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**COMPETITION LAW AND STATE-OWNED ENTERPRISES: ENFORCEMENT**

**Paper by Deborah Healey**

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More documentation related to this discussion can be found at: [oe.cd/csoes](https://oe.cd/csoes).

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*Table of contents*

**Competition Law and State-Owned Enterprises: Enforcement - Paper by Deborah Healey\* -... 3**

**1. Introduction ..... 3**

**2. Enforcement of competition laws against SOEs ..... 5**

    2.1. Abuse of dominance and related conduct ..... 5

    2.2. Cartels and other horizontal conduct ..... 8

    2.3. Mergers and other corporate restructuring ..... 9

**3. SOEs and single economic entities ..... 11**

**4. State action defences..... 12**

**5. Enforcement challenges and the practical limits of power ..... 13**

**6. Other important questions..... 14**

**7. Conclusions ..... 14**

## *Competition Law and State-Owned Enterprises: Enforcement*

**- Paper by Deborah Healey\* -**

### **1. Introduction**

1. State-owned enterprises (SOEs) are not anachronisms disappearing from markets as some may have thought a few years ago. The proportion of SOEs which find a place in the Fortune 500 grew from 9% in 2005 to 23% in 2014.<sup>1</sup> They are an important component of many domestic markets and national economies. They are an influential and growing force in international markets.

2. Historically many were monopoly operators of essential infrastructure originally funded by government. SOEs often operate in areas where other businesses depend on them, such as energy, telecommunications and transport, and they are increasingly active internationally. China, not surprisingly, has most SOEs- more than all other countries contributing to a 2017 OECD survey combined.<sup>2</sup> The Central Government there is owner or part-owner of more than 51,000 enterprises valued at more than \$US 29.2 trillion, employing more than 20.2 million people.

3. Ensuring SOEs compete on a level playing field with private companies is important to establishing and maintaining a competitive market environment and maintaining an open international trade and investment climate.<sup>3</sup>

4. In more precise terms, an SOE is a corporate entity which is recognised by national law as an enterprise, which a government owns and controls, and which engages in economic activity: that is, offering goods and services in a given market, which could in principle be offered by a private operator.<sup>4</sup> SOEs include corporations established under specific laws if they engage in economic activity. Various features- historical, economic, commercial, legal, developmental stage- influence the approach of competition laws and policies to SOEs in individual jurisdictions.

5. Governments govern for the benefit of citizens, and they also have a role as market participants by ownership of SOEs. The balance between these two roles varies within jurisdictions. But at a basic level, while the state performs the task of governing, SOEs

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<sup>1</sup> PWC, State Owned Enterprises: Catalysts for Public Value Creation? (April 2015), 1.

<sup>2</sup> OECD, The Size and Distribution of SOEs (2017).

<sup>3</sup> OECD, Guidelines on Corporate Governance of State-Owned Enterprises (2015).

<sup>4</sup> This definition is based on the more detailed definition set out in the OECD Guidelines on Corporate Governance of SOEs, *ibid*.

should generally be subject to market rules lest their activities distort the market, harm efficiency and consumers, and block the path of rivals to compete on the merits.

6. SOEs in most jurisdictions are subject to competition laws if they are engaged in commercial activity, variously described.<sup>5</sup> Activities of the state as regulator are generally distinguished from commercial activities although this is not the case in all jurisdictions.<sup>6</sup>

7. From a competition law perspective, the role of SOEs in markets has features which may be distinct from those of other market participants. Unlike other companies, SOEs may not have the objective of maximising profits but may have other objectives linked to regulation, public good, industrial policy, government reputation or other strategic purposes. They may be a manifestation of national pride; or they may just be big and receiving patronage from their government owners. If not competing in the market from a level playing field, SOEs may harm competitors and market efficiency, blocking rivals' paths to compete on the merits and damaging consumers.

