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COMPETITION LAW AND STATE-OWNED ENTERPRISES

- Background note by the Secretariat -

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at: oe.cd/csoes.

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Competition Law and State-Owned Enterprises

- Background note by the Secretariat -*

In recent years State Owned Enterprises (SOEs) have extended the reach of their activities and have become important global players. Given the presence of SOEs in key sectors of the economy, often undergoing liberalisation, and the number of SOEs engaging in commercial economic activities competing with private entities, competition authorities have sought to be effective in enforcing competition law against them.

Although competition agencies have been active in starting proceedings against SOEs and in imposing sanctions where they find liability, these investigations can pose a variety of challenges, due to the distinctive nature of state-owned entities. For example, challenges include taking into account SOEs' public service obligations when assessing their conduct, defining the limits of an SOE's corporate group and calculating the appropriate turnover. These challenges mean that the risk of under enforcement is always present, and this is particularly so when it comes to enforcement cases involving foreign SOEs.

In order to protect consumers, competition agencies' enforcement needs to be neutral, with respect to the parties' ownership and nationality. While there is a risk that SOEs' specific characteristics can lead to under or over enforcement, an effects-based analytical framework is sufficiently flexible to accommodate the analytical challenges we identify, while the practical challenges can be overcome provided that competition agencies are empowered to initiate and complete the necessary investigations.

* This paper was written by Carolina Abate, with comments from Chris Pike and Antonio Capobianco, Acting Head of the OECD Competition Division.

1. Introduction

1. Given that state-owned enterprises' ("SOEs") anti-competitive behaviour can be as harmful as restrictions of competition by private competitors, governments and competition authorities have come to recognise the fundamental role of neutral¹ and rigorous antitrust enforcement to level the playing field².
2. SOEs involved in anti-competitive agreements, mergers or unilateral anti-competitive conduct are regularly prosecuted in jurisdictions with an established competition law. However, these investigations can pose a variety of challenges to competition authorities, due to the distinctive nature of state-owned entities. The result can be a risk of under-enforcement at the domestic level, and even more so when it comes to investigations involving foreign SOEs.
3. By analysing past cases from different jurisdictions, this paper considers a variety of anti-competitive conducts undertaken by SOEs. It identifies the main challenges for competition authorities in these types of investigation, the factors that create those difficulties, and if, and how, they might result in under enforcement.
4. The paper is structured as follows: Section 2 provides an overview on the nature and extent of state owned enterprises, and the role and limits of antitrust with respect to competitive neutrality. Section 3 introduces the challenges of competition enforcement against SOEs and analyses case examples of SOEs involved in unilateral anti-competitive conduct, mergers, collusive behaviour, as well as the difficulties faced by competition authorities. Section 4 discusses the risk of under- enforcement against domestic SOEs, while Section 5 addressed the challenges and concerns with respect to enforcement against foreign SOEs. Section 6 concludes.

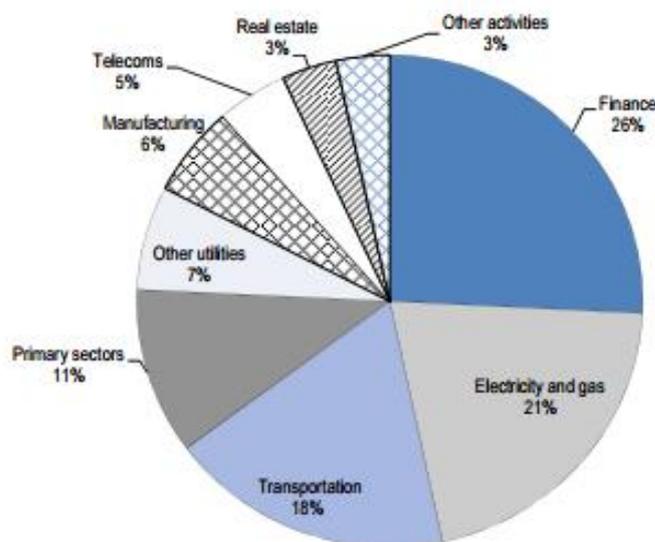
2. Antitrust enforcement and competitive neutrality

2.1. State owned enterprises: an overview

5. State-owned enterprises are companies controlled, to varying degrees, by the state. SOEs' corporate form³ and commercial orientation can differ, as well as the ownership arrangements. The question of control⁴ exercised by the state is however central as it intrinsically defines SOEs⁵.
6. SOEs' role in the economy has evolved in the past decades, as state divestments took place in many jurisdictions and different markets. However, SOEs still play an important role in many jurisdictions, especially in emerging countries. According to the OECD (2017)⁶, based on a sample of 40 developed and emerging countries⁷, SOEs employ over 9.2 million people⁸ and are valued at USD 2.4 trillion. Furthermore these values exclude the People's Republic of China's (hereafter "China") SOEs sector, which alone employs around 20.2 million people and is valued USD 29.2 trillion.
7. In most developed countries, where governments undertook substantial privatisation in the past, at national level domestic SOEs are often found in smaller numbers⁹. Nevertheless, the average value of the individual SOEs in such cases tends to be high and the sectors where they operate are usually key strategic sectors of the economy, such as utilities, transport, telecom and finance. Even a small number of SOEs can thus play an important role as large shares of the private economy depend on these sectors and so substantial parts of the population are affected by their behaviour.

8. In recent years, the increasingly global scale of markets has meant that SOEs have extended the reach of their activities and have become increasingly important global players¹⁰. As a consequence, the potential impact of their activities on competition, trade and investment has become significant on a global scale.

Figure 1. Sectoral distribution of SOEs, by equity value: Sample area excluding China (end-2015)



Source: OECD (2017), *The Size and Sectoral Distribution of State-Owned Enterprises*, OECD Publishing, Paris.

9. The rationale for the existence of SOEs relates to a broad range of economic, social, political and strategic reasons, which might differ according to jurisdiction. First of all, SOEs are often originally established in order to provide public services and goods in the presence of a natural monopoly or of market failures, which would lead to such goods and services being under-provided. However, as shown in Figure 2.1, SOEs operate in a broad variety of sectors, in which private companies are present as well.

10. Moreover, especially in emerging economies, SOEs often have a role in national development strategies and can be used by governments as a tool for implementing an innovation-led industrial policy, to create jobs, or to protect national security.

11. Although there is no universal definition of SOEs¹¹, a number of characteristics differentiate them from privately-owned enterprises (POEs), with whom they often compete. As mentioned above, many SOEs have a broader set of objectives other than profit maximisation, such as public policy goals. This can mean they face obligations and constraints that POEs do not. Universal service obligations for example, and constraints on recruitment, wages, bonuses, and borrowing.

12. SOEs may also enjoy advantages linked to their government ownership. These can include direct and indirect subsidies or tax breaks, softer budget constraints, preferential access to credit or access to information not fully available for POEs¹².

13. Furthermore, SOEs may benefit from privileges and immunities, such as exemptions from antitrust laws or regulatory regimes. SOEs may also be exempted from bankruptcy rules and their ownership rights often cannot be transferred as easily as in the case of POEs.

14. In markets where SOEs compete with private companies these characteristics can create substantial competitive advantages, which, especially in a period characterised by globalisation and an increasing number of cross-border transactions, can have widespread effects on markets and the functioning of competition in different jurisdictions.

2.2. The role of antitrust enforcement within competitive neutrality

15. Competitive neutrality can be undermined by the provision of selective subsidies or other forms of support, the setting (or enforcement) of favourable public procurement rules, or the setting (or enforcement) of favourable market regulations or governance rules. As such, where jurisdictions seek to address these risks, they employ a variety of different rules and tools to address competitive neutrality distortions.

16. Through their competition law enforcement powers, and their advocacy, competition authorities can help to create a level playing field. However, the reach of their legal powers is typically limited to cases where the *conduct* of SOEs (or POEs) infringe competition law. Competition enforcement is therefore not the appropriate tool to address *all of the competitive distortions* that might favour (or constrain) SOEs.

17. Like POEs, SOEs can have the incentive and ability to engage in anti-competitive conduct, either in their own jurisdiction or abroad¹³. However, the advantages that are sometimes conferred upon SOEs can mean that they often hold market power, and the fact that substantial segments of the population heavily rely on their goods and services can enhance the potential harm that is caused when SOEs' behaviour is anti-competitive.

18. Different factors are worth considering in order to understand SOEs' ability and incentives to harm the competitive process. First of all, SOEs may be more concerned with the expansion of output and revenues than with profit maximisation¹⁴. This can be explained by the fact that their objectives often include the production of essential goods, the supply of essential industrial inputs, or the creation of jobs.

19. However this does not mean that they may not still have an incentive to engage in types of conduct, for example aimed at raising barriers to entry and foreclosing rivals, which help them achieve their objectives by restricting competition. For instance, they may expand their output, not by competing on the merits, but by strategically setting a temporarily lower than costs price in order to exclude a rival.¹⁵

20. Moreover, due to their nature and the benefits they sometimes enjoy, such as softer budget constraints or the possibility to cross-subsidise between activities in competitive and monopolised markets, they might be better able to sustain such conduct. Lastly, SOEs' choices and behaviour can be influenced by an actual or perceived sense of government protection and assistance, even when engaging in anti-competitive conduct.

21. Using competition enforcement in order to solve certain competitive neutrality distortions is particularly important in newly liberalised sectors, e.g. utilities, where former state monopoly incumbents SOEs may adopt anti-competitive conduct, often unilateral, in order to protect their monopoly position and this can ultimately hamper the liberalisation process.

22. Finally, pursuing SOEs' public policy objectives may in some cases lead to a restriction of competition¹⁶. In such cases, SOEs may have some scope to defend their conduct as necessary for meeting the obligations imposed upon them by policy.

23. Although SOEs are intrinsically different from POEs, it cannot be concluded that SOEs are more inclined to engage in anti-competitive conduct than private enterprises. However, as in certain circumstances they do have the ability and incentives to harm competition and consumer welfare, it is important to ensure that SOEs and POEs operate under the same competition law framework and that competition agencies are able to neutrally enforce competition law.

