

**INTERNATIONAL COMPETITION NETWORK
ANNUAL CONFERENCE**

SPECIAL PROJECT

Of the Moroccan Conseil de la Concurrence

**“STATE-OWNED ENTERPRISES AND
COMPETITION”**

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INTRODUCTION

This Background Report has been prepared by the Moroccan Competition Council for the discussions on the Special Project, to be conducted in a panel session during the 13th Annual Conference of the International Competition Network (ICN) in Marrakech, Kingdom of Morocco.

The topic of the Special Project was chosen by the Moroccan Competition Authority as “state-owned enterprises (SOEs) and competition law”. The choice for this topic was maturely reflected as far as it concerns the majority of the ICN members and particularly the emerging economies.

By taking into account the necessity of ensuring the compliance with competition rules on the one hand and the effectiveness of SOEs especially those vested with public service missions on the other, the Moroccan competition council considers that the interaction between competition rules and SOEs should be analyzed and brought to discussion in the 13th ICN annual conference through various competition laws and through practical experience of different jurisdictions. This report comes as a contribution alongside the excellent works already realized on this issue¹.

Indeed, SOEs can face two different situations regarding competition rules. Firstly, they are considered as ordinary economic actors in the market, subject to the same requirements as private companies and obliged to respect the rules of the competition. Secondly, they may in some cases benefit from exemptions due to the public service they assume or due to the means they implement in order to fulfill their missions through the exercise of public powers.

However, the status of public companies does not always provide benefits and entitlements but can also create constraints for public sector operators; especially when this status

¹ Fox, Eleanor M. and Healey, Deborah, "WHEN THE STATE HARMS COMPETITION — THE ROLE FOR COMPETITION LAW" (2013). *New York University Law and Economics Working Papers*. Paper 336. http://lsr.nellco.org/nyu_lewp/336

obliges them to follow certain rules of organization and subjects them to controls and procedures and a guardianship which can be seriously disabling.

All these elements make public enterprises ordinary competition actors when carrying out activities of production, distribution and service, but also exceptional or specific competition actors, enjoying exemptions because of the vital nature or sensitive activities they manage, which constitute a particular and important interest for citizens or when they contribute to the economic growth.

That is why, the conciliation between public sector and competition law seems to be difficult but not impossible. And this is where lies the challenge for emerging economies such as Morocco, namely the inclusion of the public sector in the new economic landscape, characterized by the primacy of competition rules and the need to comply with these rules. In order, to achieve the enforcement of competition law in the public sector, it is absolutely necessary to take steps in the direction of its upgrading and restructuring. The competition law, for its part, can not totally deny the specificity and uniqueness of the public sector.

This Background Report is based on the responses to a questionnaire prepared by the Moroccan Competition Authority which was then completed by competition authorities from 36 jurisdictions: Austria, Brazil, Canada, Colombia, Chile, Cyprus, Denmark, the European Union (EU), Finland, France, Germany, Hungary, Iceland, India, Israel, Italy, Jamaica, Japan, Kenya, Mexico, Morocco, the Netherlands, Pakistan, Poland, Russia, South Africa, Spain, Sweden, Switzerland, Taiwan, Tunisia, Turkey, the United Kingdom, United States of America, Zambia

This background report is organized following the structure of the questionnaire and the responses to it.

The Moroccan Competition Council would like to thank all responding member competition authorities and other contributors, who took the time to answer the questionnaire and provided additional comments on the preparation of the Special Project. Furthermore, the Moroccan Competition Council hopes that all competition authorities will benefit from the public discussion of the Special Project.

I. SOEs definition under the different jurisdictions, what is a state-owned enterprise?

The question addressed to ICN members was as follows: how are SOEs defined under your jurisdiction?

Among the 35 responses received by the Competition Council, 15 jurisdictions responded that they do not have a precise definition of SOEs according to their legislation. 20 jurisdictions indicated that their system gives a legal definition of the concept of public enterprise.

In the first category we find the following jurisdictions: Austria, Canada, Chile, Denmark, Germany, Hungary, Italy, Jamaica, Japan, Pakistan, Sweden, Switzerland, Tunisia, the United Kingdom, Zambia.

This is the case for example of the **United Kingdom** which stated in its response that despite the fact that its legislation does not provide a precise definition of SOEs, the UK Government's Shareholder Executive maintains a list of businesses which are owned entirely, or in part, by the Government.² Separately, UK Financial Investments³ is responsible for the Government's shareholding in the Royal Bank of Scotland and Lloyds Banking Group.

Similarly, for **Germany** although the law does not provide a definition of public companies, it includes them within the entities subject to competition law which means intrinsically their existence. In this regard, Section 130 (1) sentence 1 ARC states that: "This Act shall apply also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities. The provisions of Sections 19, 20 and 31b (5) of this Act shall not apply to public service levies and charges. The provisions of the Parts I to III of this Act shall not be applicable to the German Central Bank and to the Reconstruction Loan Corporation.

² See <https://www.gov.uk/government/publications/the-shareholder-executive-publications>

³ See <http://www.ukfi.co.uk/>

For the **Danish** competition authority, even though there is no specific definition of SOEs in the law, the Competition Act applies to all companies independently of the ownership. In the same situation we find jurisdictions like Italy, Japan and Sweden.

For **Hungary**, SOEs are not explicitly defined under Hungarian law. However, having regard to the applicable legal provisions, the following can be ascertained. A public business organisation is a business entity (business association) in which the Hungarian State, local governments, partnerships of local governments with legal personality, multipurpose sub-regional partnerships, development councils, national sub-governments, partnerships of national sub-governments with legal personality, budgetary bodies or public benefit foundations respectively or together have majority control. In addition, in the application of Act CXCVI of 2011 on the National Asset those business associations in which the Hungarian State, the local governments or the economic organisations owned by either the State or local governments have 100 % ownership qualify also as a business association in 100 % state or local government economic organisations. It has to be noted that Hungarian legislation is non-discriminatory in terms of ownership.

For **Tunisia**, public enterprises operating in a competitive industry are the responsibility of the Competition Council. Other companies providing a public service are the responsibility of the Administrative Court.

In the same way, for **Jamaica**, there is no definition of SOEs in their competition legislation. However, any enterprise or entity in which the state owns 51% or more of the shares of that enterprise or entity is treated as being state owned by the Fair Trading Commission of Jamaica.

In summary, over 35 responses received by the competition council almost half of them 15 answered that their jurisdictions do not include a precise legal definition of SOEs. This fact should not be understood that these companies do not actually exist or that they are not subject to the rules of competition. Rather, this can even be interpreted as a choice not to recognize any kind of specificity to those economic actors due to the presence of the state in their capital or the influence it would have on them.

For the other members of the ICN who answered that their system provides a definition of SOEs we have noted that this definition is mainly based on the capital structure of the company, the type of its ownership, the state control of it or the influence it can exert on it. For instance, for the **EU**, SOEs (or Public undertakings in the words of article 106 the Treaty on the Functioning of the European Union, "TFEU") are defined in the Transparency Directive⁴ 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".

The **French** competition authority responded that its law does provide a definition of SOEs, derived from EU law. Under EU law, a "public undertaking" means "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. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking: (a) hold the major part of the undertaking's subscribed capital; or (b) control the majority of the votes attaching to shares issued by the undertakings; or (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body".⁵

Therefore a SOE does not designate a particular category of entity under corporate law but is solely defined with respect to the fact that public authorities – i.e. the state and regional or local authorities – exercise their control upon it.

In **South Africa**, their Competition Act does not specifically define 'SOEs', but rather provides a general definition which refers to 'firms' more broadly as 'a person, partnership, or trust'. In this way, a number of SOEs fall within the scope of this definition. SOEs or 'public entities' are more specifically defined in the Public Finance Management Act ("PFMA") No. 1 of 1999 and they are classified into different schedules based on their nature and level of autonomy as follows:

⁴ Directive 2006/111/EC OJ [2006] L 318/7 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings

⁵ Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings).

- Schedule 2: entities are referred to as the major public entities and are intended to generate profits and declare dividends. These entities have the most autonomy of all the public entities, as they operate in a competitive marketplace and are run in accordance with general business principles. In terms of section 66(3)(a) of the PFMA, schedule 2 public entities may also borrow money through the accounting authority of that entity, which implies that they also have extensive borrowing powers. Examples include Eskom (power utility), Transnet (rail infrastructure) and SAA (national airline/carrier).
- Schedule 3B and 3D: entities are referred to as government business enterprises. These entities generate income, but may be either substantially self-funded or substantially government funded. As a result they have less autonomy than the schedule 2 public entities even though they are still run in accordance with general business principles. These entities also have limited borrowing powers. Examples include the water boards, the Passenger Rail Agency of South Africa, the Public Investment Corporation, the Industrial Development Zones and various provincial development corporations.
- Schedule 3A and 3C: entities are normally extensions of a department with the mandate to fulfil a specific economic or social responsibility of government. They rely on government funding and public money, either by means of a transfer from the Revenue Fund or through statutory money. As such, these entities have the least autonomy. Examples include the Competition Commission, the Council for Medical schemes, the National Credit Regulator, South African National Roads Agency Limited and the provincial gambling boards.

The **Spanish** legislation defines ‘public enterprise’ or “SOEs” 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 enterprises⁶:

- 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

⁶ Following the Public Administrations’ Wealth Act.

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, from market transactions.
- State corporations: Trading companies in which the State's direct and indirect participation exceeds fifty per cent. They do not exercise any administrative powers.
- Corporations 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.
- Finally, there are other entities falling within the scope of the Law 30/2007, 30 October, on Public Sector Procurement (in Spanish acronym, LCSP), but to which only certain provisions are applied (essentially those directly linked to the EU Directives transposition), such as foundations with a major public stake, public agencies or Social Security mutual insurance companies.

For India, SOEs or Public Sector Undertakings/Enterprises are commonly government controlled companies, statutory corporations set up under Parliament or owned by state governments. The group includes parastatals and departmental enterprises.

The 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, defense and space"

In Poland, there are state enterprises (SEs) and SOEs. The legal basis for SEs activity is the Act of 25 September 1981 on SEs or separate laws granting a particular enterprise legal personality. The definition of a SE is an independent, self-governing and self-funded entrepreneur having legal personality. The bodies of SE make their business decisions and

organize their activities in all business matters in accordance with the law and aiming to perform SE tasks effectively. State authorities can take decisions regarding SEs' business activity exceptionally and only in the cases provided by the law⁷.

SOEs are entered in the commercial register of the National Court Register and the entry is equal to granting them legal personality.

Apart from the enterprises wholly owned by the State Treasury (SEs), there are public companies with the Treasury as a sole or majority shareholder (SOEs). Minority shareholding by the state may also result in control over an enterprise by giving the state entities the right to designate board members.

In Morocco, the law n° 69-00 defines State-companies as those whose capital is wholly owned by public bodies. The law mentions also other categories of public enterprises such as "Public subsidiaries" which are defined as companies whose capital is owned by more than half of public bodies and also "Joint ventures" companies whose capital is held at most 50% by public bodies;

In Brazil, there are two kinds of SOEs – government-owned companies and government-controlled corporations. There are basically three differences between them, regarding corporate form, shareholding and venue.

The first difference, concerning its corporate form, is that while government-owned companies can take any form admitted by the Brazilian legislation, government-controlled corporations must always be shaped as joint-stock companies and be in accordance with Law n. 6.404 of 1976.

Secondly, government-owned companies shareholding is consummately public, derived of the Public Administration, leaving no possibility for the involvement of private resources.

⁷ An enterprise is established by the founding body: central public administration bodies (e.g. ministry), the National Bank of Poland or other national bank. State enterprises can be created on general principles or as a public utility enterprise. (Public utility enterprises are intended primarily to meet the continuous 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).

Meanwhile, government-controlled corporations' shareholding is formed by a combination of both public and private resources.

Ultimately, cases in which federal government-owned companies are involved, either as plaintiffs or defendants, are normally judged by the federal courts. State and municipal government-owned companies will have their cases processed and judged by state courts. All kinds of government-controlled corporations, however, will have their causes judged by state courts.

For **Switzerland**, SOEs are founded, carried or directed by the state in order to fulfil administrative tasks of economic nature.

For **Cyprus**, SOEs are defined as enterprises controlled by the Government of the Republic of Cyprus, either by holding the majority of the shares or by controlling the Board of Directors.

In **Finland**, the notion of SOEs refers normally to enterprises where the State of Finland has decisive control of a company having full or majority ownership of its shares.

In the **Netherlands**, the Dutch government is a major shareholder in a number of Dutch companies that serve the public interest. Besides legislation, the government can use shareholdings to influence enterprises in the public interest. The government holds shares in the following kinds of company:

- Monopolies, for example in the field of infrastructure, where investment costs are so high that there are unlikely to be competitors. This is the case with Dutch Railways, Schiphol Airport and the electricity grid operator TenneT.
- Companies that provide services for the government or organisations associated with the government. Such holdings reduce the government's costs. The Bank for Netherlands Municipalities (BNG), for example, offers local authorities low interest rates on long-term loans and credit facilities guaranteed by public authorities.