8. SOEs may have regulatory roles. In that situation, SOEs may distort competition more overtly. When SOEs take a commercial approach to market participation they are in many ways similar to other market participants, but, as noted previously, they may have different objectives. They may also accrue advantages merely because of their government ownership or different policies rules or laws which apply to them. These latter advantages may be addressed by competitive neutrality policy.

9. Due to its size and the number of SOEs, and its historical organisation of SOEs based on views of provincial viability, China often has multiple strong SOE players in the same industry. This is less common in other jurisdictions but creates additional issues from a competition law perspective, such as in the determination of issues of control, the relevant degree of market power for assessment of competition law provisions, for making decisions about relevant turnover in a merger situation, and considering whether it is actually possible for an anti-competitive horizontal arrangement to take place between these SOEs.

10. It has been suggested that SOE behaviour can be as anti-competitive as that of private companies. Arguably, SOEs have the potential to be more anti-competitive, since they are likely to be more entrenched in their behaviour which is harder to shift. They may have advantages merely because of their government ownership, and there are also issues such as the sensitivity of enforcement against government in many jurisdictions, particularly given the profitability of many SOEs.

11. Despite in principle application of competition laws to SOEs, exclusions may still apply, such as those in China for SOEs in strategic sectors, although the Anti-Monopoly Law (AML) mandates that they should not impair the interests of consumers by exploitation of their controlling or exclusive or monopoly positions.<sup>7</sup> Malaysia, Singapore and Hong Kong are examples of jurisdictions which have exemptions for many government bodies and also have industry-specific laws for others. Uncertainties about the relationship between industry-specific regulation and competition law may cause confusion and fragmentation of approach to competition regulation within a jurisdiction. Finally, while

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<sup>5</sup> International Competition Network, Annual Conference, Special Project of Moroccan Conseil de la Concurrence, *State-Owned Enterprises and Competition*, Marrakesh, 23-25 April 2014, 14.

<sup>6</sup> Interestingly, the Competition Law of Vietnam 2018 (effective 1 July 2019) appears to apply in addition to public service units such as hospitals or schools.

<sup>7</sup> AML, Art. 7.

this paper does not intend to address this issue in any detail, art. 106 (2) of the TFEU provides a narrow exclusion for undertakings entrusted with the operation of services of general economic interest, both SOEs and others, to the extent that the application of the EU rules would obstruct the performance in law or fact of the particular tasks assigned to them. Many of these undertakings are SOEs and enforcement proceedings against them which rely on art. 106 (2) are numerous.

12. This paper focuses on enforcement against SOEs both local and foreign. From a political perspective, enforcement against SOEs may be contentious and raise issues between the competition regulator and the government.

13. Of more recent importance is the trend for SOEs to compete in overseas markets. This is contentious because they may use the advantages and benefits obtained through privilege in their home market to compete against companies both private companies and local SOEs in other jurisdictions. Selected SOEs may be nurtured as “national champions,” grown and protected under industrial policy, or just advantaged by a lack of competitive neutrality in their own jurisdictions. Where they compete outside their home jurisdictions against this background, there is a significant risk that they will not be competing on a level playing field against local companies, and that they may damage more efficient local competitors. This is a sensitive issue because it is likely that enforcement targeting foreign SOEs in these particular circumstances will raise issues between governments. However, if based not on protectionism or mere size but on breaches of competition law it is legitimate.

14. Given these facts, this paper focuses on whether competition regulators are taking enforcement actions against SOEs (both local and foreign); the nature of those actions; and whether they are successful. The following material examines enforcement against SOEs in the areas of abuse of dominance; cartels and other horizontal arrangements; and mergers. It takes a selective approach to the case law, seeking to illustrate interesting trends in a diverse array of jurisdictions.