3. Competition enforcement and SOEs

3.1. Role of exemptions and defences

24. Some of the competitive neutrality distortions brought about by domestic and foreign SOEs can be addressed by antitrust enforcement. However, competition enforcement is an effective solution only if it is itself neutral, i.e. applied regardless of ownership, nationality, legal or financing status, and this can be challenging due to a variety of factors.

25. Even though there is a general consensus that competition law should apply to both public and private market actors which engage in economic activity, exemptions that shield specific conducts, sectors, or certain undertakings, such as SOEs, from competition law can be found in different jurisdictions, with adverse effects on competitive neutrality.

Box 1. Exemptions from antitrust liability for SOEs: national examples

- In the **EU**, Art. 106(2) TFEU provides for a narrow exclusion from competition law for undertakings “entrusted with the operation of services of general economic interest¹⁷ or having the character of a revenue-producing monopoly”. However, this is only if the application of the EU rules on competition would obstruct “the performance, in law or in fact, of the particular tasks assigned to them”.
- In **Hungary**, following a 2013 amendment to the Competition Act, the government can exempt concentrations from having to fulfil merger control clearance obligations, if they are of national strategic importance and serve the public interest.¹⁸ This exemption has been applied in a number of cases, mainly in the public utilities sector and is generally used for transactions involving state-owned companies. For example, in 2016 the government exempted a merger between the state-owned national electricity provider and an energy company.

26. In particular, when it comes to anti-competitive behaviour SOEs should be assessed against the same standards as those applied to POEs.¹⁹ Exemptions shielding SOEs from competition law may distort competition in the market and allow SOEs to abuse market power, to the detriment of consumers.

27. The role and relevance of exemptions varies considerably across jurisdictions. While in OECD countries SOEs are normally subject to competition law, different kinds of exemptions can be a more serious concern in developing or emerging countries²⁰, as shown in Figure 3.1 with respect to sector specific laws overriding the application of competition law to SOEs.

28. According to the ICN survey and report on SOEs and competition enforcement (2014)²¹, 34% of the responding jurisdictions grant exemptions to SOEs entrusted with public service obligations, 17% to SOEs operating in a regulated sector and 6% to SOEs operating in strategic sectors.

Figure 2. Application of Competition Law to SOEs/Government

Country or jurisdiction	Law requires SOE or state-interested entity to be engaged in business or trade	Law covers entities granted special or exclusive rights and privileges (state and non-state)	Law fully or partially exempts services of general economic interest or similar	Sector specific or other law overrides application to SOEs or administrative authorities	The law is enforced against SOE or state interested entity
Australia	Yes	Yes			Yes
Barbados	Yes	Yes		Yes	Yes
Brazil		Yes			Yes
China	Yes	Yes*	Yes*	Yes	Yes
EU	Yes	Yes*	Yes		Yes*
France	Yes	Yes	Yes		Yes
Greece	Yes	Yes*			Yes
Guyana				Yes	
Hong Kong	Yes*	Yes*	Yes*	Yes	**
Hungary	Yes	Yes*		Yes	Yes
India		Yes*	Yes		Yes
Italy	Yes	Yes*	Yes		Yes
Jamaica				Yes	
Japan	Yes	Yes			Yes
Kazakhstan	Yes	Yes	Yes*	Yes	Yes
Kenya	Yes	Yes*			Yes
Korea			Yes*	Yes	Yes
Lithuania	Yes	Yes		Yes	Yes
Malaysia	Yes		Yes	Yes	**
Mauritius	Yes	Yes*	Yes*		Yes
Mexico	Yes	Yes		Yes	Yes
Pakistan	Yes				Yes
Peru	Yes	Yes			Yes
Poland	Yes		Yes	Yes	Yes
Russia	Yes	Yes		Yes	Yes
Serbia	Yes	Yes*			Yes
Seychelles	Yes	Yes*	Yes*		Yes
Singapore	Yes*	Yes*	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes
Switzerland	Yes			Yes	Yes
Trinidad & Tobago	Yes	Yes		Yes	Yes
Tunisia	Yes				Yes
Turkey		Yes		Yes	Yes
United States	Yes*	Yes			Yes

Note: * Less than full coverage. For example, competition law applies insofar as it does not obstruct the performance of the tasks. ** Recent law; too early to report on enforcement record

Source: Fox and Healey (2013), "When the state harms competition – the role for competition law". New York University Law and Economics Working Papers. Paper 336.

3.2. The availability of the State Action defence for SOEs

29. In the absence of an explicit general exemption, SOEs may nevertheless more easily than POEs justify their anti-competitive actions as having been directed by the state²². The

state action defence can be used by SOEs to avoid liability for anti-competitive conduct if it was imposed or authorised by law.

30. Such defence can be invoked if specific conditions are met, according to the legislative framework²³ in place, and SOEs are normally required to provide substantial evidence to show that their actions were state-imposed.

31. For example, in the EU courts it is established that companies cannot be held responsible if their anti-competitive behaviour is required by a public measure and they are precluded from engaging in autonomous conduct. However, undertakings are subject to EU competition law and may incur in fines if national legislation “merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct”²⁴.

32. In the US, the conditions for the application of the state action defence stem from the Supreme Court decision in *Parker v. Brown*^{25,26}, which held that anti-competitive conduct is immunised from antitrust enforcement if two cumulative conditions are met. First of all, the conduct “must flow from a clearly articulated and affirmatively expressed state policy”, and secondly it must be subject to “active state supervision”. In subsequent cases, US courts have refined and clarified the interpretation of these two conditions²⁷.

33. The inappropriate use of state action defences can lead to under-enforcement in practice. Competition agencies need to be able to foresee this risk and rigorously evaluate, case-by-case, if such a defence should be rejected or not, as done in the Chinese price fixing investigation²⁸.

Box 2. Shenzhen Tally²⁹

The possibility of invoking a single entity defence to justify cartel behaviour was analysed by the Chinese State Administration for Market Regulation³⁰ (“SAMR”) in the Shenzhen Tally case³¹. In July 2018, the authority sanctioned China Ocean Shipping Tally Shenzhen and China United Tally (Shenzhen)³² for price fixing and market partitioning, rejecting their single entity defence arguments.

The parties claimed that the AML would not apply to their conduct in that they belonged to the same group. However, SAMR found that although both companies were held at 50% by China Merchants Logistics, the other shareholders differed and, most importantly, the two parties were independent from an operative perspective and gave the appearance of competing.

Moreover, regulations introduced by the government in 2002 and 2015, to increase entry in the market and aimed at limiting joint ownership³³, additionally supported SAMR’s position that the single entity defence would not be applicable to the parties’ behaviour, due to the specific circumstances of the case.

China Ocean Shipping Tally Shenzhen and China United Tally (Shenzhen) also argued that the prices for their services were guided by the State and therefore they could not be prosecuted for price-fixing. The authority rejected this view as, even in the presence of such government intervention, companies are not allowed to collude and should determine their conduct on the market independently.

34. The use of state action defences can be especially problematic if foreign SOEs under investigation claim that the allegedly anti-competitive conduct is carried out as a result of their national legislation. In this case, competition agencies will have to examine foreign legislation as part of the investigation, and might come under political pressure to consider the broader diplomatic relationship with the state in question.

35. One interesting example on the use of a state action defence by foreign SOEs is provided by the recent, and still on-going, Vitamin C case.

Box 3. Vitamin C case

In 2013 a jury for the U.S. District Court for Eastern New York³⁴ found the Chinese SOEs North China Pharmaceutical Group Corp. and Hebei Welcome Pharmaceutical Co. Ltd. guilty for fixing prices of vitamin C exported from China to the US, and awarded damages to the US purchasers Animal Science Products Inc., The Ranis Co. Inc. and Magno-Humphries Laboratories Inc.

However, following this decision, the Chinese SOEs³⁵ appealed claiming that their collusive behaviour was mandated by the Chinese government and as such could not be prosecuted by US antitrust laws.

Their argument was strongly shared by MOFCOM, who provided support to the parties' interpretation of Chinese law, underlining how the SOEs could not have complied with US law as they were compelled by Chinese law to fix export prices³⁶.

In 2016 the Court of Appeals for the Second Circuit put forward a decision³⁷ reversing the 2013 one on international comity grounds³⁸. The Court stated that the district court should have not awarded damages and should have instead accepted the Chinese government statements regarding their laws, and thus established that the SOEs were indeed legally mandated to collude on exports to the US.

The Court concluded declaring that "China's interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law", this "recognizing China's strong interest in its protectionist economic policies and given the direct conflict between Chinese policy and US antitrust laws".

Nevertheless, the damages' claimants, supported by the US Department of Justice³⁹ and the US Chamber of Commerce, appealed to the Supreme Court⁴⁰, which unanimously overturned the second Circuit's judgement⁴¹.

The decision established that "a federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements"⁴²⁴³.

Moreover, it highlighted that the weight to be given to such statements can vary according to the specific circumstances of the case, taking into account elements such as "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions on the law".

Therefore, as the standard of deference applied by the Court of Appeals for the Second Circuit was considered to be incorrect, the Supreme Court returned the case to the appellate court for reconsideration.

Although this case has not reached a final conclusion yet, the judgement of the Supreme Court is highly relevant for foreign SOEs and governments, in that it clarifies that foreign authorities' statements will be examined and reviewed by US courts, with no guarantee that they will prevail.

In particular, two different elements come into play here. Firstly, the right of US courts to interpret foreign law differently from a foreign government. Secondly, a further issue could emerge if US courts agree that the conduct was mandated by foreign law, and a decision has to be made as to how to address the anti-competitive effects of that conduct (e.g. could a state action defence apply?).

To conclude, it is worth underlining how the matter here at stake was never related to territorial issues, as the effects of the cartel were only in the US and the Sherman Act could thus apply. Instead this related to sovereignty and ultimately to the treatment of a foreign government's statement of its laws.

3.3. Enforcement challenges

3.3.1. Overview

36. While SOEs are entities that are fundamentally different from private actors in many aspects, “most competition standards are based on the logic of private sector and profit-maximising economic players”⁴⁴.