The Netherlands government is an active shareholder in state-owned companies. The government oversees the businesses' strategies, investments and financial positions and also the remuneration policy for the directors. The companies must also observe the

Corporate Governance Code for listed companies and be transparent about their operations and their social implications.⁸

In addition, government organisations, such as local councils, may be indirectly involved in commercial activities, and so be considered as a government undertaking to which competition law should apply. 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. Legislation with regards to government and markets has therefore been introduced in the Netherlands, to deal with these situations.

For **Kenya**, SOEs are enterprises wholly owned by the government or in which the government has majority shareholding. In the same way, for **Turkey**, SOEs, are defined as economic enterprises which are or partially owned by the state and which carries out its activities under the supervision of a public institution.

For **Taiwan**, Article 3 of the Statute for the Privatization of SOEs provides as follows:

The term “state-owned enterprise” shall refer to:

- 1) Any enterprise either solely owned by any government or jointly operated by governments at various levels;
- 2) Any enterprise jointly invested in and operated by the government and private individuals where the capital of the government exceeds fifty percent (50%); or
- 3) 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.

For Ukraine, under the Commercial Code of Ukraine, SOEs are businesses that operate on public property.

In Russia, a unitary enterprise is a government-owned corporation in Russia and some other post-Soviet states. Unitary enterprises are business entities that have no ownership rights to the assets they use in their operations. This form is only possible for state and municipal

⁸ <http://www.government.nl/issues/financial-policy/government-shareholdings>

enterprises, which operate state or municipal property, respectively. The owners of the property of a unitary enterprise have no responsibility for its operation and vice versa.

The legal status of unitary enterprises in Russia is defined in Federal Law No. 161-FZ "On State and Municipal Unitary Enterprises", which was approved by the State Duma on October 11, 2002 and signed by President Putin on November 14, 2002.

The assets of unitary enterprises belong to the federal government, a Russian region, or a municipality. A unitary enterprise holds assets under economic management (for both state and municipal unitary enterprises) or operative management (for state unitary enterprises only), and such assets may not be distributed among the participants, nor otherwise divided. A unitary enterprise is independent in economic issues and obliged only to give its profits to the state. Unitary enterprises have no right to set up subsidiaries, but, with the owner's consent, can open branches and representation offices.

Though unitary enterprises are owned by the government they work on the basis of commercial accounts and commercial legislation. They are under ministerial responsibility, but off budget. They are auxiliary to a ministry's activity, such as a printing house under the Ministry of Education or a production facility for police equipment under the Ministry of Internal Affairs. State unitary enterprises have a distinct legal status, different from regular market sector corporations.

Establishment of the state unitary prices may pursue receiving profits for its founder (a federal or regional government agency or municipality) and/or public interest⁹. (wording from Wikipedia, so does it have to be sourced or is this from an agency?)

⁹ Examples of the state unitary enterprises include:

- Information Telegraph Agency of Russia (ITAR-TASS)
- Russian International News Agency (RIA Novosti)
- Goznak (printing money, government documents etc.)
- Russian Satellite Communications Company
- Russian Post
- All-Russia State Television and Radio Broadcasting Company (VGTRK)
- Russian Television and Radio Broadcasting Network
- Mosgortrans (the municipal transportation company of the city of Moscow)
- Khrunichev State Research and Production Space Center (development and production of missile, airspace, space exploration and defense equipment)
-

SOEs have a quite broad definition in the **Icelandic** jurisdiction. That is an undertaking wholly or partially owned and operated by a government or an undertaking either wholly or partially operating under a public monopoly or patent or the protection of the government by law or regulation.

In Colombia, SOEs are split into two categories in this jurisdiction: those that are 100% state-owned (Industrial and Commercial SEs) and those that have both public and private capital (Mixed Economy Enterprises). Industrial and Commercial SEs are regulated by Law 489 of 1998, which governs their activities and corporate structure. This Law defines them as “entities created or authorized by law that develop activities of industrial or commercial nature subject to private law”. These entities have legal personality, administrative and financial autonomy, and economic independence. Additionally, Article 87 of Law 489 of 1998 establishes that Industrial and Commercial SEs compete against private enterprises and, thus, must abide to the same requirements as private companies, and cannot enjoy the privileges granted under Colombian legislation.

Mixed Economy Enterprises are also regulated by Law 489 of 1998 and by the Colombian Commerce Code. Law 489 defined Mixed Economy Enterprises as “entities created or authorized by law, which are incorporated as commercial enterprises with public and private capital that develop activities of industrial or commercial nature subject to private law”. A company that is not an Industrial and Commercial State Enterprise but has public equity will immediately be considered a Mixed Economy Enterprise (before it had to be 50% or more).

For **Mexico**, Article 46 of the Organic Law of the Federal Public Administration (LOAPF for its acronym in Spanish) defines SOEs as those enterprises in which government own 50% or more of its equity.

In sum, through the responses of the different ICN members who responded to the questionnaire, it appears that there are firstly some jurisdictions that do not have a precise legal definition of SOEs but this does not mean that these companies do not exist in those jurisdictions or are not subject to competition law. Rather, this absence of definition could be interpreted as a desire to not recognize any specificity to these companies by ignoring

their legal status, their missions and their capital structure when they are active in competitive markets.

For jurisdictions which have a precise definition of SOEs there are many models which vary according to the criteria selected for the definition. These criteria are:

- The method of creation of these companies (creation by law or regulation);
- The part of the State or public bodies in the capital of the company (usually more than 50% of capital is required);
- The influence that the State might have on the undertakings, particularly in defining their strategy or the appointment of the management team; and
- The type of tasks carried out by these companies.

Regarding the legal form of these types of companies, it can vary from a similar form to private companies to particular forms of status as those of industrial or commercial establishment or unitary enterprises, as the case in Russia.

The areas of intervention are also varied. In addition to "classic" areas of intervention where the intervention is justified by the exigencies of public service or strategic sectors (postal services, telecommunications , water supply and electricity, energy, etc.) , public companies are also involved in areas quite normal and open to competition.

II. The scope of coverage of SOEs by competition rules

Most jurisdictions in our sample answered seem to the question if their national antitrust laws provide some coverage of SOEs, and all respondents answered "No" when asked if SOEs are exempted solely on the basis that they are owned by the state or other public bodies.

Indeed, through these answers, we can observe that in most legislations surveyed the competition rules may apply to most operators regardless of their nature, their status or structure. In most jurisdictions, all operators, whether public or private, are nominally equally subject to competition law. Admittedly, some exemptions are recognized in specific cases, but there are far more exceptions than rules. The organic criterion normally used to recognize the specificity of SOEs has no weight under the rules of competition.

Meanwhile, it was found that the choice made by the legislature in the various jurisdictions who responded to the questionnaire focuses on a material or a functional criterion rather than an organic one to define the scope of application of competition law. Even when it comes to determining exceptions to SOEs, it is a material factor which is adopted. In other words, only having public ownership or connection to the apparatus of the State is not sufficient by itself to exempt public sector compliance with competition rules. This marks an alignment of the public sector on the private sector regarding the rules to follow in pursuit of economic and commercial activities, and the abandonment of the exception provided by the administrative law regime.

Certainly, the legislation on competition maintained or introduced exemptions for the public sector, however these are exceptions and the standard proposed here remains compliance with the rules of competition. In addition, exemptions are not based on an organic criterion but on a material factor which may also benefit private companies. It is the exercise of activity of general interest, the exercise of public power, practices legitimized by law or regulation and practices contributing to economic progress.

III. Exemptions

The question addressed to ICN members was as follows:

Does your competition law apply to SOEs?

Are (some) SOEs exempted from competition law in your jurisdiction as far as they?

- are not engaged in trade or business,
- are owned by the state or a public entity,
- are in a regulated sector,
- are in a strategic industry, and
- ensure a mission of public interest/service

Concerning the exemption system we have noticed that among the jurisdictions which responded to the questionnaire 34% of them do not recognize any kind exemptions to public

enterprises or SOEs. This is the case for Brazil, Chile, Colombia, Denmark, Japan, Mexico, Pakistan, Poland, South Africa, Taiwan, Tunisia, and Ukraine.

For the other jurisdictions surveyed, different justifications are advanced to justify the exemptions granted to SOEs.

1) Engagement in trade or business

Among the 35 jurisdictions, 12 of them recognize exemptions for SOEs because they are not engaged in economic activity. This category of jurisdictions concerns: Canada, Cyprus, the EU, Germany, Hungary, Iceland, Israel, Jamaica, Kenya, the Netherlands, Sweden, Turkey.

For the **EU**, 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. An "economic activity" is defined as "any activity consisting in offering goods and services on a given market". It is not necessary that the activity is intended to earn revenues¹⁰.

For the **Hungarian** competition authority, this exemption which is contained in their competition law is not SOE-specific. According to Article 1 of the Hungarian Competition Act "This Act shall apply to market practices ..." (emphasis is added), that is, if the activity of a SOE or of a privately owned undertaking does not qualify as market practice, Hungarian competition law is not applicable.

Similarly for **France and Morocco**, because the competition law applies "to all production, distribution and service activities", conversely the activities that do not consist in production, distribution or the supply of services, i.e. activities that do not qualify as "trade or business", are out of its scope.

¹⁰ For more information regarding the notion of "economic activity" that falls within the scope of competition rules, see Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, Official Journal C8, 11.01.2012, p. 4-14; See also case C-205/03 P FENIN v Commission [2006] ECR I-6295, para 25.

An entity, whether state-owned or not, that carries out such activities is not subject to competition law, although only to the extent of those activities. Any distinct “production, distribution and service” activity engaged in by the same entity is subject to competition law.

For the **UK**, the prohibitions in the Competition Act 1998 only apply where the conduct in question may affect trade in the United Kingdom. For the purposes of merger control, any SOE not engaged in trade or business would not create a ‘relevant merger situation’ for the purposes of the Enterprise Act 2002.

For the **Netherlands**, the competition act applies to “undertakings”. An undertaking under Dutch competition law is every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. In addition, in July 2012 specific legislation came into effect regarding government organizations. The term “government organization” includes local councils, provinces, regional water authorities and quasi-autonomous administrative authorities. A government undertaking is defined as a private undertaking which is controlled by (has its strategy set by) the government. Since July 1, 2012, local governments competing with private companies must comply with these new rules to prevent unfair competition with businesses. 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. These rules have been laid down in the Dutch Act on Government and Free Markets.¹¹ This legislation aims to prevent unfair competition between SOE’s and private companies. All governments (local, provincial, and national) must comply with these rules of conduct. For economic activities that took place before July 1 2012, a transitional period until 1 July 2014 applies.

In the same way, according to Chapter 1, Article 5, of the **Swedish** Competition Act (2008:579) *“an undertaking shall be defined as a natural or legal person engaged in activities of an economic or commercial nature. To the extent that such activities involve the exercise of authority, they shall not fall within the scope of this definition.”* Hence, it is the concept of an undertaking that decides if SOEs in a particular case are covered or not. Swedish law conforms to EU practice in this regard.

¹¹ <https://www.acm.nl/en/publications/publication/10811/NMa-begins-enforcement-of-Dutch-Act-on-Government-and-Free-Markets/>

For **Iceland**, if SOEs are not engaged in trade or business (not undertakings cf. Article 101-102 TFEU) their decisions that affect competition in an adverse manner can be challenged according to provision b) of paragraph 1 of article 16 of the Icelandic Competition Act no. 44/2005:

“The Competition Authority may take measures against:

a.

b. acts of public entities to the extent that they may have detrimental effects on competition, provided that no special legislation contains any specific provisions regarding authorization or obligation for such acts.”

2) SOEs operating in regulated sectors

17% of the jurisdictions recognize exemptions for SOEs when they exercise their activity in a regulated sector. This is the case of Cyprus, Germany, Hungary, Iceland, the Netherlands and Switzerland.

In this regard, for the **German** competition authority, the Act against Restraints of Competition (ARC) generally applies to enterprises without regard to their ownership structure. Thus, competition law is generally applicable to the commercial activities of SOEs. Thereby, 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 organization 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 because they are acting with regards to a service of general interest or because there are safety or health considerations. Thus, the rules of the ARC are applicable where a SOE is 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 SOEs or on the intention of the state-owned enterprise to

realize or maximize profits. Activities of SOEs which aim at the exchange of products or commercial services are subject to the application of competition law.

However, there are two exemptions: firstly, since the Eighth Amendment to the German ARC, SOEs that have a structure of an entity under public law are only under limited control of abusive practices. Specifically, the prohibition of abuse of a dominant market position does not apply to fees and charges of SOEs under public law. Furthermore, some agreements between companies of water supply are excluded from cartel infringements, for example concessional contracts or demarcation agreements. Finally, public Health insurance falls only partly under the ARC. Whereas, the ARC is applicable to mergers and vertical agreements, horizontal agreements between public health insurance companies are exempt.

For **Hungary**, SOEs do benefit from exemption when they are involved in regulated sectors but this exemption is not SOE-specific. This also applies to privately owned undertakings as well, that is, if these operate under sector specific rules their activities might be exempted from the applicability of competition law to the extent of the specific rules of these sectoral regulations.

For **Iceland**, the fact that a public undertaking is active in a regulated sector has no effect on the application of the Competition Act which applies equally to private and public undertakings. However, if the public undertaking operates under a specific provision authorizing or obligating anti-competitive behaviour the undertaking is exempt from the appropriate provisions of competition law, as stated in provision b) of paragraph 1 of Article 16 in the Icelandic Competition Act. However, this may not give the public undertaking the right to infringe all provision of the Competition Act.