## 2. Enforcement of competition laws against SOEs

15. Research indicates that enforcement against SOEs is regularly undertaken by regulators in many jurisdictions. There are too many examples to detail them all in this short paper, but a number of examples are discussed briefly.<sup>8</sup>

### 2.1. Abuse of dominance and related conduct

16. This section looks at enforcement aimed at unilateral abuse of dominance or significant market power, however it is termed in a particular jurisdiction. In 2014, respondents to an ICN Special Project on SOEs indicated that their major enforcement area for SOEs was abuse of dominance “because of their weight, their resources, their legal

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<sup>8</sup> It is interesting to note, for example, that in China both SAIC and NDRC, two of the three traditional competition law regulators, have investigated local SOEs in industries as diverse as gas, power, water, tobacco, salt, liquor, gold, telecommunications and auto. See Wendy Ng, *The Political Economy of Competition Law in China* (2018) Cambridge University Press 280-281.

status and their relationship with the State.”<sup>9</sup> This is especially true if such SOEs have monopoly or quasi-monopoly privilege or status within a particular market. The preponderance of SOEs in essential industries makes dominance a real issue. In these circumstances SOEs often seek to leverage their market power in the monopoly market to enter or control related markets. Many SOEs operate an essential infrastructure or essential facilities and they may seek to block access to upstream or downstream markets.

17. South Africa has been particularly active in pursuing SOEs. Of 21 abuse of dominance complaints referred to the Competition Tribunal between 1999 and September 2016, 13 involved former or current SOEs.<sup>10</sup> For example, the wholly-owned national airline of South Africa, SAA, has been subject to many complaints alleging abuse of dominance (as well as cartel behaviour and concerns around the possible anti-competitive effects of the assistance SAA receives from government). Abuse of dominance claims have involved concluding agreements with travel agents under which the agents received commissions on an incremental basis and instituting an exclusionary reward scheme for employees of travel agents, both of which affected competitors. Between 1999 and 2004 the Competition Tribunal found that SAA contravened the Act by this conduct, but the rewards scheme alone not offend the Act. Fines levied totalled 45m rand.<sup>11</sup> Follow-on cases were conducted by the Commission around similar types of issues and there were also a number of private suits.

18. The Italian Competition Authority took action for abuse of dominance against SNAM, the owner of the gas transport network, in markets for the transport of natural gas in the national gas pipeline network, and the primary distribution of natural gas. The Authority found that the company was not justified in refusing access to its national network of gas pipelines to actual and potential competitors and that these competitors had the right to the carriage of natural gas other than for electricity generation and their own consumption. The Authority also found that the method of calculating the charge used by SNAM allowed it to fix the price independently of effective demand for the transport of third parties' gas and was likely to led to the imposition of unjustifiably burdensome contractual conditions. The Authority imposed a fine of 9% of SNAM's revenue for the year.<sup>12</sup> Another case in Italy involved a state-owned undertaking in the national railway infrastructure access market blocking entry of a new candidate.<sup>13</sup>

19. The Competition Commission of India in 2012 charged the Ministry of Railroads with abusing its dominant position by increasing charges for various railroad services, not providing access to rail terminals, and imposing restrictions on the carriage of certain

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<sup>9</sup> Special Project of the Moroccan Conseil de la Concurrence, State –Owned Enterprises and Competition, Marrakech, 23-25 April 2014, 35. Several the examples mentioned are noted in this report.

<sup>10</sup> For specific figures and a detailed examination of complaints of abuse of dominance in relation to SOEs in South Africa, see generally Genna Robb and Pamela Mondiliwa, SOCS and Competition: Reflections on South Africa's Experiences in Telecommunications and Energy, Working Paper 2/2018 University of Johannesburg.

<sup>11</sup> Competition Tribunal (2005) Reasons and Order: The Competition Commission and South African Airways (Pty) Ltd Case no 18.CR/Mar01.

<sup>12</sup> Provvedimento n 6926 (A221) SNAM-Tariffe DI Vettoriamento, in Official Bulletin no 8/1999.