37. Neutral enforcement of a consumer welfare standard might thus require adapting analytical tools typically applied in competition proceedings to evaluate anti-competitive conduct. An example of this is the recoupment test for predatory pricing, which might not be necessary to prove predation in the case of SOEs, as explained in the following chapter.

38. For the purpose of competition analysis, calculating the appropriate measure of costs, determining if the state-owned entity constitutes an undertaking or not, its independence from other SOEs, and who exercises control over it, could be problematic due to SOEs’ different nature. Moreover, these considerations can also impact the calculation of turnover, making it less straightforward.

39. Lastly, also assessing the effectiveness of different types of sanctions can be complex when the undertaking at questions is an SOE. Indeed, turnover-based fines can be difficult to calculate and monetary penalties might not have a deterrence effect if they are passed-on to tax payers.

40. Some of these issues can be particularly problematic where foreign SOEs are involved in cross-border mergers and antitrust investigations. When it comes to foreign SOEs “the challenge is increased by the difficulty to gather evidence on governance and control within the state concerned, and interpret foreign law”⁴⁵. Obtaining information from a foreign SOE could also be burdensome, and pressures from foreign governments together with broader political issues can create substantial barriers to enforcement.

41. Practical enforcement challenges faced by competition agencies and SOEs’ anti-competitive behaviours will be analysed in more detail in the following chapters, in relation to mergers, unilateral anti-competitive conduct and collusive agreements.

3.3.2. Cross-cutting practical challenges

42. In practice, competition agencies can face several enforcement challenges. Issues linked to having an SOE as defendant in competition proceedings can arise at different stages, such as case selection, investigation and evaluation of the SOEs’ conduct, or sanctioning and imposition of remedies.

43. Evidence from OECD countries⁴⁶ shows the various issues that can emerge when SOEs are being investigated and charged by a competition authority. For example, it shows that SOEs are sometimes found to have less regard for the competition agency than a private company would in a comparable situation.

44. Although competition agencies are generally experienced in dealing with less collaborative entities, SOEs might have more effective means to obstruct proceedings because government ties can play a role and the government may have a financial interest in allowing the SOE to act anti-competitively. Other problems include courts reducing penalties when the offender is an SOEs⁴⁷ or being reluctant to apply sanctions to public officials.

45. Other elements, like different accounting standards for SOEs and lack of transparency regarding costs, can make it difficult for agencies to obtain relevant information from SOEs on which to base their analysis. For example calculating profitability or price cost margins may not be possible. Moreover, explicit or tacit government pressure during an investigation against an SOE can create additional obstacles for the agencies' enforcement.

46. For example, there could be a perception that some agencies might be at risk of shelving complaints that target state-related firms on prioritization grounds, if under government pressure at the case-selection stage⁴⁸. Meanwhile at the investigation and evaluation stage, there may be a risk of agencies coming under pressure to accommodate SOEs. To reduce these risks, agencies may wish to enhance transparency.

47. In certain jurisdictions competition authorities may also lack the specific institutional features and powers, such as financial resources, independence and adequate investigative powers, which would allow them to carry out effectively investigations into SOEs' anti-competitive conduct and to impose the appropriate remedies and sanctions.

3.3.3. Challenges related to SOEs involved in unilateral anti-competitive conduct

48. Abuse of dominance is a particular risk for SOEs since they often enjoy quasi-monopoly positions or strong incumbent advantages in newly liberalised markets.

49. Further, SOEs active in multiple markets can engage in cross-subsidisation and leverage the market power they have in quasi-monopoly or legally reserved markets to protect their position in neighbouring markets where they also operate. This behaviour is central in many competition cases. However, competition agencies have also examined a broad variety of anti-competitive conducts by SOEs.

Box 4. Cross-subsidisation

SOEs active in both a legally reserved market and in one or more competitive markets, where they compete with private entities, may be in a position to exploit the economies of scope and cost complementarities between the two markets.

Where it exists this privilege allows SOEs to shift costs away from the competitive activities and charge them to the legally reserved activities, in order to exclude rivals. Thanks to cross-subsidisation, SOEs might be able to price below costs and reduce rivals' share of the market, force them out of business or deter market entry.

In addition, if cross-subsidisation allows the SOE to set prices below cost, its output in the competitive product market may increase. In this case, the SOE will experience economies of scale that its rivals cannot achieve. The increase in output will result in a decline in the SOE's unit cost of operation, leading to a further shift in sales from the competitors' product to the SOE's product.

This suggest that fining SOEs is not sufficient and that remedies should include any changes to prevent cross-subsidisation. For example separate accounting, transparency on costs of producing the legally reserved service, and the creation of duties not to cross-subsidise. Where competition agencies identify such possibilities they may also reflect on this in their advocacy to government in relation to the structuring and duties of other SOEs.

Predation

50. Predatory pricing strategies can be implemented by SOEs looking to expand their output by reducing competition in the long term. SOEs that can cross-subsidise as discussed above, may therefore be able, like some POEs, to price below marginal cost and to sustain losses through monopoly profits in other markets, thereby removing the need to recoup profits in the post-predation period.

51. Although below cost pricing without the likelihood of a recoupment phase⁴⁹ might not seem damaging to consumer welfare, but only to competitors, “it may still be of public policy concern, due to the effect on productive efficiency. Distortionary pricing might induce a more efficient firm to leave or not enter the competitive market”⁵⁰, as explained in OECD (2009). These competitive distortions might therefore merit investigation under any competitive neutrality rules that may apply in certain jurisdictions. However they should not be identified as infringing competition law.

52. Finally, if an SOE does successfully recoup the profit sacrificed through a predatory strategy, and it competes in multiple markets, then it might enjoy reputational effects from successful predation. Sokol (2009) observes how “this reputational effects create a credible threat that allows firms to reap the benefits of predation even in markets in which they did not predate”⁵¹.

53. For competition agencies it can be difficult to assess predatory pricing in this context, in that the tests normally used do not distinguish between SOEs and profit maximising firms. As a result many jurisdictions use cost-based tests to evaluate whether the pricing strategy is anti-competitive or not.

54. However, these may not be effective unless subsidies affecting SOEs’ costs, objectives and incentives are taken into account. Indeed, where a firm enjoys subsidies or preferential treatment in its domestic market, the relevant price-cost test might be for pricing below its cost in the absence of these subsidies or other support.

Box 5. Pricing low in the presence of state support: predatory pricing or competitive neutrality offence?

There is also a risk of using competition law to address distortions that are caused by government action and not by SOEs’ independent behaviour, and which should therefore be dealt with under competitive neutrality rules, and not using competition enforcement tools. For example, where they enjoy softer budget or borrowing constraints or the existence of explicit and implicit subsidies, SOEs may be able to set prices at low levels. These might be above their costs, but below the level at which their costs would have been, absent the undue advantages that they enjoy from government.

This means that the SOE is not sacrificing profit, but rather is competing on the merits, albeit that its ‘merits’ were created artificially by government. It should therefore not be found to have predated (and incur the financial sanction).

Although competing on the merits (where these are artificially created) might not seem damaging to consumer welfare, but only to competitors, “it may still be of public policy concern, due to the effect on productive efficiency. Distortionary pricing might induce a more efficient firm to leave or not enter the competitive market.”⁵² These competitive distortions might therefore merit investigation under any competitive neutrality rules that may apply in certain jurisdictions. However they should not be identified as infringing competition law.

However where the SOE is not independent from the government, e.g. is part of a ministry, the analysis might differ. In particular, awarding *itself* cost advantages could mean that competition agencies should instead use the level of its costs absent the cost advantages that it awarded itself, as the relevant cost benchmark.

Under that analysis its prices would be below cost, and it would be sacrificing revenue in the sense that the cost advantages that the state awarded itself were costly. Identifying the state as a whole as the economic entity would then lead to finding an infringement where there would not have been one if the entity was differently defined.

55. Therefore, although the same tools and analyses may work for both SOEs and POEs, when assessing the effects of SOEs' conduct agencies need to be aware of all of the elements that may differentiate SOEs, and use them within the context of an effect-based analysis. In this light, it is important that the recoupment prong of a predatory pricing test is considered as potentially occurring simultaneously.

56. The Deutsche Post case represents the first time the European Commission ("EC") applied a predatory pricing test in a traditional public service sector, taking into consideration the SOE's public service obligations, the related costs, and the characteristics of the network industry.

Box 6. Deutsche Post

The EC's investigation, which led to a prohibition decision in 2001, started following a complaint by United Parcel Service⁵³ ("UPS") alleging that Deutsche Post⁵⁴ engaged in cross-subsidisation, using the revenues from its profitable letter-mail monopoly to finance below-cost pricing in business parcel services, where it faced competition.

In its decision the EC clarified that Deutsche Post qualified as an undertaking⁵⁵, regardless of its ownership, as it offered services for remuneration in the market⁵⁶. However, for the assessment of anti-competitive behaviour the Commission had to take into account the fact that Deutsche Post was an SOE entrusted with a public service obligation and thus had to bear the costs of providing a universal service.

In particular, in analysing Deutsche Post's pricing strategy the EC distinguished the common fixed costs for network capacity, which reflect the SOE's public service mission of maintaining an infrastructure and a capacity reserve for parcel delivery, from the service-specific incremental costs⁵⁷, linked to network usage.

The EC established as a test for predatory pricing that "any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector"⁵⁸.

Following this line of analysis, the EC concluded that Deutsche Post pricing strategy in the period 1990-1995 was not in the entity's own economic interest, as it did not cover the incremental costs of providing the service. This did not imply that Deutsche Post should have been seeking to earn a commercial margin, but simply that, like any other business, setting loss-making prices was irrational unless the loss was expected to be compensated through higher prices elsewhere or at a later date⁵⁹. The EC did not explicitly consider whether Deutsche Post was likely to be able to recoup the losses that it identified.

Indeed, every sale in the mail-order parcel services "represented a loss which comprises all the capacity-maintenance costs and at least part of the additional costs of providing the service"⁶⁰. This anti-competitive conduct restricted the sales of competitors and was expected to lead ultimately to higher prices for consumers. The decision established that in the EU pricing below LRAIC is inappropriate for both POEs and SOEs and that Deutsche Post infringed Art. 102 TFEU, however no fine was imposed.