Also certain special laws or provisions allow for exemptions from the Competition Act. For example the Act on Electricity no. 65/2003 partially exempts energy companies from the coverage of the Competition Act, especially regarding the natural monopoly of delivery and distribution of electricity.

Also the special law applicable to agriculture in Iceland covers the production, pricing and sale of agricultural products and is known as the Agricultural Products Act no. 99/1993. The Act contains significant official restrictions to competition in the agricultural sector in Iceland, for example, the Act provides authorization for companies in the dairy processing

plants industry to merge and actively collude. It should be noted that most undertakings active in agriculture are private companies.

3) SOEs operating Strategic industry

In this respect, only two jurisdictions, namely, Hungary and Iceland recognize exemptions for public enterprises when they operate in sectors considered as strategic:

For **Hungary**, its response is based on a new rule which was enacted in November 2013, which exempts M&As of national strategic importance from the notification obligation of the Hungarian Competition Act.

Specific provisions in laws that concern SOEs, for example in health care, can contradict the provisions of the Competition Act. If those provisions allow certain actions that would otherwise be anti-competitive, the **Icelandic** Competition Authority may not be able to intervene.

4) SOEs entrusted with public service mission

34% of the jurisdictions recognize exemptions for SOEs when they are engaged in public service or public interest. These jurisdictions are Cyprus, the EU, Finland, France, Hungary, Iceland, Israel, Italy, the Netherlands, Sweden, the United Kingdom, and the United States of America.

For the **EU**, Article 106(2) of the Treaty on the Functioning of the European Union (TFEU) specifies the conditions under which the competition rules can be set aside for public undertakings or undertakings to which the state has granted special or exclusive rights.

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";
- (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.

Article 106(2) of the TFEU can be invoked, and is indeed often invoked, by companies as a defense in antitrust proceedings and by the Member States in proceedings where state measures are allegedly in violation of the competition and/or the State aid rules of TFEU.

The exception will only apply if the restriction is proportionate, i.e. to the extent necessary for the fulfillment of the service of general economic interest. This exception is moreover interpreted in a very strict manner.

For **France**, as a rule, exceptions to the statutory coverage of SOEs by competition law may only be granted insofar as they do not contravene the rules set forth by Article 106 of the TFEU: “Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union”.

Therefore the only limitation to the application of competition law consists in circumstances where such application would entirely thwart the supply of a “service of general economic interest”. An EU member State seeking to put this exception into place must demonstrate the necessity to establish such “a service of general economic interest”, and that the infringement of competition law is necessary and proportionate to the general interest it claims to hereby pursue.

The Moroccan legislation also admits exemption for undertakings when they are entrusted with public services mission, but this is not specific to SOEs as far as this exemption may also benefits to private companies. Moreover To the extent that economic activities of SOEs involve the exercise of authority, they shall not fall within the scope of coverage of competition law.

For the **UK**, the provisions against anti-competitive agreements and abuse of dominance do not apply to ‘an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly¹² in so far as the

¹² Competition Act 1998, Sch 3, para 4.

prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking'.¹³

The **Dutch** Act on Government and Free Markets does not apply to services of public interest carried out by for example municipalities. 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.¹⁴

According to **Finland** legislation, if a SOE is carrying out functions of a public authority, competition rules may not be applicable. Bodies (including SOEs) that exercise an activity typical of a public authority are normally not subject to the rules on competition. In many cases this notion equals the concept of 'public service' that is used in this questionnaire. The SOE status itself does not hinder application of competition rules. Also, it may well be that some parts of SOE's functions fall under the scope of competition rules and some parts not. A case-by-case analysis of the functions of SOE is needed.

For **Iceland**, Specific provisions in laws that concern SOEs, for example in health care, can contradict the provisions of the Competition Act. If those provisions allow certain actions that would otherwise be anti-competitive the ICA may not be able to intervene, c.f. provision b) of paragraph 1 of article 16 of the Icelandic Competition Act mentioned above. The ICA has the burden of proof in this matter.

The **U.S.** antitrust laws do not explicitly exempt SOEs, although courts have interpreted the antitrust laws as implicitly incorporating various exemptions that may apply to SOEs. In addition, there may be other laws, or judicial interpretations of such other laws, that provide exemptions from antitrust law in specific instances, as explained below.

As a general matter, agencies and instrumentalities of the U.S. government (e.g., National Science Foundation, Small Business Administration, U.S. Postal Service) are not subject to liability under the federal antitrust laws, even when engaging in commercial activity.¹⁵ This exemption stems from two sources: (1) agencies of the government enjoy sovereign

¹³ These concepts are discussed further in the UK submission to the OECD 2009 roundtable on State Owned Enterprises and the Principle of Competitive Neutrality (see <http://www.oecd.org/daf/competition/46734249.pdf>, pages 400-402)

¹⁴ <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/46734249.pdf>

¹⁵ IB Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 252a (3d ed. 2006).

immunity unless it has been waived, and (2) such entities generally do not come within the definition of “person,” to which the Sherman and Clayton Acts apply. Federal government corporations (e.g., Tennessee Valley Authority) are the exception to this rule; they typically do not enjoy sovereign immunity and they are considered as “persons” subject to the antitrust laws. Nevertheless, they may enjoy other immunities from the antitrust laws, and whether such immunities apply depends heavily on the facts and circumstances of each case.

This general framework was elaborated in *United States Postal Service v. Flamingo Industries (USA), Ltd.*,¹⁶ a 2004 case in which the U.S. Supreme Court held that the federal antitrust laws did not apply to the U.S. Postal Service (USPS). The Court’s opinion noted that the USPS by statute was “an independent establishment of the executive branch of the Government of the United States.”¹⁷ It discussed the USPS’s monopoly over carriage of certain letters and its “significant governmental powers,” along with a statutory provision giving it the power to sue and be sued in its own name. Although that provision waived the USPS’s 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.”¹⁸

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

¹⁶ 540 U.S. 736 (2004).

¹⁷ 39 U.S.C. § 201.

¹⁸ *Flamingo*, 540 U.S. at 746.

international postal agreements).¹⁹ 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 break-even requirement).²⁰

Although federal government corporations, unlike the USPS, are “persons” under the antitrust laws and therefore subject to suit, some may enjoy **limited immunities** deriving from the specific regulatory frameworks in which they operate. Thus, 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.²¹ The court noted, however, that “the TVA is authorized to enter into contracts for the purpose of ‘promoting the wider and better use of electric power for agricultural and domestic use, or for small or local industries.’”²² The court concluded, therefore, that the statutory authorization negated the application of the antitrust laws to the TVA’s challenged conduct, reasoning that “the TVA’s primary concern is to provide services, and concerns about competition would conflict with the fulfilment of TVA’s purpose.”²³

In addition to 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 that offer the same or similar products or services, but in most cases the public offerings are differentiated and provided with a view to

¹⁹ *Id.* at 741.

²⁰ *Id.* at 747.

²¹ See *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399 (6th Cir. 2006).

²² *Id.* at 414 (quoting 16 U.S.C. § 831i).

²³ *Id.*

achieving a governmental, public service objective. Although the U.S. antitrust laws may apply to such entities, the application of those laws is limited by the state action doctrine.

Furthermore, the **state action doctrine**, first set forth by the Supreme Court in *Parker v. Brown*,²⁴ the federal antitrust laws do not apply to “anticompetitive restraints imposed by the States ‘as an act of government.’”²⁵ 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, of a state supreme court, and probably of the governor.²⁶ Application of the doctrine to subordinate instrumentalities of the state, on the other hand, such as political sub-divisions, agencies, and (possibly) government-owned 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.²⁷

The Supreme Court therefore held that the state action doctrine would not immunize a municipal electric utility from federal antitrust law in *City of Lafayette v. Louisiana Power & Light Co.* unless, on remand, the utility could show its actions derived from an affirmatively expressed state policy to displace competition.²⁸ The FTC and DOJ 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

²⁴ 317 U.S. 341 (1943).

²⁵ *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 370 (1991).

²⁶ ABA Section of Antitrust Law, *Antitrust Law Developments* 1272 (7th ed. 2012).

²⁷ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Antitrust Law Developments*, *supra*, at 1272 n.14.

²⁸ 435 U.S. 389 (1978). The Court was split on the rationale for the decision, however. A plurality “conclude[d] that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.” 435 U.S. at 413. Concurring in the judgment, Chief Justice Burger would have gone further: “There is nothing in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality.” *Id.* at 418.

both electricity and water/sewer service.²⁹ In its recent decision in *FTC v. Phoebe Putney Health System*,³⁰ which involved a municipally controlled hospital system, the U.S. Supreme Court clarified and strengthened its long-standing view that the state action doctrine requires a “clearly articulated” state policy to displace competition. The DOJ and FTC have also filed *amicus curiae* briefs opposing application of the state action doctrine in cases involving state-level enterprises.³¹

As Chief Justice Burger’s concurrence in *City of Lafayette* suggested,³² the law is unsettled as to how the state action doctrine should apply to sub-state governmental units acting in a commercial, rather than regulatory, capacity. In a subsequent case, the Supreme Court said that “with the possible market participant exception, *any* action that qualifies as state action is *ipso facto*. . . exempt from the operation of the antitrust laws.”³³ The lower courts are divided on whether that statement was an invitation for them to recognize a market participant exception to state action immunity.³⁴ If the Supreme Court explicitly adopts the market participant exception (or if the lower courts adopt it more consistently), then enterprises owned by state governments in the United States may be more fully subject to the antitrust laws.

For Sweden, To the extent that economic activities of SOEs involve the **exercise of authority**, they shall not fall within the scope of the definition of undertaking. SOEs may only be

²⁹ 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>.

³⁰ 133 S. Ct. 1003 (2013).

³¹ See, for example, *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), and *Jackson, Tennessee Hosp. Co. LLC v. West Tennessee Healthcare, Inc.*, 414 F.3d 608 (6th Cir. 2005), for antitrust cases involving state-affiliated hospitals in which DOJ and FTC filed joint *amicus curiae* briefs.

³² See footnote 19, *supra*.

³³ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991) (internal quotation marks and citation omitted).

³⁴ Compare *VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) (“if a state acts as a commercial participant in a given market, action taken in a market capacity is not protected” (internal quotation marks omitted)), with *Crosby v. Hosp. Auth. of Valdosta and Lowndes County*, 93 F.3d 1515, 1526 n.14 (1996) (“The parties have not argued and we decline to address the Supreme Court’s invitation to employ a ‘market participant’ exception to state action immunity.”).

exempted in this regard to the extent that their activities are a direct outflow of the special tasks that they are entrusted with.

For **Cyprus**, *The Law of 2008 provides that: "it is presumed that the application of the provisions of this Law obstructs the performance in law or in fact of the particular tasks of the said undertakings when there is not financial or technical way in the disposal of these undertakings, which is compatible with the provisions of this Law and allows the implementation of the particular tasks assigned to these undertakings by the State."* The Commission may decide that an undertaking, in respect of which an exemption is being invoked, does not fulfill the conditions provided for in the said subsection. As long as such a decision of the Commission remains in force, the relevant agreement or undertaking falls within the scope of this Law.

Concerning **Italy**, Pursuant to art 8 of the Competition Act, the provisions of the Italian Competition Act do not apply to undertakings which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only insofar as this is indispensable to perform the specific tasks assigned to them.

SOEs are not prevented from operating on markets different from the ones where they operate services of general economic interest. However, in that case they are subject to some constraints. In particular, they must operate through separate accounts³⁵. In addition, they must submit prior notification to the Italian Competition Authority if they intend to incorporate or acquire controlling interests in undertakings trading on markets different from the ones where they operate services of general economic interest. Finally, when the undertakings entrusted with services of general economic interest supply their subsidiaries or controlled companies on different markets with goods or services, including information services, over which they have exclusive rights by virtue of their role, they shall make these same goods and services available to their direct competitors on equivalent terms and conditions, in order to guarantee a level playing field.

³⁵ See for instance 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.

5- Liberalisation or opening up sectors to competition

In Europe, the European Commission has been instrumental in opening up services such as transport, energy, postal services and telecommunications to competition in the EU Member States. The approach of the European Commission has evolved over the years. In 1993, when requiring Denmark to end the monopoly rights of the State-owned railway company DSB on the port facilities at Rodby, the European Commission left the Danish government the choice to allow competitors to use the same facilities or, alternatively, to construct new facilities near the existing port. However, it soon became apparent that establishing competing facilities, especially in the case of nationwide networks, requires a great deal of investment and is usually inefficient. So the European Commission developed the concept of legally separating the provision of the network from the commercial services using the network. In the railway, electricity and gas industries, the network operators are now required to give competitors fair access to their networks. In these industries, monitoring fair network access by all suppliers is essential to allow the consumer to choose the supplier offering the best conditions.

In the airline sector for instance, before 1987, European aviation markets were traditionally protected, fragmented and highly regulated by national states. It took the European Commission several initiatives to secure the reorganisation and adaptation of the air transport sector in Europe.

In 1979, the Commission set out a first Memorandum to stimulate dialogue in the Community and among its institutions by proposing ideas for possible action aimed at the harmonious development of civil aviation in the whole of the Community. This was followed in 1980 by a Commission proposal on inter-regional air services which was adopted by the Council in 1983. Although this Directive had limited effect, it was nevertheless important since, for the first time, air traffic rights were created at Community level, in addition to those agreed bilaterally between governments by way of Air Services Agreements (ASAs).