<sup>13</sup> Provvedimento n23770 (A\$#^)^ ARENAWAYS-OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI, in Official Bulletin no 30/2012.

goods. In arguments which underline the dichotomy between the dual tasks of government in this area, the Ministry argued that running the railroad was a sovereign function and not subject to the Competition Act. The High Court noted that in a welfare state many monopoly activities are operated by the state. However, it found that did not make those functions sovereign. The Court stated that aside from functions such as the administration of justice, maintenance of law and order and the repression of crime, which are among the primary and inalienable functions of a constitutional government, the state could not claim any immunity. The fact that the Government runs railways to provide quick and cheap transport for people and goods, and for strategic reasons, does not convert what amounts to carrying on of a business into an activity of the state as a sovereign body.<sup>14</sup> The conduct was thus susceptible to actions for abuse of dominance.

20. Many examples of SOE abuse of dominance centre around the delivery of mail and related services, and telecommunications services. Many of the incumbents in these industries are, or have been, SOEs for significant periods of time and the examples generally relate to new market entry into areas they have traditionally monopolised.<sup>15</sup> The cases on mail have included the well-known Corbeau case, where the European Court of Justice found that a state-owned mail delivery service or one with an exclusive licence could not prevent the entry of a private express delivery service except to the extent that the exclusivity was necessary to achieve its public mission.<sup>16</sup> In the Deutsche Post case the European Commission used a the predatory pricing test in a traditional public service sector, taking into consideration the public service obligations of the SOE, then the related costs and the characteristics of a network industry. In that case United Parcel Service alleged that Deutsche Post had engaged in cross-subsidisation using revenues from its profitable letter mail monopoly to finance below-cost pricing in business parcel services where it faced competition. In assessing the activity, the Commission took into account that Deutsche Post was an SOE with public service obligations and thus had to bear the costs of providing universal service. In its analysis of pricing it distinguished common fixed costs for network capacity which reflected the SOEs public service mission of maintaining an infrastructure and a capacity reserve for parcel delivery from service-specific incremental costs linked to network usage. The Commission established as a test for predatory pricing that any service provided by the beneficiary of a monopoly in open competition must at least cover the cost of branching out into the competitive sector. Deutsche Post did not do this. The Commission did not consider whether recoupment was likely as every sale in mail order parcel services represented a loss. The anti-competitive conduct restricted the sales by competitors and would ultimately lead to higher prices for consumers.

21. In Australia there are far fewer SOEs following decades of reform and privatisation of such bodies. A statutory power authority of a territory was found to have misused its market power (the Australian equivalent of an abuse of dominance case) in violation of the

<sup>14</sup> Union of India v Competition Commission of India (2012).

<sup>15</sup> Spain (preventing new entrants) Case 542/02 Surese-Correos, and Case 568/03 ASEMPRE/Correos. Fines for successive violations were between 5 and 15 million Euros.

<sup>16</sup> Case C-320/91, Regie des Postes v Corbeau 1993 E.C.R I-2533, para. 12-13. Others have included Case COMP/39.562-Slovenska Posta, Comm'n Decision 2008 O.J. (C322) 10, on appeal Case T-556/08, Slovenska Posta v Comm'n [2008]; AB Lietuvos pastas – see Eleanor Fox and Deborah Healey, UNCTAD Project on Competition Law and the State, A Summary on the data on the reach of competition laws to cover state anticompetitive acts, June 2014.

competition law when it refused to grant access to its power transmission lines to a licensed potential competitor following major deregulation of the industry to promote competition. This was a hard fought and lengthy proceeding pursued through a number of courts. Ultimately the High Court found that the conduct was in breach of the competition Act despite the authority arguing that it was not carrying on a business in relation to those power lines because it had never previously leased them.<sup>17</sup>

22. In China a well-publicised case involved two SOEs, China Unicom and China Telecom, which refused to deal with another SOE telecom and were found to have engaged in abuse of dominance. While it was originally suggested by the authorities that they would be fined, ultimately they were not. It has been suggested that a fine was not levied there due to the intervention of other government bodies such as industry regulators.