This, due to the fact that the relevant measure of costs used to identify predation, which in this case the SOE should have taken into account when calculating the pricing floor for the purpose of predatory pricing, was not yet sufficiently developed and had not been previously clarified by the Commission.

Raising rivals costs

57. Secondly, competition authorities' investigations often concern anti-competitive conduct by an SOE that is thought to raise rivals' costs. In these cases, the theory of harm is that the SOE is looking to force competitors to increase their prices or decrease their output, without necessarily requiring market exit.

58. This would allow the SOE to benefit from higher demand for its products and services and thus expand its output and revenues. Compared to predatory pricing, raising rivals' costs can be relatively less expensive for a dominant firm, and can be done through a variety of practices depending on the market, capacity, structure and regulations in place.

59. SOEs are often in a position where they are capable of raising rival's costs and increasing barriers to entry. For example, where SOEs have a history as a regulated monopolist in a market which has been subsequently opened up to competition, they may find themselves in possession of infrastructure facilities that they did not invest in developing (or at least in which they did not take any risk when investing and developing them since the market was not liberalised at the time).

60. Where these are essential, such facilities may therefore qualify as essential facilities since rivals did not have the same opportunity to make the investment. This satisfies the second prong of the test for an essential facility. SOEs can therefore be vulnerable to allegations that they have refused to grant access to an essential facility. Similarly there may be concerns that they use other strategies such as vertical margin squeeze, or excessive purchasing of an essential input to increase its price.

61. Competition enforcement with respect to SOEs is particularly important in sectors undergoing a liberalisation process, as shown by the Italian Competition Authority's ("ICA") investigation into Ferrovie dello Stato's alleged abusive practices.

Box 7. NTV

In May 2013 the Italian Competition Authority initiated an investigation⁶¹ over a breach of Art. 102 TFEU in the railway sector following complaints by Nuovo Trasporto Viaggiatori S.p.A. (“NTV”) which entered the market for high-speed passenger rail transport services in 2012, sole competitor of the Ferrovie dello Stato (FS), state-owned group, and its subsidiaries.

NTV claimed discriminatory practices by FS, related to advertising spaces and the positioning of its desks and ticket machines within train stations, as well as delays in carrying out infrastructural works in stations where it operates and a margin squeeze abuse. In this context NTV put forward the issue of possible cross-subsidisation by Trenitalia, suggesting to evaluate the use of state resources from the public service obligation regime in the traditional railway services market to support its activities in the high speed one⁶².

The ICA decided not to impose a fine but to conclude the proceedings with commitments⁶³, which were considered adequate to remove unlawful obstacles for the new entrant and preserving the liberalisation process. However, in 2015, the ICA then started proceedings against RFI⁶⁴ for non-compliance with the measures agreed upon in the commitments decision.

62. Anti-competitive conduct can therefore be particularly effective during an entrant’s start-up phase, heavily increasing costs to the benefit of the incumbent. This could be potentially damaging for a successful liberalisation of a sector in the long term, to the detriment of the functioning of the market and consumers.

63. The concepts of dominant position and abuse, as well as the tests normally used to evaluate anti-competitive behaviour of private entities may not always capture an SOE’s ability to harm actual or potential competition⁶⁵. Thus, in order to achieve effective and neutral competition enforcement, competition authorities need to take this into account throughout their investigations and fully recognise the distinctive characteristics of the state-owned entities involved in the infringement.

64. Finally, as the many infringements concern key sectors, like utilities and transports, and often sectors undergoing liberalisation, in some instances competition agencies used a more cautious approach, which has resulted in closing investigations with commitment decisions and avoiding the imposition of fines. This choice can be influenced by public service obligations’ considerations as well as by political issues or difficulties in undertaking certain cost and pricing analyses for SOEs.

3.3.4. Challenges related to SOEs involved in mergers

65. Merger control can also be affected by the involvement of SOEs. Establishing the competitive impact of a transaction requires an assessment of the change in incentives brought about by the merger. Analysing incentives requires an understanding of the decision-making entities whose incentives will be changed, based on the jurisdiction’s specific legal framework. In cases involving SOEs this can create multiple challenges for competition agencies.

66. A first issue concerns the notion of group. When a concentration takes place between two SOEs it is fundamental to establish if they can be considered two distinct economic units or two parties that are part of the same group, which would form a single economic unit for competition law purposes.

67. Defining the limits of a corporate group in the case of SOEs can be complex, as they are ultimately owned by the State but the extent of the State's involvement in the SOE's decision-making is not always clear-cut. In practice, the key determinant should be whether the state can exercise control over the SOE's decision making power and if it can impose a common conduct on the SOEs⁶⁶, all or part of them, under its control.⁶⁷

68. These aspects will then also influence the calculation of turnover, which can be fundamental in order to establish jurisdiction on the case and notification requirements. Indeed, in many jurisdictions notification thresholds are based on turnover. A wrong calculation of the latter, caused by an incorrect definition of the SOE's corporate group, can lead to unnecessary review of transactions which did not require notification⁶⁸ in the first place or the risk of under enforcement with respect to mergers that were not notified.

69. Establishing which other entities owned by the State should be considered as part of the same group can be central to the substantive assessment of the transaction. This is because it can help to identify the market power of a firm, the competitors to the merging firms, and indeed whether two merging SOEs are already a single economic unit (see for example the distinction made in the UK between different types of state-owned hospitals).⁶⁹

70. For example Cheng (2015) notes that, "the issue is the extent to which SOEs under the same state should be deemed to be a single economic unit", as "whether the single economic unit doctrine applies affects the size and the market power of the merging parties at issue. A merger may raise no competitive concerns if we only simply focus on the SOE at issue involved in the merger. However, competitive harm may arise if we treat the merger as one involving all the SOEs owned by that particular state"⁷⁰.

71. These considerations are particularly relevant when SOEs are involved in transactions abroad, as governance systems might vary and their functioning may be difficult to grasp correctly. For example, in many countries a central state authority is responsible for managing the state's interest in its different shareholdings. This aspect can have a significant impact on how jurisdictions assess mergers, and the EC experience with Chinese SOEs' transactions provides a good example of how to address it.

Box 8. EC experience

Over the years the EC has developed considerable experience with mergers involving foreign SOEs. Its enforcement practice can be seen to have evolved and adapted over time, in order to address some of the challenges it has encountered.

Starting from 2011 the EC assessed various transactions involving Chinese SOEs, under the EU Merger Regulation. In doing so, the Commission considered the concepts and analyses previously applied to European SOEs⁷¹ and adapted them to the specificities of the governance of Chinese SOEs.

In particular, in cases such as Petrochina/Ineos/JV⁷², DSM/Sinochem/JV⁷³, China National Bluestar/Elkem⁷⁴, China National Agrochemical Corporation/Koor Industries/Makhteshim Agan Industries⁷⁵, and CNRC/Pirelli⁷⁶, the EC looked into the possibility that the regional or central SASAC⁷⁷ would exercise decisive influence on the parties and thus constitute a single economic unit with the party involved in the transaction and all, or part of, the other SOEs under its control.

The degree of independence from the Central SASAC and from the other SOEs was important not only for jurisdictional purposes, but also for the competitive assessment of the transaction.

Although the level of detail of the assessment varied slightly in the different cases mentioned above, often including the analysis of different possible scenarios, in all of them the Commission adopted a flexible approach, leaving open the question of independence and the exact scope of the SOE's group.

This was possible due to the fact that the parties already met the turnover thresholds on their own and the Commission did not identify any substantive competition issues linked to the transaction, under any of the several scenarios considered.

Moreover, with this approach the Commission avoided setting unnecessary precedents for the definition of the SOEs' economic unit, allowing a margin of flexibility for future cases.

As underlined in Fountoukakos and Puech-Baron (2012)⁷⁸, "if the Commission had found in one instance that the Chinese SOE at hand belonged or did not belong to a wider economic unit involving all companies active in the same markets and reporting to the Central SASAC, it would have been very difficult for it to reach a different conclusion in a later decision". Thus, in these first cases the EC focused on highlighting the different concerns to be aware of and to assess case by case, providing a reference for future investigations without constraining the possible outcomes⁷⁹.

72. Finally, the assessment of certain mergers can have a relevant political dimension. The State can indeed be involved in mergers as a party to the transaction, but also as a third external party influencing the transaction, as it is the case for mergers with a national security aspect or that bring about strategic considerations, often mergers and acquisitions by foreign entities.

73. In these circumstances competition agencies' enforcement can be affected by external factors and the outcome of the transaction can become the result of broader considerations, often also political, rather than of antitrust considerations only. Examples can be found, amongst many, in the United States, with the CNOOX/Unocal Corp. case⁸⁰, or in Europe with the Fincantieri/STX deal⁸¹⁸².

3.3.5. Challenges related to SOEs involved in collusive agreements

74. SOEs have been found to engage in collusive behaviour and anti-competitive agreements, both with other SOEs and with private entities. The rationale might be to facilitating the achievement of public policy goals, protect an incumbent position in newly liberalised markets, or more broadly to avoid competition and obtaining the economic or non-economic advantages, in terms of profit, or an easier life.

75. As with other types of anti-competitive conduct, competition agencies might encounter several challenges related to the domestic SOEs' involvement in collusive agreements, which can undermine the effectiveness of their enforcement. In addition there may also be some specific challenges in enforcing against cartels.

76. This becomes especially relevant when the collusive agreement takes the form of hard core cartel, which is one of the infringements with the most serious effects. Given the potential severity of the infringement, it is fundamental for competition agencies to be able to open proceedings and effectively assess these cases, also and in particular when SOEs are involved.

77. Once again, as in the case of mergers, the definition of the SOE's economic unit is fundamental for the assessment of anti-competitive agreements. Determining if the parties are independent entities, coordinating their behaviour on the market, or part of the same group coordinating its internal organisation is indeed central to whether a given agreement constitutes an anti-competitive agreement or not.

