985 à 8 % en 2007 et devrait encore être ramenée à 3 % d'ici à 2013. Les secteurs où les fonds publics restent déterminants ont été libéralisés, et des organes indépendants ont été institués pour assumer les fonctions de réglementation auparavant exercées par les monopoles d'État. Des efforts de libéralisation sont également en cours dans les services publics tels que les services postaux et le transport ferroviaire. La délégation turque insiste sur le fait qu'à ses yeux ces politiques aideront à mettre en œuvre, au moins en partie, les principes de neutralité concurrentielle définis dans le document de travail du Secrétariat.

2. Suivi des politiques de neutralité concurrentielle

S'agissant de la traduction des principes de neutralité concurrentielle dans la pratique, le Président demande à l'Espagne de décrire le contenu et les modalités d'application du décret royal qu'elle a récemment adopté sur la neutralité concurrentielle entre les entreprises publiques et privées.

La délégation espagnole explique que ce décret a pour vocation de mettre en œuvre une loi adoptée il y a trois ans. Cependant, étant donné qu'il n'est pas encore entré en vigueur, le pays n'a pour l'instant aucune expérience de son application. L'objectif est de promouvoir l'efficacité, la bonne gestion et la concurrence sur les marchés où opèrent des entreprises publiques. Il est interdit aux entreprises publiques de tirer parti de leur position de monopole dans certains domaines où elles fournissent des services publics au profit d'autres domaines où elles font face à la concurrence du marché. En outre, la loi vise à accroître la transparence en exigeant des entreprises publiques qu'elles rendent publiques toutes informations non confidentielles pertinentes relatives à leurs activités commerciales, leurs comptes annuels et leurs activités liées à la fourniture de services publics. En vertu du décret royal récemment adopté, le ministère de l'Économie aura le pouvoir de surveiller les entreprises publiques, d'une part en déterminant les coûts additionnels associés à la fourniture de services publics et d'autre part en évaluant les avantages dont elles bénéficient en matière d'accès au financement et le revenu que l'État devrait recevoir des entreprises publiques en contrepartie des investissements effectués, tout en tenant compte des obligations de service public et des avantages financiers et réglementaires précédemment calculés.

La délégation espagnole répète qu'il est difficile d'évaluer l'impact de cette législation puisqu'elle n'est pas encore entrée en vigueur. Pour l'instant, elle assure avoir bon espoir que cette nouvelle loi contribue de manière positive à la mise en place de conditions de concurrence équitables. Reste à voir également quel sera le rôle de l'autorité de la concurrence dans ce domaine. Pour ce qui est des prochaines étapes, la délégation précise qu'il serait opportun d'obliger les entreprises publiques à tenir une comptabilité distincte pour leurs activités de service public et leurs activités concurrentielles.

Le Président fait remarquer que l'expérience du Royaume-Uni peut être particulièrement intéressante à cet égard, l'Office of Fair Trading ayant récemment lancé une étude visant à déterminer si l'utilisation d'informations par les entreprises du secteur public leur confère des avantages sur les entreprises privées qui leur font concurrence. Il invite la délégation du Royaume-Uni à faire part de son point de vue.

La délégation du Royaume-Uni explique que cette étude répond à un certain nombre de plaintes d'organisations privées invoquant des difficultés d'accès à tout un éventail de données détenues par des organismes publics qu'elles souhaiteraient commercialiser. Au Royaume-Uni, de nombreux organismes publics collectent et stockent énormément de données. Par exemple, les données cartographiques sont collectées par l'Ordnance Survey, les données relatives aux permis de conduire sont conservées par l'autorité compétente en matière de circulation routière (Driver and Vehicle Licensing Agency) et les données sur l'immobilier sont collectées par le cadastre (Land Registry). Les détenteurs de ces informations n'avaient souvent pas conscience de leur valeur et ne voyaient pas non plus comment les commercialiser, tandis que les entreprises privées n'y avaient pas accès. Le rapport a montré que ce marché pouvait représenter 500 millions de livres par an, et jusqu'à un milliard si les données étaient correctement commercialisées. Le même rapport a également conclu que, si des parties privées avaient accès à ces données, elles pourraient probablement offrir de nouveaux services et produits aux consommateurs. Le rapport a proposé un ensemble de principes pour un meilleur accès à ces informations. Selon ces principes, les parties privées devraient pouvoir accéder aux données brutes que le détenteur choisit de commercialiser ; au minimum, la comptabilité de l'organisme collecteur devrait être séparée, avec d'un côté son activité de fournisseur de données, et de l'autre tout usage commercial de ces dernières ; l'accès devrait être non discriminatoire et les prix des données ne devraient pas dépasser la récupération totale des coûts, y compris le taux de rentabilité applicable à la fois aux données brutes et aux données affinées. La délégation du Royaume-Uni fait remarquer que ce rapport est loin d'être resté sans suite et que le sujet est particulièrement d'actualité, les autorités réfléchissant à la possibilité de privatiser un certain nombre d'organismes publics de collecte de données.