23. Finally, in Singapore CCS took action against SISTIC.com Pte Ltd for abuse of dominance under s47 of the Competition Act in relation to its exclusive agreements for ticketing services with venues. These included agreements between SISTIC and venues, and the Singapore Sports Council. Each of the agreements required the venue owner to use SISTIC as the sole ticketing provider at its venues for long periods and under rolling agreements. The case was successful and involved fines. It also required consideration of issues related to the single economic entity issues in relation to the relationships between various SOEs involved.

24. These cases mentioned really only scratch the surface of enforcement in the area but show that the law on abuse of dominance is being enforced against SOEs in a wide range of jurisdictions.

## 2.2. Cartels and other horizontal conduct

25. Cartel conduct is recognised as some of the most damaging anti-competitive conduct. SOEs may take part in cartels with other SOEs or with other companies. Different issues arise in each of those situations.

26. The well-known case of Spanish Milk involved a public enterprise attached to the Ministry of Agriculture, La Lacteria Espanola S.A., which led a cartel of industrial dairy firms that agreed on basic prices, quality bonuses and discounts for raw milk.<sup>18</sup>

27. A number of jurisdictions contain provisions on cartels despite government authorities simultaneously engaging in regulatory price setting. In Vietnam, for example, the three main phone companies, two of whom were SOEs, raised prices on the same day by the same amount. On investigation by the VCCA it was found that this was done in accordance with a decree by the Ministry of Communications.

28. In China, the AML has been applied to SOEs in many industries on a large number of occasions. It has been applied to SOEs in cartel situations, one example being when a pricing agreement by local SOEs was investigated and sanctioned in the Shanghai Gold Jewellery Association case (which also involved non-SOE jewellery stores). However, in China the State is both a participant and a regulator in the market and has the task of ensuring orderly markets generally, and expressly in the context of the AML. There are a number of examples of situations where SOE competitors have been ordered to engage in

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<sup>17</sup> NT Power Generation Pty Ltd v Power and Water Authority [2004] 219 CLR 90.

<sup>18</sup> Case 352/94 Industrias lacteas. See also Fox and Healey, *ibid*.

industrial self-regulation, which means agreeing with its competitors to adopt a floor price, in circumstances where prices are considered to have dropped too low and competition is considered to be unsustainable.

29. A case in Iceland involved an undertaking in the waste management sector owned by several municipalities taking part in the setting of a retail price for methane gas for automobiles with other undertakings.

30. Finally, an Australian case against 15 airlines, many of them SOEs, for colluding on various airline fees and charges, including for flights into Australia, involved settlements with 13 of the airlines and a total of \$98.5 million in fines.<sup>19</sup> The case raised important issues around the statutory definition of market (which required a market in Australia) in the Australian law, and issues of sovereign immunity raised by defendants, which were thoroughly ventilated but ultimately dismissed by the courts.

31. Important questions raised in relation to SOE cartels include whether agreements between related entities such as SOEs with common ownership can constitute cartel arrangements, since as a matter of logic the ultimate owner cannot agree with itself. Ultimately this will depend upon the actual circumstances. Implications of this and related issues are discussed below.

### 2.3. Mergers and other corporate restructuring

32. SOE mergers may involve mergers of SOEs with other entities or mergers with other SOEs in the same or similar industries. Where more than one SOE is involved, issues in relation to mergers include the extent to which the state controls the SOE, and whether the SOE is part of a broader group which the state controls. If the state does control the SOEs they may be treated as a single entity and their market power and turnovers aggregated for the purposes of merger review. Other important issues are how merger review fits with industrial policy, and how the national interest or national security may be factored into merger review.

33. Mergers may be sensitive in particular industries and particular jurisdictions. India, for example, has recently exempted mergers in the areas of nationalized banks and the oil and gas sectors for ten years from 2017. In the banking context these exemptions are said to be for the purpose of allowing consolidation of state-owned banks to increase their efficiency, and for government-directed mergers of rural banks set up to provide credit and other facilities for small farmers.