78. Establishing which companies are part of the SOE's economic unit is also important in order to determine the turnover of reference when calculating appropriate fines, since in the majority of jurisdictions these are established starting from a percentage of turnover. Moreover, this is also relevant in order to identify which entities can be considered jointly liable, depending on the competition law system in place

79. In addition, discovery of cartels involving SOEs may prove more challenging if leniency applicants are less forthcoming (due to perceived ties between the competition authority and the SOE). Dawn raids on SOEs may also be subject to greater scrutiny, either internally or by other arms of government.

80. Other challenges for competition agencies can emerge when parties invoke state action defence, the foreign act of state doctrine⁸³, or their actions are covered by competition law exemptions, as mentioned in Section 2.

81. One interesting example is provided by the ESSA⁸⁴/Mitsubishi case⁸⁵, which revolves around the act of state doctrine in the US. This case and its conclusions cannot easily be generalised to other circumstances, as the treatment of ESSA and the application of the doctrine are very much case-specific and linked to ESSA's role as producer and exporter of Mexican natural, this illustrates a case in which a foreign SOE relied on a defence based on the sovereignty of the state which owns it.

Box 9. ESSA/Mitsubishi

In 2016, Sea Breeze Salt⁸⁶ and Innofood⁸⁷ filed a complaint against Mitsubishi and ESSA in the Central District of California, for violation of Section 1 of the Sherman Act, amongst other violations. In particular, ESSA is a major producer and exporter of solar sea salt products⁸⁸ and allegedly entered into exclusive distribution agreements with Mitsubishi, refusing to honor standing distribution contracts with Innofood, which in turn was precluded from fulfilling its contractual obligations with Sea Breeze.

In line with the argument of Mitsubishi's motion, the Court decided to dismiss the action based on the act of state doctrine, which precludes the US courts from exercising their authority on sovereign acts of foreign governments.

The court considered that since the state of Mexico was ESSA's majority owner, ESSA itself could be regarded as a foreign state, and thus its actions and alleged anti-competitive agreements would be covered by the doctrine.

Moreover, the Court opposed the plaintiffs' argument that since ESSA was operating on the market as a commercial entity the act of state doctrine should not apply. Indeed, it found that the doctrine does not envisage any exception of this kind.

Finally, the Court took the view that the doctrine could not only cover ESSA but also Mitsubishi, since its conduct was strongly intertwined with ESSA's.

This decision was upheld by the US Court of Appeals for the Ninth Circuit, which confirmed that the behaviour at issue was exempted from US antitrust laws. As explained by Judge Wardlaw, "because this antitrust action is fundamentally a challenge to the United Mexican States' determination about the exploitation of its own natural resources, made by a corporation owned and controlled by the Mexican government, it is barred by the act of state doctrine"⁸⁹.

82. Finally, challenges may arise when SOEs are involved in export cartels. This specific type of cartels is often explicitly exempted from domestic competition law, implicitly or explicitly⁹⁰. Indeed, the competition authority of the country affected by the cartel might not have the power, in terms of laws, capabilities and resources, to enforce competition law against it, but also the national competition authority may not have the strength and advocacy capabilities to prevent the creation of export cartels.

83. In order to correctly function as a punishment and create an effective deterrent effect, the system for determining and imposing sanctions may need to take into consideration the specific nature of SOEs. For example, neither punishment nor deterrence may be achieved if the cost of a monetary fine imposed on a state entity can be simply transferred to tax payers. A focus on sanctioning individuals may therefore be more effective.

84. Thus, for competition authorities obtaining the optimal level of enforcement against SOEs also entails finding the most effective types of sanctions for such entities, which could differ from those imposed on POEs.

4. Are agencies under (or over) enforcing against domestic SOEs?

85. In the last decade competition agencies have been increasingly active in starting proceedings against domestic SOEs, including agencies in emerging countries, and in imposing sanctions where they find liability. Given the presence of SOEs in key sectors of the economy, often undergoing liberalisation, and the number of SOEs engaging in commercial economic activities competing with privately owned entities, authorities have sought to be effective in enforcing competition law against domestic SOEs.

86. In many jurisdictions competition agencies have been consistently sending signals to the markets that SOEs' anti-competitive behaviour will be prosecuted, as is the case for POEs. Agencies' practice has evolved over time, leading to a number of new and potentially successful cases in both developed and emerging countries.

Box 10. Case examples

Competition authorities worldwide have also been increasingly investigating SOEs.

India

The Competition Commission of India ("CCI") imposed its first major fine on an SOE in December 2013, when it charged the domestic SOE Coal India Ltd. for abuse of dominance⁹¹ in the market for production and supply of non-coking coal⁹². Coal India, who allegedly imposed discriminatory conditions in its fuel supply agreements, appealed to the Competition Appellate Tribunal (COMPAT) and obtained a reduced penalty in 2017, after COMPAT had set aside the CCI's first ruling⁹³.

Ukraine

In 2017 Boryspil International Airport was fined by the Ukraine's Antimonopoly Committee ("AMC") for abuse of dominance on the airport's specialised services market⁹⁴. In this case, Boryspil enjoyed a natural monopoly on the market for specialised airport services and was also operating in aircraft ground handling services, which could be supplied by other operators as well. According to the AMC, Boryspil abused its monopoly position by refusing to approve applications by Interavia LLC for certificates of conformity for airport operations, effectively foreclosing access to the market of aircraft ground handling services. Moreover, it charged excess fees for use of the airport infrastructure, required by other providers for the provision of aircraft ground handling services. In June 2018 the Supreme Court confirmed the Antimonopoly Committee's decision.

South Africa

In the early 2000s, the South Africa Competition Commission started to open proceedings against Telkom^{95,96} after a number of complaints regarding Telkom's conduct over the years. In particular, the South African Value Added Network Services (VANS) Association (SAVA) and other 20 internet service providers put forward a first complaint in 2002, after which the Commission referred the case to the Tribunal in 2004, having found that Telkom had refused to supply essential access facilities to VANS providers, induced their customers not to deal with them and charged excessive prices for access services.

However, Telkom challenged this referral in the High Court, arguing that ICASA and not the Tribunal had jurisdiction to investigate the complaints. The Supreme Court of appeal rejected this argument establishing the competition authority's jurisdiction on the case. Therefore, the case was referred back to the Tribunal⁹⁷, which imposed an administrative penalty in 2012⁹⁸ having found that Telkom had unlawfully leveraged its upstream monopoly position in the facilities market, to advantage its subsidiary in the competitive VANS market.

Brazil

In 2011 the Administrative Council for Economic Defence ("CADE") opened administrative proceedings⁹⁹ to investigate contracts between Banco do Brazil and several public institutions. These contracts included clauses imposing territorial and negotiation exclusivity arrangements for the provision of payroll loans to civil servants.

Banco do Brazil argued that CADE did not have jurisdiction to analyse the case, as it was the Central Bank of Brazil's responsibility to address issues in the bank sector, including competition issues. However, the case was closed with a settlement agreement establishing that all exclusivity arrangements (current and future ones) with public institutions had to be removed¹⁰⁰.

87. One additional example is the GE China/Shenhua merger. This investigation, amongst others in the following years, has been considered particularly significant in that it shows the intention of China, which does not have a long-established experience with competition policy and enforcement, to actively enforce its Anti-Monopoly Law against domestic SOEs, and hence to contribute to the attainment of a level playing field.

Box 11. GE China/Shenhua

In recent years China, through its Ministry of Commerce (MOFCOM) tasked with merger control, has been actively scrutinising domestic SOEs' transactions. Indeed, in 2011 MOFCOM published its first conditional merger clearance decision involving a domestic SOE, since the implementation of the Anti-Monopoly Law ("AML") in August 2008.

The case related to a proposed joint venture between General Electric China ("GE China") and China Shenhua Coal to Liquid and Chemical ("Shenhua")¹⁰¹, aimed at licensing coal-water slurry gasification technology for industrial projects in China.

MOFCOM found that the relevant market¹⁰² was highly concentrated, with significant barriers to entry and a considerable risk of input foreclosure, and thus that the transaction could result in the elimination or restriction of competition. In order to solve competition concerns MOFCOM decided to clear the joint venture imposing behavioural remedies on the parties, after an extended Phase II review.

88. Given the challenges set out in section 3, a risk of under-enforcement is always present. Nevertheless, competition agencies seem to be aware of the risks brought about by the nature of domestic SOEs and how to take these factors into account during proceedings.

89. For example, in several cases the Italian Competition Authority (“ICA”) found that SOEs had exploited the lack of independence of the regulator and/or the uncertainty of the legal framework in sectors which were being liberalised in order to justify their abusive conduct¹⁰³. This was the case in the Ferrovie dello Stato/Arenaways investigation, where the appropriate representation of the SOE’s costs and the role of the Regulator were central for the outcome of the case.

Box 12. Ferrovie dello Stato

In July 2012 the Italian Competition Authority imposed a EUR 300,000 fine on Ferrovie dello Stato (FS), state-owned group, and its subsidiaries¹⁰⁴ for abuse of dominance in the national railway infrastructure access market. It found that FS’s anti-competitive conduct sought to prevent Arenaways, the complainant, from offering its services on an important line, thus excluding it from the market.

Following a request, RFI can grant train paths to the extent that they do not endanger the economic equilibrium of the public service contracts¹⁰⁵ (“PSC”). However, in this case RFI delayed processing Arenaways’ request and waited over 18 months to ask the Regulator (Ministry for Transport) to assess the impact of the requested train paths on the economic equilibrium of the PSCs. As a consequence of such evaluation, based on the cost accounting provided by FS, Arenaways was allowed to provide its services only in a very limited way.

In its investigation the ICA found that FS gave a misleading representation of its costs, in order to impact the outcome of the evaluation and exclude the potential competitor, thereby maintaining its market power. It held the group liable for this practice in addition to the dilatory conduct¹⁰⁶.

Nevertheless, in 2014 the decision was overturned in appeal, as the TAR del Lazio ruled that the behaviour characterised as dilatory strategy, allegedly aimed at excluding a rival, was in reality legitimate, and aimed at solving objective technical difficulties. Moreover, it also stated that the ICA should not have questioned the outcome of the economic equilibrium evaluation, as that was exclusively the Regulator’s competence¹⁰⁷.