Le Président s'adresse à la Norvège, où les pouvoirs publics ont le droit d'attirer l'attention sur des mesures anticoncurrentielles et d'encourager l'entrée sur les marchés, et il demande à la délégation norvégienne de relater son expérience à cet égard.

La délégation norvégienne explique qu'en Norvège le droit de la concurrence s'applique sans exception aux entreprises publiques comme privées. En matière d'intervention publique, l'autorité de la concurrence a le pouvoir de surveiller la concurrence sur divers marchés et de porter à l'attention des organismes publics concernés les effets anticoncurrentiels de telle ou telle intervention publique par écrit ou oralement. Si l'autorité de la concurrence estime nécessaire de promouvoir la concurrence sur certains marchés spécifiques, elle peut suggérer que le ministère de la Réforme et de l'Administration intervienne pour mettre fin à des conditions, des accords ou des initiatives qui entravent ou sont susceptibles d'entraver à la concurrence. La délégation norvégienne cite un exemple dans le domaine de la gestion des déchets dans la région de Bergen. Des changements positifs y sont en effet intervenus dans le mode de fonctionnement de l'autorité publique locale en charge de la gestion des déchets après que l'autorité de la concurrence lui a adressé une lettre dans laquelle elle faisait part de ses préoccupations. Suite à cette lettre, l'entreprise a clairement séparé ses activités non concurrentielles de ses activités concurrentielles, afin d'éliminer tout risque de subvention croisée.

Le Président demande à la Suède de commenter les règles qu'elle a récemment adoptées pour garantir la neutralité concurrentielle entre les secteurs public et privé.

Selon la délégation suédoise, de nombreuses plaintes ont été formulées concernant les interventions des pouvoirs publics en Suède ces dernières années, ce qui s'explique probablement au moins en partie par l'existence d'un secteur public assez développé dans le pays. Certes, le droit de la concurrence s'applique aux entreprises publiques et privées, mais il est parfois insuffisant pour traiter certains problèmes préoccupants, par exemple à l'échelon municipal, où il peut s'avérer très difficile d'établir la preuve d'une position dominante. Afin de remédier à cette situation, le gouvernement suédois a soumis un projet de loi portant modification de la loi sur la concurrence, qui comporte des dispositions visant à instaurer la neutralité concurrentielle. Le projet de loi devrait être adopté en novembre 2009. Ces dispositions

prévoient que le tribunal de district de Stockholm puisse, à la demande de l'autorité de la concurrence ou, à défaut, à la demande des entreprises concernées, interdire certaines mesures et comportements des autorités municipales et locales susceptibles d'entraver ou de fausser la concurrence, à moins qu'ils ne soient justifiés par l'intérêt public.

Le Président s'adresse à la Roumanie et invite sa délégation à décrire certaines de ses mesures évoquées dans sa contribution concernant les marchés publics et visant à résoudre la question de la neutralité concurrentielle.

La délégation roumaine explique qu'en matière de marchés publics une coopération croissante se développe avec l'agence des marchés publics, qui portera également à l'avenir sur le partage d'informations. En outre, les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées dans les marchés publics ont été très utiles et ont été diffusées auprès de toutes les instances publiques. Pour ce qui concerne directement la neutralité concurrentielle, l'autorité de la concurrence s'emploie activement à promouvoir ses principes. Une question connexe est celle de la transparence financière, et l'autorité de la concurrence est chargée à cet égard de surveiller les relations financières entre les autorités publiques et les entreprises prestataires de services publics. En cas d'incohérence, elle peut exiger des éclaircissements, mais elle ne dispose d'aucun pouvoir de sanction.

3. Règles de gouvernement d'entreprise pour les entreprises publiques

Le Président demande au Brésil de décrire son cadre institutionnel et législatif régissant le gouvernement d'entreprise des entreprises publiques.