The Commission presented a second Memorandum on Civil Aviation in March 1984. The purpose of this Memorandum was to develop and expand on the objectives of the Commission's 1979 memorandum in the light of developments which had occurred and to make specific proposals situated within an overall framework for a Community air transport policy. This led to a first

legislative package, being proposed by the Commission and adopted by the Council in 1987 (and proposed by the Commission), towards the creation of a common air transport policy for the EU. For intra-EU traffic, it limited the right of governments to object to the introduction of new fares. It gave some flexibility to airlines concerning seat capacity sharing.

The second “package” in 1990 opened up the market further, allowing greater flexibility over the setting of fares and capacity-sharing. It also gave all EU carriers the right to carry an unlimited number of passengers or cargo between their home country and another EU country.

The following stage of the liberalisation of air transport in the EU was the subject of a “third package” of measures, which applied as from January 1993. This package introduced the freedom to provide services within the EU and, in April 1997, the freedom to provide “cabotage”: the right for an airline of one Member State to operate a route within another Member State. This single market has been extended to Norway, Iceland and Switzerland in the following years.

In France, There used to be sector exemptions from competition law in some sectors, all of which have been lifted, most often within the framework of European law and the advancement of the Single market. For instance the airlines sector was liberalized from the late 1980’s, pursuant to Council Regulation (EEC) n° 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, modified by Council Regulation (EEC) n°2410/92 of 23 July 1992 which extended its scope to domestic air transport.

However it should be noted that opening up to competition sectors that used to be exempted therefore does not imply the privatisation of the SOEs concerned. In the above example of air transport, the national airline remained an SOE while being submitted to competition rules. Moreover and as mentioned before, the private or public ownership of an entity is irrelevant to the application of competition law.

For Germany, Historically and until the 1990s, activities in the postal services and telecommunications were conducted by the state – though not so much through SOEs, but rather by public administrations. However, since the 1980s these sectors have been privatized and the state’s activities have decreased. Today the state only holds minor stakes in the former state-run monopolists in the postal sector, Deutsche Post DHL, and the telecommunications sector, Deutsche Telekom.

Until 1994 the rail sector also was directly conducted by public administration. In 1994 the public rail agency (Deutsche Bundesbahn) has been transferred into a private company, owned by the state. The rail sector itself has been liberalized in recent years, which led to a noticeable increase of the level of competition, particularly in the rail freight market. However, sometimes competition issues arise from the “German holding model”: the state-owned incumbent still controls the major part of the railway infrastructure, which opens up possibilities for discriminatory practices.

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.

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. 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, agreements determining regional monopolies of electricity and gas suppliers 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 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).

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.

This exemplifies that German law does not allow for a general exception for SOEs, such as a general “state action doctrine”.

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. 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 ARC are not applicable. This means that the acquisition of interests by the fund in financial institutions is not subject to German merger control law. 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.

In the **Netherlands** multiple companies were previously owned and run by the state, but are now run as private enterprises. Examples include: the Dutch railway system (NS) telecom and ICT services (KPN), postal services (Post NL) and Energy supply. In the Netherlands these markets were liberalized at the same time as the privatization.

The ACM’s activities encompass general competition oversight, regulation of the energy, telecommunication, postal services, and transport markets (or parts thereof), and consumer protection. The common objectives behind these activities are promoting well-functioning markets, ensuring well-organized and transparent market processes, and fair treatment of consumers. Through regulation, special conditions have been created on certain markets, wherever the Dutch legislature has found it necessary so that competition can exist. On the basis of the specific regulations for transport, telecommunication, energy and postal services, ACM additionally protects public interests relating to the affordability, quality, and availability of certain

products and services. For example, this concerns the right of consumers to be connected to the power and natural-gas networks, or the right to a basic service of access to telephony. In that regard, it is critical to safeguard the quality and reliability of networks, as well as network investments to guarantee enough room for innovation. Moreover, it is also crucial for the power and natural-gas networks that investments are made in such a way that it becomes possible to get an increasingly larger share of energy from renewable sources. The costs that are associated with such investments are to be passed on to end user, one way or another. Within the legislative limits, ACM will take sustainability and innovation questions into account to make the assessment of 'clean and affordable' coherent and consistent.³⁶

With regard to the Dutch Act on Government and Free Markets, ACM has similar investigative powers over government organizations such as local councils/municipalities as it does over other areas of competition enforcement. However, ACM does not have the power to impose fines on government organizations in particular situations. This ability has been omitted from the Dutch Act on Government and Free Markets as it was considered prudent to prevent one administrative body from having the power to impose penalties on another.

For Turkey, especially after 2000, the government decided to remove itself from the markets as a player and started a big privatization campaign. They are numerous undertakings that have been privatized up to this date from various sectors such as banking, petroleum products, textile, telecommunications, etc. There has never existed any exemption from the application of competition law to the SOEs so there is no incident of revoking exemptions.

For Taiwan, during the drafting process of the Fair Trade Act, there was a debate as to whether to apply competition policy to SOEs straight after the Act was passed, or whether to grant them a certain transition period. Many strongly held the view that a compromise period was necessary. Paragraph 2, Article 46 of the Fair Trade Act promulgated on 4 February 1991 thus provided a five-year grace period for specific SOEs' 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. Since the expiry of the transition period on 4 February

³⁶ Cf, <https://www.acm.nl/en/publications/publication/11993/Strategy-Netherlands-Authority-for-Consumers-and-Markets/>

1996, the SOEs in question have been subject to the Fair Trade Act. In addition, since the 1999 amendment, Paragraph 2, Article 46 of the Fair Trade Act has been deleted.

Since 4 February 1996, any competition issues that may arise from anti-competitive actions on the part of SOEs are regulated by competition law. Paragraph 2, Article 46 of the Fair Trade Act (exemption provisions) has been deleted in the 1999 amendment. Two examples of exempted activities include 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, and the Taiwan Sugar Corporation which provided sugar to military units and honeybee farmers at preferential prices.

In 1989, the government implemented a policy to promote the privatisation of SOEs. The Statute for the Privatization of SOEs was passed by Parliament and promulgated in June 1991. Since then, the privatization of SOEs not only has gained a groundswell of support but it has also had a stronger legal basis. Between 1989 and 2013, thirty-eight SOEs in Taiwan were privatized, including the state-owned steel, petrochemical, marine transport, telecommunications, ship-building, engineering industries and commercial banks, as well as insurance companies. A number of SOEs still remain, and most are public utilities and large-scale SOEs in different fields, including electricity, water, petroleum, sugar, wine, and tobacco. They have been appended to the list of enterprises currently undergoing privatization.

For the US evolving judicial interpretations of the state action doctrine and other judicial limitations on the coverage of the antitrust laws may eliminate or narrow other exemptions in certain circumstances.

After the Supreme Court's holding in the *Flamingo* case (described above), 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).³⁷ The Act established a new Postal Regulatory Commission (PRC) as the regulator of USPS's rates for "market-dominant" services; USPS was empowered to set its own

³⁷ Pub. L. 109-435, 120 Stat. 3189 (Dec. 20, 2006), *codified* at 39 U.S.C. §§ 101 *et seq.*

prices for “competitive” products, subject to publication and filing requirements.³⁸ The Act also mandated that the PRC 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.³⁹ 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.⁴⁰

As explained, the U.S. government has had limited instances of SOEs, and therefore even more limited experience in privatizing those enterprises. In general, the U.S. government has had SOEs only when necessitated by exigent circumstances, and it has been transitory in nature. For example, “[i]n 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.”⁴¹ 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.⁴² The government’s policy and practice was to sell the firms and return them to the private sector as soon as possible⁴³. Finally, in response to the financial crisis in 2008, the

³⁸ 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).

³⁹ 39 U.S.C. § 3633(a).

⁴⁰ 39 U.S.C. § 409(e)(1)(A)-(B). See also *Tog, Inc. v. U.S. Postal Service*, 2013 WL 3353883 (D. Colo. 2013), in which the court held that certain USPS contractors’ services were not “products” for which Congress had removed antitrust immunity in 2006.

⁴¹ *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 388 (1995) (citations omitted).

⁴² 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.

⁴³ 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.

United States acquired an interest in General Motors, Chrysler, and AIG. The investment was limited to taking investment positions that did not compromise the independent direction and management of the companies, which have now been sold back to the private sector.

For Iceland, in the last few decades many markets have been opened for competition in Iceland either partly or in full. For example special or exclusive rights have been abandoned in telecommunications, postal service (partly), air service, fertilizer (production and sales), vehicle safety inspection and banking. This repeal of special and exclusive rights can be accredited to privatization efforts by the Icelandic state but also to the impact of the law of the EU through the European Economic Area agreement.

In Mexico, in the second half of 2013, the Mexican Congress discussed and approved a large-scale and unprecedented energy reform. Now, the private sector is allowed to participate in all the energy markets that were previously reserved to the Mexican State, including exploration, production, refining and trading of gas and petroleum, and transmission and distribution of electricity. The effects of this reform remain to be seen, as further reforms to secondary laws will be discussed during 2014.

IV. Competition rules enforcement against SOEs

The question addressed to ICN members was as follows:

What types of enforcement actions have your agency initiated against SOEs in your jurisdiction? If you have come across particular problems bringing cases against SOEs, please share these experiences.

The majority of the competition authorities who responded to the questionnaire said they had already examined cases involving public companies with a preponderance of practices of abuse of dominant position. It shows that abuse of dominance is the "major risk"⁴⁴ faced by public companies operating on a market, because of their weight, their resources, their legal status and their relationship with the State. This is especially true for companies with a

⁴⁴ P. HUBERT, *L'administration et le droit de la concurrence*, Cahiers de la Fonction publique, novembre 1999, p. 3.

monopoly or quasi-monopoly privilege. There also cases concerning cartels or anticompetitive agreements in which SOEs can be implicated but their number remains limited compared to abuse of dominance/monopolization cases.

Two situations can occur. Either no longer the monopoly of law is remaining in fact and the dominant position can then be operated under conditions which have the object or effect of hindering new entrants to the market or even evict them. Or, public entities, from their legal monopoly activity, develop diversification activities directed towards a competitive market: it may happen when the dominant position on the first market is used to implement anticompetitive practices in the second.

These situations are particularly encountered concerning large SOEs which operates in network industries, practicing commercial activities in addition to the public service.

Abuse of dominant position may thus result from situations in which public companies are making use of a damped commercial network by the public service activity in order to develop competitive activities or so-called "cross-subsidization" to practice predatory pricing. In this case, the resources of the public service activities are used to fund competitive activities, and produce goods or services that can be sold at such a low price (predatory prices) than other competitors can run the risk of being eliminated, which ultimately reduces the intensity of competition in the market.

Situations of abuse of a dominant position may also be encountered in the commercial development by public entities of the information they are responsible for collecting. This information is usually of considerable wealth, and public enterprises are often tempted to exploit them even beyond the requirements of public service. Therefore, the risk of abuse of a dominant position is particularly high when other operators are using the raw administrative information to feed their own sales activities information.

In addition, a special place in the abuse of a dominant position must be made to the issue of essential infrastructures. In this regard, the Court of Appeal of Paris says that " When the monopoly operator of a basic structure is the same time the potential competitor of a business requiring the use of this facility , the operator may restrict or distort competition on the downstream service market by abusing its dominant position or situation of economic

dependence in which is its competitor by establishing an unjustified and disproportionate price for the access to this facility compared to the importance of the services requested, and also a non transparent and non -oriented costs incurred under objective criteria.⁴⁵

The issue of essential infrastructures finds a natural field of application in public service networks where the network interconnection is the key to opening up to competition. This is essentially the reason that justified the creation of regulatory authorities in the field of telecommunications, electricity, gas and other similar sectors.

Moreover, returning to the responses of competition authorities to the questionnaire we also found that most of the cases mentioned relate to areas that were historically managed by the State or its agencies under legal monopolies before opening them to competition. These sectors are essentially those of telecommunications, energy, postal services, health and transport.

Regarding the decisions taken by the competition authorities, we noted that in most cases they are organized around two axes: either they require from the company to cease its anticompetitive conduct, or in the event of refusal of comply the authority take the required decision including sanctions, where appropriate.

Generally, through the responses of competition authorities to the questionnaire, the case can take four directions:

- SOEs decide for themselves to end anticompetitive practices without being subject to referral or instruction. This is the case for example of Finland where following the entry into force of provisions of the law on competition SOEs aligned with the new regime
- SOEs are penalized following the investigation by the Competition Authority
- the competition authorities are unable to sanction because of the existence of laws that do not allow them to do (Netherland)

⁴⁵ C.E, rapport public 2002, jurisprudence et avis de 2001, *Collectivités publiques et concurrence*, p. 240.

- SOEs undertake to cease their anti-competitive practices following a decision by the competition authority.

Regarding the difficulties encountered by the competition authorities in the application of competition law to public companies, the analysis of the responses to the questionnaire revealed that generally there is no particular problem in this level. However, some authorities have raised some problems especially with regard to the definition of the relevant market, the differentiation between public service activities and commercial ones and the problem of calculating the fines to be imposed on public companies convicted of anticompetitive practices.