90. In this case, although the ICA’s findings showed that the overall strategy by FS was aimed at limiting competition in the liberalised domestic passenger transport services, the economic equilibrium analysis¹⁰⁸, required by FS’ status¹⁰⁹, and based exclusively on Trenitalia’s representation of its costs, led to an appeal decision in favour of the incumbent service operator, thus denying the by the new entrant’s¹¹⁰ request to access the tracks.

91. Having in place competition laws that cover both POEs and SOEs, and regularly starting proceedings when SOEs are involved in anti-competitive behaviour, does not always guarantee effective enforcement against domestic SOEs.

92. Case examples show that when the infringement involves an SOE added difficulties and complexities can come into play, with respect to POEs cases. Although these complications can affect the outcome of investigations, if not appropriately addressed, the extent of the possible impact on decisions remains unclear.

93. Moreover, as underlined in Section 3, the inappropriate use of state action defences¹¹¹ can lead to under-enforcement in practice. Competition agencies need to be able to foresee this risk and rigorously evaluate, case-by-case, if such a defence should be rejected or not.

94. In relation to case resolutions, commitments are often used in proceedings involving SOEs. This could often be the right approach, for example in markets undergoing liberalisation, but authorities need to routinely ask themselves if they would have used commitments if the party were privately owned, and if not, why that is.

95. Linked to this, when financial sanctions are considered appropriate, agencies have to take extra care to correctly define the relevant turnover for the SOE and its economic unit, as an error in this sense can lead to disproportionately low or high fines. However, this can be complex as seen in the case examples.

96. The direct intervention of national governments in competition authorities' investigations does not appear to be the main obstacle for cases involving domestic SOEs. However, the courts need to understand why consumers require rigorous antitrust enforcement against SOEs, as it is their decisions that ultimately affect the outcome of the proceedings¹¹².

97. While it is difficult to assess if a court's decision is biased due to the ownership status of the parties, it is fundamental that the framework in which the courts operate emphasise the need for the behaviour of SOEs to be assessed against the same standard as POEs.

98. To conclude, the laws in place and the agencies' practice of consistently starting proceedings against SOEs indicate that in the majority of jurisdictions there is no difference, from an enforcement point of view, between privately owned and state owned entities. However a risk of under-enforcement remains due to the different challenges identified above¹¹³, and so competition agencies need to remain vigilant.

5. Are there additional obstacles to enforcement against foreign SOEs?

99. When SOEs engage in anti-competitive conduct in foreign or international markets challenges for enforcement can be substantial.

100. Firstly, the influence of governments, which generally do not seem to directly affect enforcement against domestic SOEs, can have a different role in this case. When investigations involve foreign SOEs, the market in which the effect of the anti-competitive conduct occurs, and the nationality of the SOE's ownership do not match.

Box 13. The EU Gazprom investigation

A more recent EC case, the **Gazprom case**¹¹⁴, relates to a foreign SOE's anti-competitive behaviour. Gazprom is a Russian-based energy SOE¹¹⁵, dominant in 8¹¹⁶ EU national markets for the upstream wholesale supply of natural gas¹¹⁷ and key supplier of energy for different EU countries. Moreover, Gazprom's position of commercial power is reinforced and complemented by its political power¹¹⁸, which might be expected to increase the challenges if a smaller competition authority had started proceedings against it.

The Gazprom antitrust investigation can be seen in the context of a much broader EU initiative aimed at achieving a fully functioning, competitive, single market for energy¹¹⁹. However, the importance of this specific investigation stems from a variety of factors.

In dealing with this case the Commission had to address multiple antitrust issues, in the context of the creation of a liberalised single EU gas market. Further, the investigation brought with it the possibility of dismantling Gazprom's system of long-term supply contracts with vertically integrated national energy incumbents and increase competition in the gas market.

Following a number of ex-officio investigative steps in EU gas markets, the EC opened proceedings against Gazprom in August 2012, with the aim of adopting a decision.

In response to the investigation the Russian Federation government adopted an executive order¹²⁰ with the effect of obstructing foreign investigations of Russian strategic enterprises¹²¹, and in particular of prohibiting Gazprom from replying to information requests issued by the Commission¹²².

The investigation focused on three main conducts carried out by Gazprom, namely market segmentation and restrictions on the reselling of gas, territorial restrictions in the form of contractual export bans or destination clauses¹²³, and excessive pricing. In addition, in its preliminary assessment the Commission found that Gazprom leveraged its dominant position in Bulgaria by making gas supplies conditional on infrastructure commitments by the Bulgarian gas incumbent, in contravention of Art. 102 TFEU.

The EC adopted a Statement of Objections in April 2015, setting out its concerns in relation to the three potentially abusive practices on Central and Eastern European gas supply markets. To meet such concerns, in March 2018 Gazprom offered commitments¹²⁴ under Article 9(1) of Regulation (EC) no. 1/2003, which were considered sufficient and made binding by the Commission with the Decision of May 2018. No fine was issued.

Given the structural supply security issues and geostrategic questions linked to this case, as well as the level of public attention received the day of the decision the European Commissioner for Competition Ms. Vestager declared that the decision was not about the "flag of the company" but about "achieving the outcome that best serves European consumers and businesses".

101. Secondly, problems with enforcement can also be caused by the fact that competition agencies, especially but not exclusively in emerging countries, need to learn how to adjust their practices to account for the characteristics of foreign SOEs. As a matter of fact, although their practice related to domestic SOEs' conduct might be already developed, they may not yet have the strength, powers and resources to effectively enforce against foreign SOEs, especially in complex or particularly sensitive cases, with an appreciable involvement of foreign governments.

102. Thirdly, difficulties can relate to the application of tests and analyses based on the availability and accuracy of information such as costs, turnover and definition of an SOE's economic unit. In case of foreign SOEs, these difficulties can be enhanced by the need to interpret foreign legislation and to collect evidence from foreign governments.

103. Standard of transparency and the separation of accounting for market and non-market activities may therefore be helpful for competition agencies in those jurisdictions in which foreign SOEs compete.¹²⁵ For example it might help them to understand more quickly whether there is any merit in complaints of anti-competitive conduct that are levelled against foreign SOEs.

104. The EU practice in dealing with foreign SOE mergers (see box 3.8 and 5.2 below) provides a good example of the need to adapt enforcement to the specificities of the parties over time, without setting a strict precedent. In particular, the Commission's practice shows that it is important not to take for granted that SOEs belonging to the same state are necessarily part of the same economic unit.

105. For example, jumping to this conclusion could inflate turnover and lead to over-enforcement in the case of mergers, or to under-enforcement in the case of anti-competitive agreements, if the parties are believed to be part of the same group and thus not prosecuted. Moreover, transactions between SOEs could be wrongly seen as internal restructuring when they are actually not entities part of the same group, or vice versa, again leading to over or under-enforcement.¹²⁶

Box 14. EDF/CGN/NNB Group of Companies

In EDF/CGN/NNB Group of Companies case¹²⁷, the EC for the first time adopted a public decision providing a specific answer to the question of SOEs' independence from other state-owned entities.

In this case, that relates to the acquisition of joint control by EDF¹²⁸ and CGN¹²⁹ over NNB Companies¹³⁰, the exact scope of CGN's economic unit had to be defined in order to establish the EC's jurisdiction on the transaction, as its turnover considered independently from the Central SASAC did not meet the EUMR thresholds.

Therefore, in order to determine the relevant turnover and define the companies to include in its assessment, the EC needed to establish to what extent CGN was controlled by Central SASAC and thus if all other SOEs governed by it should be considered as part of the same single economic entity as CGN.

This entailed analysing Chinese legislation related to SOEs' governance and Central SASAC's prerogatives, the specificities of the energy and nuclear industries in China, the SOEs active in the market, their relationship with CGN and the relation between CGN and the Central SASAC.

The assessment of these elements led to the conclusion that CGN and the other Chinese SOEs active in the energy market did not have independent decision-making powers. The Central SASAC was found able not only to exercise a decisive influence on SOEs but also to impose or facilitate coordination between them. Therefore, the turnover considered for the assessment of the transaction was that of all energy market SOEs controlled by Central SASAC.

In a 2011 speech¹³¹, the European Commissioner for Competition Almunia stated, with regard to Chinese SOEs, that looking carefully "at whether, through the State, companies in the same sector act as one or different entities" is not done because they are foreign or there is a prejudice against State control, but "because it is a relevant aspect for assessing if competition will be significantly reduced or not".

The EC's practice in relation to Chinese SOEs clearly illustrates the way to apply traditional concepts to complex entities, with particular governance systems and operating under foreign legislation. It can therefore be used as a reference for competition agencies wishing to assess transactions involving foreign or domestic SOEs for the first time. Though they will need to look case by case, to the specificities of the legislation and governance system in place, in case of foreign SOE.

106. Fourthly, the existence of state action defences can lead to under-enforcement if foreign SOEs and foreign states are able to use it to become effectively exempt from competition law in the markets in which they compete.

107. The conditions under which a jurisdiction allows such a defence to be invoked, depend on the legislative framework in place in the foreign SOE's country and the obligations that it places on the SOE. As previously mentioned, this does not necessarily coincide with the framework in place for domestic SOEs based in the jurisdiction where the effect of the conduct takes place.

108. The Vitamin C case exemplifies this issue, as the Chinese law mandating the conduct differed from the framework that applied to domestic SOEs in the United States. Furthermore the Chinese government's interpretation of that framework differed from that of the US competition Authorities.

109. In this kind of situation there may be under-enforcement if antitrust law allows for a defence based on the foreign states' interpretation of the obligations that its legislative framework places on its SOE, since this will prevent the anti-competitive behaviour from being prosecuted. This could for example be the case for export cartels, which can also lead to under-enforcement against foreign SOEs (as well as foreign POEs).

110. Fifth, in sharp contrast, there may also be pressure to take cases against foreign SOEs. While these might in some cases be valid, they might in others be a way to raise non-tariff barriers to trade. This might for example, lead to a risk of over-enforcement against foreign SOEs if some states are tempted to use competition law to protect a national champion or to pursue strategic or industrial-policy goals.