La délégation du Brésil explique comment les fonctions importantes concernant les entreprises publiques sont attribuées au ministère compétent, qui veille à ce qu'elles appliquent les politiques du gouvernement dans ce domaine. Par ailleurs, en janvier 2007, le gouvernement brésilien a institué la commission interministérielle sur la gouvernance. Entre autres choses, cette dernière a le pouvoir de mettre en œuvre des stratégies relatives aux participations de l'État actionnaire, de définir des critères pour la nomination de l'administrateur et du représentant du gouvernement au sein de chaque conseil d'administration et de fixer des normes d'éthique. Les pouvoirs publics estiment possible d'agir en tant qu'État actionnaire actif et éclairé tout en encourageant la transparence et la responsabilité et en protégeant les actionnaires minoritaires. Les exemples de la Banque du Brésil et de Petrobras illustrent bien ce modèle de gouvernance. Une question fondamentale non résolue est celle de la répartition des droits de vote entre les actionnaires. Les meilleures pratiques recommandent «un vote par action», mais la législation brésilienne prévoit deux catégories d'actionnaires titulaires de droits de vote non proportionnels. Une transformation du système serait problématique, car ce dernier permet justement à l'État de conserver des participations de contrôle. En revanche, le droit brésilien des sociétés recommande la participation des actionnaires minoritaires, par exemple via un système de cumul des droits de vote.

Le Président se tourne vers la délégation des États-Unis pour recueillir son point de vue sur les principes nécessaires à une gouvernance efficace des entreprises publiques.

La délégation américaine en cite quatre. Premièrement, les concurrents doivent savoir clairement et en toute transparence quels sont les privilèges dont jouissent les entreprises publiques du fait qu'elles sont détenues par l'État. Deuxièmement, les pouvoirs publics devraient veiller à maintenir la neutralité concurrentielle, de telle sorte que, lorsqu'une entreprise est favorisée en raison de l'objectif d'une politique publique, les distorsions du marché soient réduites au minimum pour permettre une concurrence saine et équitable. Troisièmement, de tels objectifs de politique publique devraient être formulés par le gouvernement en qualité de régulateur et pas en tant qu'acteur du marché. Cette distinction traditionnelle devrait être maintenue dans toute la mesure du possible. Enfin, lorsque des circonstances exceptionnelles

exigent à une prise de participation de l'État, une telle participation doit se limiter à son objectif initial dans sa durée et sa portée.

Le Président remercie la délégation des États-Unis et demande au Taipei chinois d'expliquer son approche du gouvernement d'entreprise des entreprises publiques.

La délégation du Taipei chinois explique qu'en 2003 un groupe spécial a été créé pour réformer le gouvernement d'entreprise, en particulier dans les entreprises publiques. Ses travaux ont abouti à l'adoption de six principes que l'on peut résumer comme suit : renforcer les systèmes d'audit interne, mettre en place des systèmes de comptabilité de qualité, accroître l'efficacité des organes directeurs, conforter les fonctions de surveillance, améliorer la transparence et promouvoir les droits des actionnaires et des parties prenantes.

Le Président invite la Finlande à faire part de ses observations sur l'application de ses principes et de sa résolution gouvernementale concernant le gouvernement d'entreprise des entreprises publiques.

En matière de gouvernance, la délégation finlandaise indique que la politique gouvernementale actuelle concernant les entreprises publiques consiste à agir comme tout actionnaire. Par conséquent, l'État s'attend à recueillir des dividendes comparables à ceux que percevraient les actionnaires d'une société privée. Dès lors, si une entreprise publique remplit une mission de service public, son coût devra être compensé équitablement. Pour ce qui est plus précisément de la neutralité concurrentielle, un projet de loi est à l'étude, qui interdirait l'utilisation du modèle de l'entreprise publique sur les marchés concurrentiels. Les communes et les administrations locales ont pris des dispositions similaires en adoptant un mémorandum qui vise au même résultat à l'égard des entreprises créées par elles.

Avant d'inviter les experts du groupe de travail à faire part de leurs observations finales, le Président propose à toute délégation qui le souhaiterait d'ajouter un commentaire sur cette question.