1. Anti-competitive infringement cases

In South Africa, SAA is the South African national airline and is wholly owned by government. Despite this, it has been the subject of numerous complaints to the Commission, covering abuse of dominance, cartel behaviour and also concerns around the possible anti-competitive effects of the assistance SAA receives from government.

In October 2000, a complaint against SAA was lodged with the Commission by a competing domestic airline, Nationwide.⁴⁶ The Commission's investigation concluded that SAA had abused its dominance by concluding agreements with travel agencies in terms of which they received commissions on an incremental basis, and by instituting a reward scheme for employees of travel agents resulting in the exclusion of competitors. The alleged conduct was said to have taken place from April 1999 to December 2004.

The Competition Tribunal ("Tribunal") found that SAA had contravened section 8 (d)(i) of the Act through the commission payments made to travel agents and that the use of the reward scheme contributed to the anti-competitive effects of the conduct. The reward scheme could not be said, however, to contravene the Act on a standalone basis. SAA was fined an administrative penalty of R45 million.

⁴⁶ Competition Tribunal (2005) Reasons and Order: The Competition Commission and South African Airways (Pty) Ltd, Case no. 18/CR/Mar01.

Two further complaints were subsequently made to the Commission by Nationwide and another competing airline, Comair, again focussing on incentives schemes offered by SAA to travel agents.⁴⁷ Following its investigation, the Commission entered into a settlement with SAA whereby SAA agreed to pay the Commission an administrative penalty of R15 million but with no admission of liability. The settlement also included a behavioural remedy designed to prevent SAA from pursuing similar conduct in future. This settlement was confirmed by the Tribunal.

However, Comair and Nationwide chose to continue to fight the case at the Tribunal, as a finding of contravention is a prerequisite for the institution of an action in the High Court for damages. Comair and Nationwide alleged that SAA's 2001 scheme was a continuation, albeit with a few amendments, of the earlier scheme. The incentive schemes were designed to induce travel agents not to deal with SAA's competitors and had an anti-competitive effect on its rivals in that it had foreclosed them from the domestic airline travel market. The Tribunal again ruled that SAA had contravened Section 8 (d)(i) of the Act and foreclosed competitors, extending its market power in the travel agent segment.

The Italian Competition Authority has carried out formal proceedings against the state-owned monopolist or dominant undertaking for alleged abuses of dominant position. In most cases, the undertaking leveraged its market power stemming from legal reservation to prevent competitive entry in the same or in a neighbouring market.

The Italian Competition Authority has presented multiple cases in which SOEs were convicted of abuse of dominance⁴⁸. We have chosen two examples to illustrate the intervention of the authority with respect to SOEs.

In February 1999, the Authority fined the SOE called SNAM (the owner of the gas transport network) for an alleged abuse of a dominant position in the markets for the transport of natural gas in the national gas pipeline network and the primary distribution of natural gas.

⁴⁷ Competition Tribunal (2006) Judgment on the proceedings between Comair Ltd and Nationwide Airlines (Pty) Ltd vs South African Airways (Pty) Ltd, Case no. 80/CR/Sep06.

⁴⁸ Provvedimento n. 7043 (A263) UNAPACE/ENEL, in Official Bulletin no. 13-14/1999. Provvedimento n. 4045 (A84) ADUSBEF/AUTOSTRADA, in Official Bulletin no. 27/1996. Provvedimento n. 8065 (A227) CESARE FREMURA-ASSOLOGISTICA/FERROVIE DELLO STATO, in Official Bulletin no. 8/2000.

In view of SNAM's dominant position in the market, the Authority concluded that the company was not justified in refusing access to its national network of gas pipelines to actual and potential competitors and that they therefore had the right to the carriage of natural gas in cases other than use for electricity generation and own consumption. Moreover, the Authority found that the method of calculating the charge for carriage allowed SNAM to fix the price level independently of the effective demand for the transport of third parties' gas and was likely to lead to the imposition of unjustifiably burdensome contractual conditions, in violation of Article 3 of Law no. 287/1990. In view of the seriousness and duration of the violations identified, the Authority fined SNAM €1,8 million, equivalent to 9% of the company's revenues in 1997 for the carriage of gas for third parties⁴⁹.

In July 2012, the Authority closed an investigation into the abusive conduct by state-owned undertaking Ferrovie dello Stato(FS) in the national railway infrastructure access market, blocking entry of new candidate Arenaways. FS Group succeeded in its aim of preventing Arenaways from offering its services on important line. The infringement was committed in a completely unique context, characterised by the entering into force between 2009 and 2010 of legislation that aimed to balance the needs of liberalizing the rail transport market with preserving the economic balance in the service contracts drawn up for the provision of subsidised services. Despite the seriousness of the Group's actions, the Authority decided to impose a fine of 300,000 Euros, in consideration of the recent changes in the legislative framework⁵⁰.

The Spanish Competition Authority has prosecuted and fined several public undertakings. An example of abusing dominant positions concerns 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 Euros⁵¹ and € 15 million⁵². 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.

⁴⁹ Provvedimento n. 6926 (A221) SNAM-TARIFFE DI VETTORIAMENTO, in Official Bulletin no. 8/1999.

⁵⁰ Provvedimento n. 23770 (A436) ARENAWAYS-OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI, in Official Bulletin no. 30/2012.

⁵¹ Case 542/02, Suresa-Correos.

⁵² Case 568/03, ASEMPRE/Correos.

Using its full array of instruments The European Commission can enforce competition rules against SOEs. Where an SOE is found to have infringed antitrust rules (articles 101 and 102 TFEU), the Commission can either adopt a prohibition decision imposing fines (article 7 Regulation 1/2003⁵³) or a commitment decision (article 9 Regulation 1/2003). SOEs are equally subject to merger control, unless it would concern an operation whereby both acquiring and acquired undertakings are companies owned by the same State of the same public body or municipality and where the different economic units will also not have an independent power of decision after the operation (in which case the operation is to be considered as an internal restructuring)⁵⁴. Finally, the Commission applies State aid control to aid granted to SOEs.

To cite a few examples, in the Slovak Republic, the delivery of hybrid mail (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, and is an important product to companies who regularly send large amounts of mail, such as invoices, for example insurance companies or banks) 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. The Commission considered that Slovakia's postal legislation effectively re-monopolising hybrid mail services infringed the provisions of TFEU and adopted a decision to ensure these services open to competition

More recently, the Commission opened an investigation into the Czech electricity sector. The Commission had concerns that CEZ, the Czech electricity incumbent (70% State-owned), had hindered the entry into the Czech market for generation and wholesale supply of electricity, in particular in making a pre-emptive capacity reservation in the transmission system network which it did not need at the time. To address the concerns expressed by the Commission, CEZ offered to divest a significant generation capacity. Following a consultation

⁵³ Council Regulation 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L1, 2003.

⁵⁴ Commission Consolidated Jurisdictional Notice under council Regulation 139/2004 on the control of concentrations between undertakings, OJ 2008, C95.

of market participants, the Commission was satisfied that the final commitments offered by CEZ adequately addressed its concerns.

In France, by way of a decision dated 30 November 2004, the Conseil de la concurrence fined the mail delivery operator La Poste for having abused its dominant position by offering to its largest corporate customers tie-up discounts on their commercial contracts, based upon their overall purchase of mail and parcel delivery services, although these were related to distinct market segments. La Poste was also held to have abused its dominant position by offering loyalty rebates in proportion of the annual increase in the overall sales to a given corporate customer with no consideration for efficiency gains.

The telecommunications sector has also been concerned by enforcement against the incumbent operator France Telecom (now Orange) which remained an SOE for a period of time before being privatized – the State is now a minority shareholder. By a decision of 8 November 2005, the Conseil de la concurrence fined France Telecom for abusing its dominant position on the wholesale market for broadband internet by refusing to a competitor access to an essential infrastructure. In view of the seriousness of the infringement, taking place on an emerging market on the part of the vertically integrated incumbent operator, which in the same proceedings had already been fined for breach of an interim injunction, the Conseil decided on a penalty in the amount of 80 million euros. On 30 November 2005, the Conseil issued a heavy fine of 534 million euros against the three mobile phone operators, including Orange, for engaging in two anticompetitive agreements, namely: sharing strategic information on new subscriptions and contract terminations, and colluding to consolidate their respective market shares based on jointly defined targets.

The transport sector has also been subject to enforcement proceedings. By a decision dated 18 December 2012⁴, the Autorité de la concurrence fined the national railway operator SNCF an amount of 60.9 million euros for having carried out practices that hindered or delayed the entrance of new operators in the railway freight sector, by using in its own commercial interest confidential information about its competitors that it was holding in its legal capacity as infrastructure manager, and by preventing its rivals from accessing rail capacities that were essential to their business.

In Poland, The enforcement actions are undertaken mainly in cases of abuse of dominant position.

Two very significant cases from recent years refer to the oil and gas mining company – Polskie Górnictwo Naftowe i Gazownictwo S.A. (“PGNiG”). PGNiG is a state controlled company (72,4% of shares). The antimonopoly investigation demonstrated that PGNiG had abused its dominant market position by hindering its customers to terminate their agreements when changing the supplier. In most extreme cases, customers were required to submit a 15-month notice of termination, which, in the opinion of the Office, might have discouraged them from terminating the agreement and using the services of other entities. The President of UOKiK decided that this practice of PGNiG might have affected the trade between EU Member States, and thus might have infringed the EU law. PGNiG voluntarily undertook to discontinue the practice and the President of UOKiK accepted that commitment. (Decision DOK-1/2012 from April 2012)

As stated by the President of UOKiK in the second decision from 2012 relating to this undertaking, PGNiG abused its market position by unjustifiably refusing to sign a comprehensive contract for the supply of gas with NowyGaz, thus hindering that company to enter the gas retail market and compete with PGNiG as a gas trader. PGNiG was fined with PLN 60 million for the abuse of its dominant position and for having deprived consumers of the possibility to choose a different supplier. The company submitted a court appeal against that decision. (Decision DOK-2/2012 from July 2012)

The largest group of cases concerning SOEs concerns abuses of dominant positions by entities providing public service. It must be noted that the Antimonopoly Act applies to municipalities – if they are acting within their obligations of managing public property (the dominium) - and to municipally owned/controlled enterprises. Majority of the decisions issued by the President of UOKiK refers to infringements of competition rules by these entities, especially abuse of dominant position on the markets such as: water supply, sewage, funeral services, public transport and waste management. In the period 2000-2010 over 60% of the overall number of decisions concerned monopolistic practices on the markets of communal services (e.g. creating barriers to enter the local market for companies which could compete with municipal companies; imposing terms and conditions in

contracts, which allow the municipal company to obtain unfair gains at the cost of their customers).

2. Cartel cases

The Spanish Competition Authority has prosecuted and fined several public undertakings. One example concerning a cartel in the milk sector can be presented. It concerns La Lactaria Española S.A., a public enterprise attached to the Ministry of Agriculture, which was sanctioned in 1997 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 million⁵⁵.

Another example can be cited from Hungary where the rail freight market was liberalised on the day of Hungary's accession to the EU (1 May 2004). Before liberalisation took place, the two incumbent integrated railway undertakings were MÁV and GySEV, which were providing infrastructure access services to operators without their own tracks, and rail freight transport services to customers. As a result of the liberalisation process, the use of the public railway network became possible for other railway undertakings which - in the possession of the necessary permissions - were able to access the railway network freely without discrimination. Some smaller undertakings (so-called private railways) entered the market, but GySEV and MÁV - which due to their experiences in the sector and the fact that their business clients could have become each other's most significant competitors - refrained from entering into a price competition with each other and from threatening each other's "traditional" infrastructure. Instead, they shared the market in order to preserve the status quo.

In addition, the GVH found that the undertakings had applied a uniform pricing policy (common tariff system) which could be regarded as a restrictive price agreement. The GVH in its decision made the following statement of utmost importance relating to state ownership:

Article 15(3) of the Hungarian Competition Act (HCA) contains special rules on the groups of undertakings under state control. According to this, economic units with autonomous

⁵⁵ Case 352/94, Industrias lácteas.

decision-making shall be deemed to be independent from each other even if otherwise (i.e. without the application of the special rules) the conditions of being sorted into the same state-owned group of undertakings were met. However, the application of these special rules is not necessary in the case of those state-owned undertakings which are deemed to be independent from each other and to not belong to the same group of undertakings under the general rules. In such a case the independence of the undertakings can be assessed on the basis of the general rules stated above.

The GVH imposed a fine of 1.250.000.000 HUF (approx. 4 million EUR) on the parties. The parties appealed the decision of the GVH, the court proceedings are still ongoing.⁵⁶

For Iceland, in decision no. 33/2012 SORPA bs., an undertaking active in the waste management sector, and three other undertakings were found to have infringed the legal provisions regarding anticompetitive agreements. SORPA is an undertaking that is owned by several municipalities in the Reykjavík area. The collusion concerned the setting of retail price for methane gas for automobiles. The case was concluded with a settlement between the ICA and the undertakings that took part in the cartel. The undertakings were fined 9 million kr. in all and agreed to obey certain conditions. One company was rewarded with cancellation of the fine after fulfilling the conditions of the ICA rules regarding reduction or cancellation of fines.