111. Overall, national antitrust rules apply equally to all participants in a relevant market and hence include foreign SOEs and POEs that sell within those domestic markets. Therefore, a neutrally enforced competition law would subject the actions of those entities to the same scrutiny as domestic SOEs and POEs.

112. While merger control regularly assess transactions involving foreign SOEs, we have only in recent years started to see a very small number of examples of competition law being enforced against foreign SOEs. In part this may reflect the smaller role played by foreign SOEs in domestic markets in the past. In any case an increase in the willingness of agencies to consider the merits of enforcing competition law against foreign SOEs is to be welcomed, and is important for the functioning of markets.

6. Conclusion

113. In order to protect consumers, competition agencies' enforcement needs to be neutral, with respect to the parties' ownership and nationality. While there is a risk that SOEs' specific characteristics can lead to over (or under) enforcement, an effects-based analytical framework is sufficiently flexible to accommodate these differences, provided agencies are empowered to follow it through.

114. Cases show that the factors that create challenges for competition authorities are diverse and often complex to address. Although competition agencies are aware of the risks that can affect their investigations and are increasingly taking cases against foreign SOEs, these elements have to be constantly taken into account and assessed on a case-by-case basis, establishing over time a signal to all SOEs on the market, that builds trust amongst POEs and provides legal certainty for both.

115. Moreover, limiting the exemptions, derogations, and non-efficiency based defences that are available to SOEs, is essential to prevent under-enforcement. Where such defences exist, their scope should be defined as narrow as possible and the suitability of their use regularly assessed.

116. What emerges from past investigations is that there are risks of under enforcement that competition agencies need to be remain vigilant towards, and these risks even greater when it comes to foreign SOEs.

117. With increasing globalisation, SOEs are increasingly operating in foreign and international markets. Dealing with anti-competitive behaviour by foreign SOEs, and the additional difficulties that can bring in terms of the role of foreign governments and the need to understand foreign government's legislation, will therefore form a growing challenge for competition agencies in the years ahead.

118. While maintaining a neutral enforcement stance is important, competition agencies should not ignore that SOEs are intrinsically different from POEs, and so they should not aim at finding one-size-fits-all solutions or tests. Instead, knowing where the obstacles to neutral enforcement come from, they should develop an enforcement practice accordingly, with full awareness of the risks associated with these cases and the definite goal of avoiding under- (or over-) enforcement.

Endnotes

- ¹ With respect to nationality and ownership of the firm.
- ² A first OECD background paper in 2009 (OECD (2009), “State Owned Enterprises and the Principle of Competitive Neutrality”) discussed the main competition issues arising from the presence of SOEs in competitive markets, and provided an overview of some policy solutions other than ex post antitrust enforcement. Then, in 2015 a note on Competition Policy and Competitive Neutrality (OECD (2015), “Competition Policy and Competitive Neutrality”) laid down the fundamental principles and the role and limits of competition law in levelling the playing field.
- ³ According to OECD (2017), *The Size and Sectoral Distribution of State-Owned Enterprises*, OECD Publishing, Paris. , 92% of SOEs in the sample, by value, are fully incorporated (i.e. incorporated according to company law) state controlled companies.
- ⁴ Moreover, from a competition perspective control is not always uniformly defined by different legislations and this can lead to complications in the assessment of competition cases involving foreign SOEs. Section 3 will further deal with this aspect.
- ⁵ State-influenced entities, i.e. companies where the state has minority shares but a very strong influence on the company’s decisions and activities, could also be included in the notion of SOE.
- ⁶ OECD (2017), *The Size and Sectoral Distribution of State-Owned Enterprises*, OECD Publishing, Paris.
- ⁷ Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Mexico, the Netherlands, New Zealand, Norway, People’s Republic of China, Poland, Saudi Arabia, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.
- ⁸ Among OECD countries SOEs’ percentage of employment goes from 1.9% in New Zealand to 9.6% in Norway.
- ⁹ However, at the local level numbers are higher.
- ¹⁰ OECD (2018), *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices*.
- ¹¹ The OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015), defines an SOE “any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature”.
- ¹² See for example OECD (2012), *Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, Paris.
- ¹³ In particular, as noted in Fox and Healey (2013), “anticompetitive state acts that block entry and expansion on the merits and facilitate cartels are a qualitatively more serious problem in transitional and developing countries than in developed countries”, although overall all jurisdictions are affected, to different degrees. (Fox and Healey (2013), “When the state harms competition – the role for competition law”. New York University Law and Economics Working Papers. Paper 336).
- ¹⁴ See also Xu and Birch (1999), “The Economic Performance of State-owned Enterprises in Argentina an Empirical Assessment”. *Review of Industrial Organization*, Vol. 14, No. 4.
- ¹⁵ Equally they may expand their output by competing on the merits, for example and for clarity, where enterprises have an objective that differs from profit maximisation this may lead them to set low prices without having any prospect of recouping the profit it ‘sacrifices’ in order to meet its

objectives. While a competitive neutrality framework would examine whether the low price was facilitated by government support, this would not constitute anti-competitive behaviour.

¹⁶ See for example E.Y.A.TH. excessive pricing case, HCC Decision 350/V/2007 – *Thessaloniki Water Supply and Sewerage Company S.A.* . E.Y.A.TH, SOE dominant in the Thessaloniki market for water supply and sewerage services, operating for public interest purposes, made significant investments to modernise and develop its water supply and sewerage network, and subsequently increased, allegedly excessively, its fees. The authority concluded that this did not constitute an abuse of its dominant position as it was necessary for the provision of its services. See also the Canadian Wheat Board’s exclusive purchasing agreements.

¹⁷ Services of general economic interest (SGEI) are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. See http://ec.europa.eu/competition/state_aid/overview/public_services_en.html .

¹⁸ Eötvös and Haid, “No merger control for concentrations of national strategic importance”, International Law Office, 1st December 2016.

¹⁹ Though as we will discuss the tests that are used to assess the impact on consumer welfare may be different depending on the objectives of the enterprise.

²⁰ For more details see also Fox and Healey (2013), “When the State Harms Competition — The Role for Competition Law”. New York University Law and Economics Working Papers. Paper 336.

²¹ Survey answered 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, Chinese Taipei, Tunisia, Turkey, the United Kingdom, United States of America, Zambia.

²² One specific case is that of SOEs’ public service obligations, which under particular circumstances might also be used to justify an anticompetitive behaviour, if it was put in place in order to comply with the state mandate. Indeed, as mentioned before, certain policy objectives set by the state might in some cases require a restriction of competition.

²³ E.g. in the EU Art 106(2) TFEU in relation to “Undertakings entrusted with the operation of services of general economic interest”, and only if the application of EU rules on competition would obstruct “the performance, in law or in fact, of the particular tasks assigned to them”.

²⁴ Case C-198/01, *Conorzio Industrie Fiammiferi*, [2003] ECR I-8055, para. 56.

²⁵ 317 U.S. 341 (1943).

²⁶ For more details see also McCall (1977), *The State Action Exemption in Antitrust: From Parker v. Brown to Cantor v. Detroit Edison Co.*, *Duke Law Journal* 871-908.

²⁷ For more details on the state action doctrine in the EU and US see also OECD (2009), *State-Owned Enterprises and the Principle of Competitive Neutrality*.

²⁸ *China Ocean Shipping Tally Shenzhen and China United Tally (Shenzhen) case*.

²⁹ *China Ocean Shipping Tally Shenzhen and China United Tally (Shenzhen) case*.

³⁰ Chinese antitrust authority.

³¹ Decision at http://samr.saic.gov.cn/gg/201807/t20180720_275163.html (Chinese only).

³² State-owned tallying service providers in the port of Shenzhen.

³³ According to the provisions issued by the State Council and the Ministry of Transport port tally firms should introduce a competition mechanism to the market and any two tally companies in one port cannot be controlled by the same investment entity.

³⁴Second Amended Judgment and Final Decree 06-Md-1738; 05-Cv-0453.

³⁵ Members of a trade group called the China Chamber of Commerce for Import & Export of Medicines & Health Products.

³⁶ In this case, the Chinese government appeared for the first time before an American court, as *amicus curiae*.

³⁷ United States Court Of Appeals For The Second Circuit, Docket No. 13-4791-cv.

³⁸ Like international law, international comity mediates the relationship between legal systems of different nations. However, international comity is a discretionary practice, which implies respect for the laws, judicial decisions, and institutions of other jurisdictions, for reasons of courtesy.

³⁹ The solicitor general and the Antitrust Division.

⁴⁰ *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 585 U.S. (2018).

⁴¹ June 2018.

⁴² Supreme Court ruling, Justice Ginsburg.

⁴³ However, this does not appear to challenge the idea that, if the US' interpretation of Chinese law would reach the conclusion that China has laws in place requiring its SOEs to fix prices of goods being sold onto US markets, US DOJ and US customers could not challenge those, which would create a clear problem for a successful enforcement.

⁴⁴ OECD (2015), "Competition Policy and Competitive Neutrality".

⁴⁵ Lallemand-Kirche, Tixier, Piffaut (2017), "The treatment of state-owned enterprises in EU competition law: new developments and future challenges". *Journal of European Competition Law and Practice*, Vol. 8, No. 5.

⁴⁶ Country contribution papers to OECD 2015 Roundtable on Competitive Neutrality in Competition Policy.

⁴⁷ However, it is important to underline that what deters SOEs from anticompetitive behaviour might be different from what deters POEs. In some cases, alternatives to financial sanctions can indeed be a better solution for infringements involving SOEs. This aspect will be dealt with in more detail in the following sections.

⁴⁸ As suggested by Petit (2015), "Implications of Competitive Neutrality for Competition Agencies: A Process Perspective". Note for the OECD Roundtable on Competition Neutrality.

⁴⁹ Depending on the laws in place a recoupment phase can be necessary to prove predatory pricing or not.

⁵⁰ OECD (2009), "State Owned Enterprises and the Principle of Competitive Neutrality".

⁵¹ Sokol (2009), "Competition Policy and Comparative Corporate Governance of State-Owned Enterprises", *BYU L. Rev.* 1713.

⁵² OECD (2009), "State Owned Enterprises and the Principle of Competitive Neutrality".

⁵³ Privately owned American corporation.

⁵⁴ German public limited company.