La délégation de la Nouvelle-Zélande aborde deux points. Premièrement, la Nouvelle-Zélande a connu un vaste mouvement de privatisation et de libéralisation, guidé par le principe de neutralité concurrentielle. Toutefois, le gouvernement a récemment utilisé les participations de l'État dans les entreprises publiques pour intervenir sur le marché de la banque de détail. On jugeait que ce marché ne contribuait pas au bien-être du consommateur, car les banques se livraient concurrence sur la qualité mais pas sur les prix. Le gouvernement a par conséquent créé une banque d'État pour faire concurrence aux banques existantes. Cette initiative a remporté un franc succès. Néanmoins, un débat s'est ouvert quant à la question de savoir si le taux d'emprunt dont peut bénéficier la banque d'État constitue une subvention indirecte. Deuxièmement, bien que les marchés de l'électricité soient dégroupés, certaines entreprises publiques de production d'électricité jouissent d'un pouvoir de marché. On s'est donc demandé s'il ne fallait pas transférer des actifs entre les acteurs du marché de la production afin d'intensifier la concurrence sur le marché de détail. Néanmoins, des préoccupations ont été exprimées quant à la perception d'une telle mesure par les marchés, et le débat se poursuit. La délégation de la Nouvelle-Zélande souligne pour finir que, si le rôle des pouvoirs publics sur les marchés fait effectivement débat, l'importance du principe de neutralité concurrentielle est, quant à elle, largement acceptée.

La délégation du BIAC attire l'attention des délégués sur les Lignes directrices de l'OCDE sur le gouvernement d'entreprise des entreprises publiques adoptées en 2005, dont les recommandations sont, à ses yeux, toujours valables s'agissant du thème de cette table ronde. Elles ont été réaffirmées par l'OCDE dans son document sur le gouvernement d'entreprise et la crise financière publié cette année. En particulier, un gouvernement d'entreprise exemplaire est plus nécessaire que jamais du fait que les carences du gouvernement d'entreprise des entreprises privées ont nécessité des prises de participation de l'État. Le BIAC reconnaît que l'organisation du gouvernement d'entreprise des entreprises publiques

dépasse le cadre des activités des autorités de la concurrence, mais il insiste sur l'importance du rôle de défenseur de la concurrence qu'elles peuvent jouer en assurant la promotion des principes définis dans les documents de l'OCDE précités.

4. Observations finales des experts du groupe de travail

Pour M. Shelanski, il ressort clairement des présentations des différentes délégations que les pays sont confrontés à un ensemble de problèmes communs en matière de neutralité. Il retient de la discussion une tendance positive générale vers la neutralité concurrentielle et vers des principes solides de gouvernement d'entreprise des entreprises publiques.

M. Geradin souligne que cette discussion a fait ressortir combien il est important de partager les expériences entre juridictions, puisqu'elles sont confrontées pour la plupart aux mêmes problèmes tout en essayant de les résoudre différemment. Progressivement, des meilleures pratiques émergeront et seront peut-être appliquées dans le monde entier. M. Geradin poursuit en faisant remarquer que la question de la neutralité concurrentielle relève de la compétence de l'État, qui devrait rechercher des solutions innovantes pour garantir la fourniture des services publics en-dehors du cadre d'intervention traditionnel des pouvoirs publics, comme lui-même et M. Shelanski l'ont indiqué plus tôt dans leur présentation respective. Pour ce qui est du rôle des autorités de la concurrence, certaines, notamment celles de l'UE, sont mieux équipées que d'autres pour apporter des réponses aux problèmes posés. Néanmoins, même celles dont les pouvoirs sont plus limités peuvent jouer un grand rôle en assurant la promotion de la neutralité concurrentielle, par exemple en appliquant rigoureusement les règles de concurrence à toutes les entreprises publiques et privées, en prêtant assistance à d'autres organismes publics dans l'adoption de mesures adéquates, en évaluant les effets sur la concurrence de diverses subventions, en aidant les organismes concernés à élaborer des réponses adaptées et, surtout, en développant des activités de promotion de la concurrence auprès du public.

M. Sturgess rappelle que sa présentation a porté sur les services publics, étant donné que les secteurs manufacturiers et des services d'utilité publique ont été en grande partie privatisés au Royaume-Uni, ce qui a réglé la question de la neutralité concurrentielle. La partie du secteur des services publics que représentent les fournisseurs privés et associatifs compte pour une part non négligeable du PIB du Royaume-Uni (comme dans d'autres pays). Cela dit, la neutralité concurrentielle n'est pas encore en place dans ce domaine. D'importants travaux ont été accomplis jusqu'à présent, mais le processus se poursuit et nécessite des efforts soutenus et une attention constante.

Le Président remercie les experts et les participants et clôt les débats de la table ronde.