3. Difficulties to implement competition rules to SOEs

South Africa has referred to the Telkom case outlined above. Specifically, Telkom challenged the Tribunal's jurisdiction to hear the case against it and argued that the matter should be addressed by ICASA, the sector regulator. There was therefore a problem relating to concurrent jurisdiction. Telkom's claim in this regard was dismissed by the SCA in a decision which finally established that in spite of sector-specific legislation and the existence of a designated sector regulator responsible for regulating some aspects of Telkom's conduct, the competition authorities still have jurisdiction to prosecute instances of anti-competitive conduct in relation to the regulated entity.

⁵⁶ Newspaper distribution cartel (Vj-140/2006).

In this regard, the Commission has a Memorandum of Agreement with ICASA which aims to address issues of concurrent jurisdiction and guide the relationship between the regulator and the competition authority; however, there are still difficulties in terms of implementing the provisions of this agreement.

A further difficulty experienced by the Commission is with respect to state aid. The Commission has received a number of complaints of this nature, however, the South African Competition Act makes no provision for addressing the potential anti-competitive effects of state aid and so the Commission does not have the power to investigate or refer these cases.

The Slovak post case is an example that the extension of a statutory monopoly into neighbouring markets is incompatible with TFEU. 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.

In Iceland, The ICA has encountered similar obstacles as when bringing cases against private undertakings, for example what is the best market definition and whether the criteria for infringement are fulfilled. The obstacle that is most common regarding SOEs is the scope of the Competition Act against special laws or provisions that regard certain SOEs and their conduct or decisions.

For the Italian competition Authority the specific issue for assessing SOEs' behaviours is rather to distinguish activities carried out by the SOEs in relation to public service obligations from activities that are, or should be performed, in a competitive market, in compliance with competition rules. An example in this respect can be quoted concerning the case of Trambus/Attività autobus di linea GT. In 2009, the Italian Competition Authority imposed a fine on Trambus, entrusted with 80% of public transport services in Rome. Besides this service of general economic interest, Trambus operated a touristic bus line through ancient Rome ruins. The Authority claimed that Trambus had not established a separate company for its activity in the separate touristic bus line market, in breach of art. 8 of the Competition Act. Trambus objected that the touristic line was contemplated in the concession by the

Municipality. The Authority maintained that such element was not sufficient to qualify the touristic service as a service of general economic interest, given that no public service obligation or subsidy was associated with the touristic service.

Moreover, serious difficulties have been faced in sectors where regulation is still in progress and the transition towards a neutral regulator – fully independent from the dominant SOE – has not been completed yet. In such cases, the regulator may provide regulatory justifications to the SOE's conduct, thus rendering competition enforcement more problematic. In this respect, the Italian Competition Authority has sometimes supplemented its enforcement interventions with advocacy that prompted the establishment of an independent regulator. For example after adopting its decision against Ferrovie dello Stato (see above) in 2012 – it urged that the independent railway regulator should quickly start its activity, to ensure actual neutrality in the managing of those railway infrastructures that are essential for effective competition in railway transport services.

In Sweden, certain challenges can be observed. In some cases it has been difficult to prove certain conducts in relation to pricing due to a lack of specific accounting by public bodies of their sales activities on competitive markets. This has meant that investigations have been complex and resource-intensive. This has led to the SCA recommending a change in the Local Government Act to require municipalities to specifically account for their activities on competitive markets. Additionally, long investigations mean that a suspected infringement can continue for a long time and market developments may need reassessed on several occasions during the investigation⁵⁷.

In Poland, UOKiK has encountered certain problems with defining whether a given entity has a legal status of an entrepreneur (e.g. the case of NFZ). Another problematic issue is connected with determination of fine – upon the Article 106 of the Antimonopoly Act the President of the Office may impose on an entrepreneur a maximum fine of 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed.

⁵⁷ Due to the fact that this competition provision is relatively new, it is important that binding court judgments are delivered in order to provide necessary legal precedent as to how the provision should be interpreted and applied.

In some cases, for example when municipalities are involved, it is difficult to establish the sum serving as a basis for calculation of fine.

V. Specificity of advocacy toward SOEs

In order to put some light on the kind of difficulties that faces the competition authorities when they enforce competition rules to SOEs the questionnaire asked the ICN members on the way the agencies have come across situations where they've been faced with opposition to their decisions or recommendations.

The EU response to the questionnaire stated that it has experienced situations in which it was confronted with resistance to its decisions. For example, In November 2013, the European Commission had to refer Germany to the EU's Court of Justice for failing to comply with a Commission decision of January 2012 ordering the recovery of incompatible state aid from Deutsche Post (see IP/12/45 and MEMO/12/37). The Commission's decision had found that a combination of high regulated prices and pension subsidies granted by Germany gave Deutsche Post AG an undue economic advantage over competitors and was therefore incompatible with EU State aid rules. The Commission ordered Germany to recover the incompatible aid from Deutsche Post and abolish the relevant provisions for the future. The beneficiaries and Germany have appealed the Commission's 2012 decision before the EU General Court (cases T-143/12 and T-152/12). These appeals are pending, but they have no suspensive effect on the recovery of the aid.

In 2008, the Commission requested Slovakia to re-open competition in the hybrid mail sector after deciding that that amendments to Slovakia's postal legislation infringed EU Treaty rules on dominant market positions (Article 102) in conjunction with Article 106. These rules require Member States to ensure that measures concerning public companies or companies to which Member States confer special or exclusive rights comply with all Treaty rules, including the antitrust rules. The amendment in question extended the monopoly of the incumbent operator, Slovenská Pošta, to the delivery of hybrid mail services, while this activity had until then been open to competition. As a consequence, Slovak postal operators which had already entered this market were prevented from continuing their activity and their economic viability was endangered. On 18 June 2008, the Commission asked Slovakia

to clarify the amendments in question because it had doubts as to their compatibility with EU competition law (see IP/08/969). However, the replies had not dispelled these doubts.

The European Commission adopts a neutral position as to the ownership or nationality of companies involved, irrespective of whether they come from within or outside the EU. As an example, in 2012, the European Commission also opened antitrust proceedings against Gazprom in relation to its alleged conduct in a number of central and eastern European gas markets. The opening of the proceedings was due to the Commission's concerns that Gazprom may have and may be abusing its dominant position in upstream gas supply markets in central and Eastern Europe, in some of which Gazprom is virtually the sole supplier. The proceedings focus on whether Gazprom has divided gas markets by preventing the free flow of gas between EU countries and whether it is imposing conditions relating to the use of infrastructure that prevent the diversification of sources of gas supply. The scope of the proceedings also covers the possible imposition of unfair prices on customers.

The response of **France** emphasised the fact that being an independent authority is a powerful tool against potential opposition. Not only does it prohibit government instructions, but it also protects the agency against the pressure of domestic and foreign companies, which can only go to court if they want to change the outcome of a decision.

In the post-war era, when competition regulation was set up in Europe, there was a need to avoid conflicts of interests, national governments wearing two hats at a time as regulators and operators. Only an independent and impartial arbitrator was legitimate to enforce competition rules. But it was soon realized that abuses of incumbent operators were not the only threat to competition. Resources had also to be focused on powerful cartels and private monopolies. The independence gained from domestic governments therefore also served a useful role when dealing with powerful companies.

Spain stressed also the crucial importance for an agency of transparency and independence of decision-making as key elements for an agency to be successful in the implementation of competition rules against SOEs. The former Spanish Competition Commission, and the current National Authority for Markets and Competition, or CNMC (that embraces six regulatory agencies) exercise its functions with independence from the government and

other institutions, and the Act establishes the necessary guarantees to make this possible (own budget, separation between case handling and resolution, etc).

In Russia, The FAS encountered substantial pressures from other government agencies who insisted on exempting the unitary enterprises they created from the competition law. It took a considerable effort by the agency to counter such pressures and persuade the lawmakers and other government agencies to avoid exemptions from the competition law for the SOEs. In its advocacy efforts the agency leaned on political support from the President and Head of the Government.

The most important advocacy effort was aimed at the lawmakers and it resulted in the adoption of the legal provisions prescribing equal treatment of the private companies and SOEs and equal application of the competition legislation to them.

For Hungary, There have been certain questions concerning the application of competition law to state organs, which – in addition to pursuing their activities in relation to the exercise of their public power – also pursue economic activity. However, in accordance with accountancy rules, these organs must also separate the incomes and expenses incurred in the pursuit of their entrepreneurial activities. In addition, until 2010 the provisions of the Act on State Budget stipulated that state organs could not offer services at a price below cost. As a result, there was little danger that competition distortions would take place. The complaints which arose were typically of minor significance, mainly due to the fact that these state organs only utilised their idle capacities, moreover the extent of this kind of capacity utilisation was limited by the document establishing the state organ.

Since 2010 on certain markets (in particular on the markets belonging to the category of public services) only state or municipality-owned undertakings can pursue services (like the transportation of household waste, coordinating organisations, water supply and sewage services, certain education and health care services, coupon management, etc.).

There are special rules which apply on these markets and competition laws play a smaller role⁵⁸.

⁵⁸ Since the early 90s numerous areas of the economy have been privatised and private undertakings have also appeared in the sectors of public services. In the last few years there have been attempts to reinforce state

It is frequently the case that the GVH is excluded from the legislative process and this reduces its ability to engage in successful competition advocacy.

In Italy, the competition rules in Italy have applied to SOEs since the adoption of a competition law in 1990. The Italian Competition Authority has confirmed this approach through steady competition enforcement targeted to SOEs.

That said, numerous SOEs play a crucial role in the Italian economy. Therefore, quite usually antitrust cases against them raise worries or criticism. In the experience of the Italian Competition Authority, the most effective way to prevent or rebut “political” objections is to found the assessment on a robust and comprehensive “technical” analysis, which is the agency’s point of strength.

Another important aspect, complementary to antitrust enforcement vis-à-vis national SOEs, is that sometimes regional and local administrations undermine the implementation of pro-competitive reforms adopted at the national level. Namely, we have observed a resistance, at the local level, to the opening to competition of markets traditionally reserved to publicly owned undertakings, or a tendency to reintroduce restrictions that had been removed at the national level.

In Poland, there are areas in which SOEs (specifically municipalities and municipal enterprises) frequently abuse competition rules. In last years UOKiK was actively advocating against implementation of the new legal regulations which seemed to escalate the problem rather than solve it.

For example, in 2012 a new system of waste management was introduced in Poland. The system became fully effective on 1 July 2013. According to the new Act on maintaining

entrepreneurship, mainly in the field of public services (via acquisitions of private undertakings by the state, or through legislative measures).

Partly as a result of EU commitments, on some markets liberalisation took place. During the 2000s the competition authority undertook sector inquiries into some of these markets in order to collect market information to help speed up the liberalisation process (mobile telephony, electric energy sector, media, etc.). These sector inquiries have provided the GVH with enough information to enable it to take proactive competition advocacy steps.

On some markets, where the state gave up its previous monopoly position (e.g. rail transport), the GVH had competition cases against the state-owned incumbent which had earlier enjoyed a monopoly position on the market.

cleanliness and order in communes municipalities became responsible for the waste collection and management. Before the reform was introduced the property owners and administrators were free to choose an entrepreneur who, based on an individual agreement, would collect their waste. After 1 July 2013 local authorities became obliged to select in a tender procedure one company collecting waste from the whole territory of the municipality. Moreover, they gained right to indicate to which regional installation (landfill, incinerator etc.) the waste should be transmitted. Many installations are run by the municipalities themselves. The main reason standing behind implementation of these rules was to improve the quality and level of natural environment protection. Not denying the rightfulness of that argument, the competition authority was critical towards the changes. UOKiK was standing on position that replacing the model of competition in the market with the model of competition for the market would negatively influence many entrepreneurs who had so far successfully carried out their economic activity. Competitive environment would be seriously undermined by introduction of the tender procedure which brings danger of bid-rigging.

As mentioned, UOKiK maintains a record of decision concerning monopolistic practices performed by municipally owned/controlled enterprises in the sector of communal services. The authority's previous experience seemed to justify the statement that the new regulations created good conditions for further infringements by this kind of entities. For example, UOKiK claimed that due to general prohibition to transport waste outside the region, regional installations would abuse their dominant position.

UOKiK prepared a thorough sector inquiry, organized a public debate on this matter and continues to monitor the situation on the market.

In **Brazil**, CADE has dealt with opposition to enforcing competition policy in the banking sector, including SOEs. There is a long discussion involving merger cases in the financial sector. The issue came before the Brazilian courts in an appeal and is currently pending judgment in the Constitutional Court, which will have the final word in deciding whose jurisdiction it is to judge merger cases within the banking sector – CADE, the Central Bank, or both. The matter of the discussion does not distinguish between SOEs or private enterprises,

but only analyses whose jurisdiction it is to decide upon merger cases in the financial sector. Therefore, until the Constitutional Court's ruling, there is no definite answer to this issue.

Colombia mentioned an edifying example of resistance to the implementation of competition rules to SOEs. case regarding the public enterprise EAAB (Empresa de Acueducto y Alcantarillado de Bogotá), which is in charge of water, sewage and waste management services is an example of an SOE opposing to the application of the competition regime to SOEs.

Before the administration of the new mayor, Gustavo Petro, the waste management service in Colombia was composed of two models. The first model was competition for the market in which the district divided the city by zones and each zone was assigned to a private enterprise by the process of public bidding. The second model was competition in the market in which the particular city was not divided by zones and the private company contracted independently with each subject that needed the service.