34. The merger provisions of the Anti-Monopoly Law of China apply to SOEs if they are engaged in business activity. The merger review processes theoretically apply to SOEs involved in mergers. The AML processes lack some transparency because the regulator (traditionally the Ministry of Commerce but more recently SAMR) is only required to issue a written decision where a merger is refused or where a merger is allowed subject to conditions. Industrial policy also plays a key role in the development of the economy, and the goals of the AML and a number of its provisions provide scope for legitimate recourse to industrial policy and the national interest in its interpretation and enforcement. The regulator must take account of the possible effect of the merger on other undertakings and

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<sup>19</sup> For details of this long-running and complicated case see ACCC Press Release dated 14 July 2017, High Court Rules in ACCC Favour in Air Cargo Case, <https://www.accc.gov.au/media-release/high-court-rules-in-accf-favour-in-air-cargo-case>.

on the national economy. Particularly in relation to those sectors which are considered key to the national economy and national security competition law has a different emphasis. As a matter of fact, these areas are broader in China than in many other countries. As a practical matter it is also difficult for a regulator to penalize a merger that has been approved by another government body such as an industry regulator. Non-notification by both private companies and SOEs has been an issue and a number of non-conforming companies have been fined, although the rate of notification has improved significantly. However, there are still a number of examples where reconstructions have not been notified. Market reconstructions, some to create national champions, have continued to occur and are part of Government policy.<sup>20</sup> Non-notification by SOEs appears to be an ongoing issue, although it is clear that some SOE mergers and consolidations are notified. The GE/ Shenhua joint venture is to date the only merger involving an SOE which has been approved subject to conditions.

35. Vietnam is still transitioning from a centrally planned economy. It has some 780 SOEs but is planning to divest some 406 SOEs during 2017 to 2020. Against the background of low filings generally, SOE mergers and consolidations are not generally notified in Vietnam but there appears to be some difference in view within the jurisdiction as to whether this is actually necessary in circumstances where the State is the ultimate owner of all assets.<sup>21</sup>

36. In Hungary, the government can exempt mergers of national strategic importance and which serve the public interest. In other jurisdictions such as the United States and Australia, issues relating to national security are assessed but not by competition regulators. Other jurisdictions are beginning to enact rules around these issues.

37. Various SOE mergers have been assessed by competition authorities and are noted in other publications: the transformation of SOEs to subsidiaries of other SOEs in Chile (Lago Peñuelas became a subsidiary of Econssa) and Lithuania (Lithuanian Shipping Company became a subsidiary of Lithuanian Railways, following the declaration of Lithuanian Shipping Company's bankruptcy); a number of mergers or spin-offs within the SOE sector in the Czech Republic, leading to an increase in the number of SOEs in the primary, telecoms and other utilities sectors and a decrease in the number SOEs in the electricity and gas sector; the demerger of Metso and the subsequent creation of Valmet in Finland; restructurings in the state-owned financial sector in Germany, leading to an increase in the number of financial SOEs by five; the merger of two financial SOEs into a newly established statutory corporation in Latvia; a number of mergers in Lithuania, including the merging of two airports into Vilnius International Airport, the merging of three penitentiaries into one SOE, the merging of the State Property Fund into the State Property Bank (Turto Bankas) and the merging of two sanatorium SOEs into one entity; and a change in the legal form of Swiss Post from autonomous "quasi-corporation" to a joint stock company.<sup>22</sup>

<sup>20</sup> The Chinese Government has continued to reorganise SOEs with the express objectives of improving resource allocation, quality and efficiency and resolving issues of excess production. There is recognition that this will improve international competitiveness in some cases. See Jing Shiuyi, *Ownership Reform Welcomes All Comers*, CHINA DAILY BUSINESS, 29 September 2017, 13.

<sup>21</sup> OECD (2018) OECD Peer Review of Competition Law and Policy Viet Nam <http://oe.cd/vtm>, 51.