⁵⁵ Within the meaning of Art. 102 TFEU.

⁵⁶ See the case *United States Postal Service v. Flamingo Industries* 540 U.S. 736 (2004) addressed in OECD (2009) for a different example of the treatment of an incumbent SOE in the postal sector.

⁵⁷The standard Long-run average incremental cost (LRAIC).

⁵⁸ EU contribution to OECD (2009).

⁵⁹ If the prices in the monopoly market were unregulated then a profit-maximising firm would have already have been setting a monopoly price and so no further price increase would have been profitable in that market. However, if prices were regulated there would be scope for the firm to argue for looser regulation.

⁶⁰ Commission decision 2001/354/EC, Case COMP/35.141 – Deutsche Post AG.

⁶¹ For more details see also Lembo (2013), “The Italian Competition Authority opens an investigation against the incumbent railway operator for breach of Art 102 TFUE (*Ferrovie dello Stato*)”, e-Competitions Bulletin May 2013, Art. N° 61757.

⁶² Autorità Garante della Concorrenza e del Mercato, Bollettino settimanale Anno XXIII - n. 22 (Italian only).

⁶³ Case A443 - Ntv/Fs/Ostacoli All'accesso Nel Mercato Dei Servizi Di Trasporto Ferroviario Passeggeri Ad Alta Velocità. Decision n. 24804.

⁶⁴ An FS' subsidiary.

⁶⁵ For example, mark-ups might no longer provide an indication of market power, and might be difficult to identify in any case if there is cross-subsidisation between market and non-market activities.

⁶⁶ As in this case the SOEs could not be considered to behave independently from each other and the merger would not change their ability or incentives to do so.

⁶⁷ In the EU this issue is explicitly addressed by the Commission Consolidated Jurisdictional Notice on the control of concentrations between undertakings. Paragraph 52 explains that “where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring. However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company”.

⁶⁸ Costly for the parties and the competition authorities.

⁶⁹ See section 5 of the CMA's guidance on NHS mergers which identifies that NHS Trusts are under common control of the state, while the more autonomous NHS Foundation Trusts are not. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/339767/Healthcare_Long_Guidance.pdf.

⁷⁰ Cheng (2015), “Competitive neutrality from an Asian perspective”, note to the OECD roundtable on competition neutrality DAF/COMP/WD(2015)49.

⁷¹ See for example Case IV/M.511 – Texaco/Norsk Hydro, Case COMP/M.5508 – SoFFin/Hypo Real Estate, Case COMP/M.5549 – EDF/Segebel.

⁷² Case No. COMP/M.6151.

⁷³ Case No. COMP/M.6113.

⁷⁴ Case No. COMP/M.6082.

⁷⁵ Case No. COMP/M.6141.

⁷⁶ Case No. COMP/M.7643.

⁷⁷ State-owned Assets Supervision and Administration Commission of the State Council, institution directly under the management of the State Council.

⁷⁸ Fountoukakos and Puech-Baron (2012), “The EU merger regulation and transactions involving states or state-owned enterprises: Applying rules designed for the EU to the People's Republic of China. Concurrences N. 1-2012, pp.44-54.

⁷⁹ A more recent case example will be addressed in the following sections.

⁸⁰ The CNOOC Case, Institute for International Economics 2012. https://piie.com/publications/chapters_preview/3942/05iie3942.pdf.

⁸¹ Press release FINCANTIERI S.p.A, 2 February 2018, <https://www.fincantieri.com/globalassets/press-releases/price-sensitive/2018/2018-02-02-fincantieri-signs-an-agreement-with-the-french-state-for-the-acquisition-of-50-of-stx-france.pdf>.

⁸² Parliamentary questions, Question for written answer E-005318-17 to the Commission, Rule 130, 28 August 2017. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2017-005318+0+DOC+XML+V0//EN>.

⁸³ In the US law system.

⁸⁴ Exportadora de Sal, owned by the Mexican government (51%) and by Mitsubishi (49%). The majority of the board members and the director general are appointed by the government.

⁸⁵ Sea Breeze Salt, Inc. et al. v. Mitsubishi Corp. et al., CV 16-2345-DMG, ECF No. 45 (Aug. 18, 2016) and Sea Breeze Salt, Inc. v. Mitsubishi Corp., No. 16-56350 (9th Cir. 2018).

⁸⁶ California corporation.

⁸⁷ Mexican corporation.

⁸⁸ Accounting for 90% of Mexico's salt exports and almost 17% of all global salt output.

⁸⁹ United States Court of Appeals for the Ninth Circuit, No. 16-56350D.C. No. 2:16-cv-02345-DMG-AGR, Opinion by Judge Wardlaw.

⁹⁰ Sokol (2008), "What Do We Really Know About Export Cartels and What is the Appropriate Solution?" 4 J. Comp. L. & Econ. 967.

⁹¹ CCI order of 9th December 2013.

⁹² CCI Press Release, 27 October 2014.

⁹³ COMPAT then upheld CCI's second decision imposing the reduced fine. See also <https://www.lexology.com/library/detail.aspx?g=16d3fd73-421f-4919-a0f1-71eeaa90c3a>.

⁹⁴ Press release can be found at <http://www.amc.gov.ua/amku/control/main/uk/publish/article/142366> (Ukrainian only).

⁹⁵ Integrated provider of telecommunications services, regulated by the Independent Communications Authority of South Africa (ICASA).

⁹⁶ Competition Commission v. Telkom SA Ltd, Case No. Case 11/CR/Feb04 and Competition Commission v Telkom SA SOC Ltd (016865) [2013] ZACT 62 (18 July 2013).

⁹⁷ Case No. 11/CR/Feb04.

⁹⁸ Competition Tribunal of South Africa, CASE No.: 11/CR/Feb04. Decision and Reasons Issued: 7 August 2012.

⁹⁹ CADE's administrative proceeding 08700.003070/2010-14.

¹⁰⁰ For more details see Brazil contribution to the OECD 2015 Roundtable On Competitive Neutrality In Competition Enforcement.

¹⁰¹ Mining and energy Chinese SOE.

¹⁰² Technology licensing for coal-water slurry gasification in China.

¹⁰³ See Provvedimento n. 23770 (A436) Arenaways – Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri, in Official Bulletin No. 30/2012 in Italian contribution to the 2015 OECD Roundtable on Competitive Neutrality in Competition Policy.

¹⁰⁴ RFI, which manages the national rail network under a legal monopoly position, and Trenitalia, main railway company in Italy with a *de facto* monopoly position in the passenger rail transport markets (regional and medium-long distance services).

¹⁰⁵ This due to a new legislation (2009/2010) aimed at striking a balance between the needs of liberalising the rail transport market and the preservation of the economic balance of the provision of subsidised services' service contracts.

¹⁰⁶ Provvedimento n. 23770 (A436) Arenaways – Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri, in Official Bulletin No. 30/2012.

¹⁰⁷ See “Ferrovie dello Stato Italiane in Successful Appeal against Italian Antitrust Authority”, Cleary Gottlieb 2014.

¹⁰⁸ Under the Regulator's competence.

¹⁰⁹ Of state-owned enterprise entrusted with the provision of subsidised services.

¹¹⁰ Italian contribution to the 2015 OECD Roundtable on Competitive Neutrality in Competition Policy.

¹¹¹ Previously addressed.

¹¹² As the Arenaways case shows.

¹¹³ For example if the outcome of an investigation involving SOEs is considerably different from what it would have been if the SOE were a POE. Although the extent of this is difficult to establish as the counterfactual situation cannot always be observed, numerous factors can lead in that direction and result in a risk of under-enforcement if they are not fully taken into account in each individual case.

¹¹⁴ Commission decision of 24.05.2018, Case AT.39816 – Upstream gas supplies in Central and Eastern Europe.

¹¹⁵ The Russian Federation Government controls over 50% of the company's shares.

¹¹⁶ Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary and Bulgaria.

¹¹⁷ Commission decision of 24.05.2018, Case AT.39816 – Upstream gas supplies in Central and Eastern Europe.

¹¹⁸ Which when exercised can impact gas flows to the EU. See for example the politically motivated cut-offs in the Central and East European states between 1991 and 2004, and cut-offs and reduced gas flows to the EU in 2006 and 2009. Riley (2012), “Commission v. Gazprom: the antitrust clash of the decade?”, CEPS Policy Brief No. 285.

¹¹⁹ See EU Third Energy Package.

¹²⁰ Executive Order of the President of the Russian Federation No 1285 of 11 September 2012 on Measures to Protect Russian Federation Interests in Russian Legal Entities' Foreign Economic Activities, (2012).

¹²¹ Martyniszyn, (2015), “On Extraterritoriality and the Gazprom Case”. 37(6) European Competition Law Review 291.

¹²² EU contribution to the 2015 OECD Roundtable on Competitive Neutrality in Competition Policy.

¹²³ The EC considered appropriate to assess these practices under Article 102 TFEU, as its preliminary assessment was that “the alleged dominant position occupied by Gazprom on the relevant markets means that Gazprom may have been in a position to impose such conditions on its gas customers”. Commission decision of 24/05/2018, Case AT.39816 – Upstream gas supplies in Central and Eastern Europe.

¹²⁴ For more details, see Commission decision of 24/05/2018, Case AT.39816 – Upstream gas supplies in Central and Eastern Europe.

¹²⁵ See OECD (2010), *Accountability and Transparency: A Guide for State Ownership, Corporate Governance Series*.

¹²⁶ See for instance, the UK CMA's recognition that each hospital trust in the country constitutes an enterprise in and of themselves, despite being ultimately owned by the state, and hence the need for merger enforcement to protect patients against a loss of competition between them.

¹²⁷ Case No. COMP/M.7850.

¹²⁸ Electricité de France S.A.

¹²⁹ China General Nuclear Power Corporation, majority owned (90%) by Central SASAC.

¹³⁰ HPC Holding, SZC Holding, BRB Holding.

¹³¹ Commission SPEECH/11/243, Joaquín Almunia, Policy Recent developments and future priorities in EU competition policy, International Competition Law Forum St. Gallen, April 8, 2011. EC press release IP/11/617, 19th May 2011.

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