Petro arbitrarily changed the system and stated that from the moment on, the public wastes service was going to be provided by the State through the EAAB, creating a monopoly for the management of this public service.

For this reason the SIC opened an investigation against the EAAB, the mayor, and several other public officials. In the investigation process a dawn raid was conducted in the company. The mayor objected the dawn raid and even arrived to obstruct it.

Petro and other district officials have stated that the dawn raid and the investigation against EAAB is illegal because:

Competition law is not applicable to them because the District has the faculty of designing the public services schemes that best work for the optimal provision of the service; and

Politically, it has been an intrusion and violation of the intimacy of a public official.

The SIC has maintained its position regarding the applicability of the competition law in this matter and the case is still advancing against this SOE.

In the US, because of the limited number of SOEs at the federal level, advocacy has been limited. After the Flamingo case (described above), the FTC prepared a report on the U.S.

Postal Service at the direction of Congress. In recent years, the U.S. Antitrust Agencies have focused substantial advocacy efforts on combating overbroad application of the state action doctrine, and reducing the scope of the exemptions available to SEs classified as SOEs.

After the Flamingo decision, Congress passed the Postal Accountability and Enhancement Act, which required the 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.”⁵⁹ The FTC’s report concluded that “from the USPS’s perspective, its unique legal status likely provides it with a net competitive disadvantage versus private carriers.”⁶⁰ This disadvantage stemmed 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.⁶¹ At the same time, “because the USPS is a federal government entity, the USPS’s competitive products operations enjoy an estimated implicit subsidy.”⁶² Among the implicit subsidies are 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.⁶³ 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.⁶⁴

⁵⁹ PAEA § 703(a).

⁶⁰ Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors, FTC Report 8 (Dec. 2007), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/accounting-laws-apply-differently-united-states-postal-service-and-its-private-competitors-report/080116postal.pdf>.

⁶¹ *Id.* at 8.

⁶² *Id.*

⁶³ *Id.* at 8-9.

⁶⁴ *Id.* at 78-98.

A 2003 FTC Staff Report⁶⁵ 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.”⁶⁶

One recent example of such litigation by the FTC was a challenge to the conduct of the North Carolina State Board of Dental Examiners. The U.S. Court of Appeals for the Fourth Circuit upheld a FTC ruling that the Dental Board illegally thwarted lower priced competition by preventing non-dentists from providing teeth whitening services.⁶⁷ The Court rejected the Dental Board’s claim that its conduct is protected from federal antitrust scrutiny by the state action doctrine, holding that a state entity composed of participants in the regulated market, which are chosen by and accountable to their fellow market participants, consists of “private actors.”⁶⁸ While the FTC has succeeded in eliminating many anticompetitive restrictions, it has not always prevailed. For example, its challenge to restrictions on where eye glasses can be sold and regulations prohibiting laymen from employing optometrists to provide optometric services was not successful.⁶⁹

⁶⁵ Federal Trade Commission, Office of Policy Planning, Report of the State Action Task Force (Sept. 2003) *available at*: http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.

⁶⁶ *Id.* at 3.

⁶⁷ <http://www.ftc.gov/news-events/press-releases/2013/06/appeals-court-affirms-ftc-ruling-north-carolina-dental-board>.

⁶⁸ <http://www.ftc.gov/news-events/press-releases/2011/12/ftc-concludes-north-carolina-dental-board-illegally-stifled>.

⁶⁹ See *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990) (holding that authorizing the FTC to condemn state rules would upset the balance of powers between the federal government and the states).

In addition, as noted in the response to Questions 2 and 3, both U.S. Antitrust Agencies have taken enforcement actions that call for a narrow interpretation of the state action doctrine in order to enforce the antitrust laws against anticompetitive conduct.

In Kenya, the competition authority faced opposition from the media with regard to the cement case above (3a). The press reports insinuated that the Authority had ordered one of the cement firms to dilute its stake in EAPCC, a SOE. Further the reports alleged that the Authority is a moribund body which did not have power to exercise its mandate. The press further stated that even though Kenya had a tough competition law, selective application of the said law had left the regime for regulating concentration of economic power vulnerable to manipulation by political elite. This was done without seeking clarification from the Authority⁷⁰.

The Authority therefore, was of the view that the report was only a fishing expedition and after various consultations, decided not to respond to the press report. This is because response would be prejudicial to the investigations that were ongoing.

IV. Some success stories

Services such as transport, energy, postal services and telecommunications have not always been as open to competition as they are today. As mentioned earlier, **the European Commission** has been actively involved in opening up markets to competition, using its powers under Article 106(3) of the Treaty, which entrusts the Commission with a specific surveillance duty "in the case of public undertakings and undertakings to which Member States grant special or exclusive rights". The Commission may use these powers either to deal with some existing infringement of the Treaty rules or to take steps to prevent future infringements.

The Commission may itself adopt a European liberalisation Directive, or propose that such Directive is adopted by the Council and the European Parliament. The objectives laid down in a Directive must then be incorporated into national legislation to be enforced by the Member States. The Commission monitors that these objectives are actually achieved.

⁷⁰<http://www.theeastafrican.co.ke/news/Kenya+orders+Lafarge+to+dilute+its+stake+in+EA+Portland//2558/1409022/-/g5sc92z/-/index.html>

The European Commission has used these procedures to adopt Directives, on its own and/or in cooperation with the Council and the European Parliament, to pro-actively initiate the opening of the following sectors to competition which were previously dominated by state monopolised industries:

- Transport (air, road, rail, inland waterways);
- Telecommunications;
- Postal services;
- Energy (electricity and gas).

Concerning telecommunications, prior to 1987, the European telecommunications market consisted predominantly of monopolies or national telecommunications incumbents, such as BT, France Telecom and Deutsche Telekom. In 1987, the EU adopted the 1987 Green Paper that essentially stated it was in Europe's best interests to overhaul the current system and liberalize telecommunications services. As a result, from 1988 to 1998 the European Commission adopted multiple directives that obligated member states to open markets for equipment⁷¹, telecom services⁷², value-added data services⁷³, satellite⁷⁴, mobile and voice⁷⁵ and cable television networks⁷⁶ to competition.

In 1996 the Commission then adopted the so-called "Full Competition Directive"⁷⁷, amending and extending its earlier Services Directive, thus aiming at creating full competition in the EU telecommunications market. It required Member States to abolish the

⁷¹ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment

⁷² Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services

⁷³ Directive 90/388 (1990) OJ L192/10

⁷⁴ Directive 94/46 amending Directive 88/301 and Directive 90/388 in particular with regard to satellite communications (1994), OJ L268/15.

⁷⁵ Directive 69/2 amending Directive 90/388 with regard to mobile and personal communications (1996) OJ L20/59

⁷⁶ Directive 95/51 amending directive 90/388 with regard to the abolition of restrictions on the use of cable television networks for the provision of already liberalized telecommunications services (1995) OJ L256/49.

⁷⁷ Directive 96/19 amending directive 90/388 regarding the implementation of full competition in the telecommunications market (1996) OJ L74/13.

remaining areas of monopoly rights in that market. Full liberalisation in the telecommunications was achieved in 1998 after the traditional telecommunication organisations were required to lease lines to new market entrants on reasonable terms and to provide open and fair access to their networks⁷⁸.

In the Postal sector Directive 97/67/EC on Postal services (OJ L15/14, amended by Directive 2002/39/EC of 10 June 2003, OJ 2002 L176/21) contained provisions to gradually open up to competition. It was intended to strike a balance between competition and continued quality service. In the Deutsche Post decision (OJ 2001 L125/27), the Commission took strong enforcement action ordering among others the structural separation of the normal postal services from business deliveries by Deutsche Post.

For the United Kingdom, in 2006, the OFT looked into the commercial use of public information, including information held by SOEs.⁷⁹ The OFT made a range of recommendations, of which the government accepted all but two.⁸⁰ The OFT followed this up with dialogue with the relevant bodies. In 2008, the Government published an independent review of Models of Public Sector Information Provision via Trading Funds. Following this report the Government committed to look at public sector information held by trading funds to distinguish more clearly what is required by Government for public tasks, ensuring this information is made available as widely as possible for use in actual and potential downstream markets, and to a pricing policy based on the principle that 'information collected for public purposes will be made available at a price that balances the need for access while ensuring customers pay a fair contribution to the cost of collecting this information in the long-term.

In Spain, throughout the liberalization process, the Spanish Competition Authority has always advocated for the elimination of remaining privileges of former SOEs. CORREOS, the Spanish State postal service can serve as example:

⁷⁸ Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision (1990) OJ L192/1

⁷⁹ See http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft861.pdf

⁸⁰ See <http://www.offt.gov.uk/OFTwork/markets-work/public-information> for further information.

The former CNC (National Competition Commission) published a “Report on the New Regulatory Framework for the Traditional Postal Sector in Spain” where analysed key elements of the postal sector’s new regulatory framework, and aimed to guide the interpretation and regulatory development of the new Postal Act towards the best possible legislative framework from a competition point of view. It also tried to adapt the traditional postal operator to the single postal market and the EU legal requirements.

The CNC had participated in the legislative process of the new postal law by issuing a Report on Universal Postal Service Bill in June of 2010. This report warned that, the special advantages granted to Correos could seriously distort the competition conditions in the postal sector and delay the competitive development of the universal postal service for a period of 15 years.

This Report pointed out that the new Postal Act contained elements that would make the development of competition more difficult once the area reserved to Correos on a monopoly basis had been eliminated. Several of those elements were already highlighted in the previous report, but the recommendations made back them were not sufficiently addressed in the new Act that followed.

The regulatory framework that come into force did not guarantee competitive neutrality between operators, tending to favour the position of Correos, and, in some aspects, it raised doubts about compatibility with EC’s rules and regulations.

Kenya mentioned cases where the competition authority was able to achieve exceptional results:

Pyrethrum Sector: this is an industrial crop mostly grown by small scale farmers. The Pyrethrum Board of Kenya, a SOE had exclusive processing and marketing rights as provided under the Pyrethrum Act. Kenya’s market share in the World-Market declined from 80% in the 1980’s to 5% around 2011. This was caused by sluggishness and governance problems of the SOE and the stringent regulatory framework.

The Competition Authority (the Authority) together with other identified Champions from the Government, Legislature and farmers Associations and with the support from The World Bank intervened by advocating for the liberalization of the pyrethrum sector to allow the selling of pyrethrum to other persons other than the Pyrethrum Board, to provide for the licensing of processors and separation of functions in the operation of the pyrethrum sector value-chain so as to remove the monopoly enjoyed by the Pyrethrum Board of Kenya. The team submitted (unsolicited) written Reports, which informed the Review of the Existing law and the SOE monopoly was removed.

Maize Sector: Maize is one of the main agricultural food crops in Kenya and also the most consumed cereal for a large proportion of the population in both urban and rural areas. It represents 9% of the consumption basket of low Income households and provides 33% of the revenues from crops sales to poor households.

In late 2010 and 2011, Kenya witnessed soaring food prices. These food prices impacted negatively on different segments of the population, especially the rural and urban poor who spend over 75% of their income on food. The food prices sparked various activities with consumer lobby groups organizing demonstrations and the issue being a top agenda of the Kenyan Parliament. Consequently, Parliament on June 23, 2010 introduced a Bill that proposed to control the prices of essential goods including maize.

The Authority undertook investigations by conducting a market inquiry of the maize sector (increase in prices) at its own initiative. The study also focused on the input (maize) of the market, and its distribution, specifically the role of the National Cereals and Produce Board (NCPB), a SOE.

The findings revealed that the milling business is concentrated to one 'family' and Millers 'Association' was recommending Prices; Maize flour prices were high at Ksh.70 per Kg, with high Profit margins for millers (42%) and that the dual role of NCPB as sector regulator and a commercial trader could result to conflict of interest as the Board could be tempted to withhold maize supplies to millers or cause delays in the purchase and sale of maize.

The Authority intervened by:

- Ordering the review of the Associations internal regulations to be in conformity with the Competition Act
- Issued 'stop and desist' orders on arrangements for price coordination
- Advocated for the review of the role of the SOE in the maize sector.

Tea Sector: Currently, Kenya is among the four leading tea producers, alongside China, India and Sri Lanka who collectively account for over 75% of the global tea production. In terms of black tea, Kenya accounts for 25 % and 8 % of world tea exports and world tea production, respectively. The industry is currently the county's leading foreign exchange earner accounting for about 5% of the country's GDP.

In October, 2012, a private investor lodged complaint with the Competition Authority of Kenya alleging that tea factories affiliated to Kenya Tea Development Agency (KTDA), and Tea Board of Kenya (the tea sector regulator) were restricting market entry. The investor alleged that the incumbents had raised unreasonable objection to grant of their application to construct a Specialty Tea Factory and that the regulator did not have valid ground to decline grant of the license.

The investigations revealed, among others, that:

- (a) Regulations required that that a person must have a minimum of 250 hectares under tea to be granted license;
- (b) The regulations provide that the sector regulator seeks a '**no objection**' from existing producers in the area.

These were found to be restrictive, and, consequently the Authority advised the regulator and the Ministry of Agriculture that:

- They should embrace the principles of competition and let the market forces determine allocation of resources in the tea sector in situations where such markets are contestable.; and
- National Tea Policy under development currently should do away with rules or requirements that unreasonably restrict competition

Finnish Competition Act was amended in 2013 in order to ensure competition neutrality between public-sector and private-sector market operators. Based on the new provision in the Competition Act, the Finnish Competition and Consumer Authority (FCCA) has now powers to supervise competition neutrality between public-sector and private-sector business activities. The main purpose is to establish national control mechanism, which would provide a tool for ensuring a level playing field between private and public market operators. The law applies to the business activities of municipalities, joint municipal authorities, the Government and entities under their authority. However, parishes, for example, are not subject to the law.

The Competition Act does not prohibit public organizations from practicing business or competing with private enterprises on the same market. Merely, the objective is to establish neutral competitive conditions between public and private sector business activities. The law is part of the Finnish Government's broader program to safeguard a level playing field for private and public sector businesses.

When the central government, a municipality, a federation of municipalities or a unit under the control of a municipality operates under an arrangement that distorts or prevents, or might distort or prevent, sound competition on the market, the FCCA can, preferably by way of negotiation, put an end to the arrangement endangering competition neutrality. If the negotiations remain unsuccessful, the FCCA is able to prohibit the activities or impose conditions that would ensure a neutral operating environment on the market. The FCCA has also the right to impose a conditional fine to enforce the prohibition or the conditions. Unless otherwise ordered by the Market Court, the prohibition or conditions imposed by the FCCA would have to be observed. Also a de minimis provision was introduced i.e. the FCCA does not have to examine the request for action concerning competition neutrality if the arrangement has only a minor impact on a healthy and sound competition environment. In addition, if the operation in question relates to public sector activities which are directly based on legal requirements, the new competition neutrality provision may not be applicable.

In Italy, In January 2012, the Competition Authority sent to the Government and the Parliament a Report advocating reforms in major sectors of our economy with the objective

of opening markets and stimulate economic growth. It highlighted the persistence of regulatory and administrative constraints on freedom of economic initiative (which often entails that SOEs are entrusted with the operation of services of general economic interest despite a questionable need for such restrictions) and advocated for a removal of constraints and restrictions. Only when this is not possible, restrictions should be maintained to the extent necessary for the pursuit of public interest objectives, while ensuring respect of the principle of proportionality. The Authority's Report identified a number of proposals concerning specific sectors, in some instances requiring new interventions, in other advocating the effective implementation of measures already taken.

In Local Public services for a significant part of the services concessions are still granted without any competitive tendering. A referendum and the consequent decision of the Constitutional Court have eliminated the obligation of competitive tendering. In order to overcome the resistances the Authority has suggested a sector by sector approach. In particular, for local transport services and waste management services the Authority proposed that when local administrations opt for the in-house management a preliminary and binding opinion of the Competition Authority is required in order to assess that more competitive alternatives are inconsistent with the general interest.

In the Energy sector measures have been suggested in order to ease the procedures for the authorization to create infrastructures and promote competitive tendering in the local gas distribution markets.

In the Postal sector the Authority suggested interventions that, through a clear identification and limitation of the services that are included in universal service obligations, would extend the scope of services that are open to competition.

In the Transport sector the Authority has advocated that the newly established Transport Authority should be made operational as soon as possible, to achieve the opening to competition of transport and railway services.

Many of the suggestions proposed by the Authority have been followed in the law decree adopted by the Government in January 2012. Moreover, the Authority has been given additional advocacy powers vis-à-vis acts adopted by local governing bodies. Namely, it can

now challenge before Court administrative acts adopted by local authorities that restrict competition without public interest justifications.

For **Russia**, The most spectacular success was the adoption of the legal provisions treating SOEs and private companies equally and spreading competition legislation over SOEs. Specifically, the Law “On Protection of Competition” stipulates that it equally applies to all the economic entities regardless of their property title (state owned or private). The Russian competition authority referred to advice of many international organizations and national competition rules of numerous countries. However, in most of these countries exemptions from the competition legislation for the SOEs were much broader than in Russia. In other words, the competition regime for SOEs in Russia is stricter compared to most of the other countries.

In Sweden, The development towards the implementation of the rule prohibiting anticompetitive public sales activities in Sweden can be seen as an advocacy success story for the SCA. In 2004 the SCA was assigned by the government the task of monitoring issues relating to competition neutrality between public and private companies, and in subsequent years undertook advocacy in various forms in this regard, such as in the report *Myndigheter och marknader – tydligare gräns mellan offentligt och privat* (“Authorities and markets – clearer boundaries between public and private”).

The SCA’s role was part of a broader dialogue amongst public and private stakeholders around the issue of competition neutrality, including the Swedish government, bodies such as the Swedish Agency for Public Management and the Confederation of Swedish Enterprise, and an ad-hoc competition council which was set up by the government to report on the issue.

It should be noted that the SCA continues to advocate for legislative changes which would enhance the rules relating to anticompetitive public sales activities in Sweden to the benefit of consumers.

⁹² P. HUBERT, *L’administration et le droit de la concurrence*, Cahiers de la Fonction publique, novembre 1999, p. 3.

CONCLUSION

Overall this report has enabled us to better understand the relationship between SOEs and competition law through an empirical approach based on the review of the laws and regulations of different members of the ICN and the practice of the various authorities competition in this field.

In this regard, it must be said that priori relationships between public companies and competition law have always been presented in terms of confrontation, since the two concepts are based on different foundations and are based on principles which are not always convergent: one expressing the interventionist logic of the state and the other is an expression of economic liberalism and the promotion of private initiative.

Indeed, these two concepts are derived from two different worlds: public enterprises are the main tool for state intervention in the economic field, they are often bearers of privileges and subject to constraints and they have status and missions that often place them beyond considerations of market and competition law.

The competition law meanwhile comes as a discipline that is based on the principle of neutrality towards the nature of economic actors, and therefore it does not recognize any specificity to the so called public economic actors based on purely material criteria to define its scope of coverage, namely the exercise of commercial activity on a specific market.

That said, through the data collected from different agencies, we found that the application of competition rules to public undertakings has advanced considerably both through legislation considered and through the practice of agencies.

Thus, in the definition of public enterprises it appeared that there is a group of jurisdictions which does not have precise legal definition of SOEs, but this does not mean that these companies do not exist in these jurisdictions or that they are not subject to competition law. Rather, this lack of definition could even be interpreted as a desire not to recognize any specificity to these companies by ignoring their legal status, their missions and their capital structure.

For jurisdictions with a precise definition of SOEs there is a multitude of models that vary according to the criteria retained for the definition. These criteria concern globally:

- The method of creation of these companies
- The part of the State or public bodies in the capital of the company (usually more than 50% of capital is required)

- The influence that the State might have on the undertakings, particularly in defining their strategy or the appointment of the management team,
- The type of tasks carried out by these companies

Regarding the legal form that SOEs can take, it can vary from a similar form as for private companies to particular status as those of industrial or commercial establishment or unitary enterprises, as the case of Russia.

The areas of intervention of the SOEs are also varied. In addition to "classic" areas of intervention justified by the requirements of public service or strategic sectors (postal services, telecommunications, water supply and electricity, energy ... etc), public companies are also involved in areas quite normal and open to competition.

Regarding the scope of competition law, all jurisdictions in our sample answered yes to the question if their national antitrust laws cover SOEs.

Indeed, in most legislations surveyed the competition rules may apply to most operators regardless of their nature, their status or structure. In most jurisdictions, all operators, whether public or private, are normally equally subject to competition law. Admittedly, some exemptions are recognized in specific cases, but it is far more exceptions than rules. The organic criterion normally used to recognize the specificity of SOEs has no weight under the rules of competition.

Meanwhile, it was found that the choice made by the legislature in the various jurisdictions who responded to the questionnaire focuses on a material or a functional criterion rather than organic one to define the scope of application of competition law. And even when it comes to determining exceptions to SOEs it is a material factor which is adopted.

In other words, the only having public ownership or connection to the apparatus of the State is not by itself sufficient to exempt public sector compliance with competition rules. This marks an alignment of the public sector on the private sector regarding the rules to follow in pursuit of economic and commercial activities, and the abandonment of the exception provided by the administrative law regime.

Certainly, the legislation on competition introduced exemptions for the public sector, however these are exceptions and the standard remains compliance with the rules of competition. In addition, exemptions are not based on an organic criterion but on a material factor which may also benefit private companies. It is the exercise of activity of general

interest, the exercise of public power, practices legitimized by law or regulation and practices contributing to economic progress.

Concerning the exemption system we have noticed that among the jurisdictions which responded to the questionnaire 34% of them do not recognize any kind exemption of to public enterprises or SOEs. This is the case of South Africa Brazil Chile Colombia Denmark Taiwan Mexico Poland Tunisia Pakistan Japan and Ukraine. The main criteria retained for exempting SOEs are:

- Engagement in trade or business
- SOEs operating in regulated sectors
- SOEs operating Strategic industry
- SOEs entrusted with public service mission

Besides, the majority of the competition authorities who responded to the questionnaire said they had already examined cases involving public companies with a preponderance of practices of abuse of dominant position. It shows that abuse of dominance is the "major risk"⁹² faced by public companies operating on a market, because of their weight, their resources, their legal status and their relationship with the State. This is especially true for companies with a monopoly or quasi-monopoly privilege. There are also cases concerning cartels or anticompetitive agreements in which SOEs are implicated but their number remains limited compared to abuse of dominance cases.

Two situations can occur. Either no longer the monopoly of law is remaining in fact and the dominant position can then be operated under conditions which have the object or effect of hindering new entrants to the market or even evict them. Or, public entities, from their legal monopoly activity, develop diversification activities directed towards a competitive market: it may happen when the dominant position on the first market is used to implement anticompetitive practices in the second.

These situations are particularly encountered concerning large SOEs which operates in network industries, practicing commercial activities in addition to the public service.

Abuse of dominant position may thus result from situations in which public companies are making use of a damped commercial network by the public service activity in order to develop competitive activities or so-called "cross-subsidization" to practice predatory pricing. In this case, the resources of the public service activities are used to fund competitive activities, and produce goods or services that can be sold at such a low price (predatory prices) than other competitors can run the risk of being eliminated, which ultimately reduces the intensity of competition in the market.

Situations of abuse of a dominant position may also be encountered in the commercial development by public entities of the information they are responsible for collecting. This information is usually of considerable wealth, and public enterprises are often tempted to exploit them even beyond the requirements of public service. Therefore, the risk of abuse of a dominant position is particularly high when other operators are using the raw administrative information to feed their own sales activities information.

In addition, a special place in the abuse of a dominant position must be made to the issue of essential infrastructures. In this regard, the Court of Appeal of Paris says that " When the monopoly operator of a basic structure is the same time the potential competitor of a business requiring the use of this facility , the operator may restrict or distort competition on the downstream service market by abusing its dominant position or situation of economic dependence in which is its competitor by establishing an unjustified and disproportionate price for the access to this facility compared to the importance of the services requested, and also a non transparent and non -oriented costs incurred under objective criteria. ⁹³"

The issue of essential infrastructures finds a natural field of application in public service networks where the network interconnection is the key to opening up to competition. This is essentially the reason that justified the creation of regulatory authorities in the field of telecommunications, electricity, gas and other similar sectors.

Moreover, returning to the responses of competition authorities to the questionnaire we also found that most of the cases mentioned relate to areas that were historically managed by the State or its agencies under legal monopolies before opening them to competition.

⁹³ C.E, rapport public 2002, jurisprudence et avis de 2001, *Collectivités publiques et concurrence*, p. 240.

These sectors are essentially those of telecommunications, energy, postal services, health and transport.

Regarding the decisions taken by the competition authorities, we noted that in most cases they are organized around two axes: either they require from the company to cease its anticompetitive conduct, or in the event of refusal of comply the authority take the required decision including sanctions, where appropriate.

Generally, through the responses of competition authorities to the questionnaire, the case can take four directions:

- SOEs decide for themselves to end anticompetitive practices without being subject to referral or instruction. This is the case for example of Finland where following the entry into force of provisions of the law on competition SOEs aligned with the new regime
- SOEs are penalized following the investigation by the Competition Authority
- the competition authorities are unable to sanction because of the existence of laws that do not allow them to do (Netherland)
- SOEs undertake to cease their anti-competitive practices following a decision by the competition authority.

Regarding the difficulties encountered by the competition authorities in the application of competition law to public companies, the analysis of the responses to the questionnaire revealed that generally there is no particular problem in this level. However, some authorities have raised some problems especially with regard to the definition of the relevant market, the differentiation between public service activities and commercial ones and the problem of calculating the fines to be imposed on public companies convicted of anticompetitive practices.

To end with advocacy, we have noticed that competition authorities face various challenges or difficulties in advocating for pro-competitive policy or legislation towards SOEs.

Challenges identified include: resistance to authorities decisions, substantial pressures from

other government agencies who insisted on exempting the SOEs they created from the competition law, lack of competition culture among certain SOEs, confusion between public services activities and commercial activities, existence of special regimes alongside with competition law. To face these difficulties, the answers to the questionnaire insisted on the fact that being an independent and transparent authority is a powerful tool against potential opposition especially when dealing with powerful companies or public bodies. Moreover, it has been demonstrated through different examples that one of the most effective way to face “political” objections or pressure is to found the assessment on a robust and comprehensive “technical” analysis, which is the agency’s point of strength.

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