<sup>22</sup> See OECD *The Size and Sectoral Distribution of SOEs* (2017), 32. See also Eleanor Fox and Deborah Healey, *ibid* note 16, at "Success Stories".

38. Whether the notion of “restructuring” by government is of a different nature to a merger between SOEs in reality may focus how involved the government is in the planning; but both transactions have potential market impact which does not change despite the description. Some jurisdictions consider that the merger scenario should be subjected to competition law while the reconstruction scenario should not. This raises the difficult potential conflict between governments as determinants of policy which they believe will be in the best interests of consumers, and governments as owners of SOEs in the marketplace which are potentially subject to competition law.

### 3. SOEs and single economic entities

39. Issues of ownership and control in relation to SOEs are tricky. Are all SOEs controlled by the same owner in competition law terms? This would have major implications for competition law analysis.

40. Generally, private bodies owned and controlled by the same entity are considered to be related and thus incapable of engaging in cartel conduct. The other side of the characterisation is that they are also considered together for the purposes of assessment of market power where they compete in the same or related markets for the purposes of assessing abuse of dominance or in a merger situation. In the latter situation, relationships will also impact the determination of notification turnover thresholds. Where penalties are levied based on turnover this may also be an important issue.

41. The issue is also determined on the basis of control of the SOEs involved, which may be considered in a number of ways.

42. In Australia, for example, the test is set in a Competition and Consumer Act (CCA) definition which is the same as that applied under the Corporations Law for determining whether bodies corporate are “related”.

43. The issue has assumed some importance in the EU where a number of cases have considered the appropriate approach.<sup>23</sup> This is against the background Art 345 of the TFEU which requires EU law to be neutral on the question of public or private ownership. The EU has considered the issue in the context of the detailed provisions of the EU Merger Rules (EUMR) which focus on a “change of control on a lasting basis”. Under that concept, control may also be acquired by more than one person. Where an SOE is not subject to any co-ordination with any other SOEs it should be treated as independent. Clearly it is important to consider each situation on its own merits and it has been stated that it is important not to assume that SOEs belonging to the same group are part of the same economic unit. Merger decisions in the EU have considered the nature and extent of state control of SOEs, and in particular Chinese SOEs, which was predictable since they are more likely to have a number of SOE players in the one industry. In the Rosneft/TNK-BP decision the Commission examined whether Rosneft and other Russian SOEs in the oil and gas sector could be deemed to be a single economic unit. The Commission found that Rosneft could not be deemed to have a power of decision-making independent from the

<sup>23</sup> For a full discussion see Dr Alan Riley, Nuking Misconceptions: Hinkley Point, Chinese SOEs and EU Merger Law (2016) 37 E.C.L.R 301.

Russian Federation itself.<sup>24</sup> The SOEs in those circumstances were thus found to constitute a single economic unit. In the Hinkley Point case in 2016<sup>25</sup> the Commission undertook a very detailed analysis of issues such as the nature and extent of state control over China General Nuclear Power Corporation (CGN) in a merger context. The Commission examined in detail a number of significant features to determine whether a singly economic entity was involved, including: the role of SASAC (the Chinese government body charged with holding SOEs and determining aspects of governance and policy) and its relevant laws and regulations; supervision of investment decisions by SASAC; and the State Assets Law, which supported the view that CGN was not able to make a number of important decisions without SASAC input and approval. On the basis of a number of the relevant factors, the Commission concluded: “that at least SASAC was able to interfere with ‘strategic investment decisions’ and ‘impose or facilitate coordination’ between CGN and other SOEs active in the energy industry, such that they should not be deemed to have an independent power of decision of SASAC.”<sup>26</sup> It did indicate that each situation should be considered on its own facts, but the control of very many SOEs by SASAC means that in many cases involving Chinese SOEs this will be the outcome.

44. China itself has taken an interesting approach in this context. It has enforced against SOEs in the same industry (one example being in the mobile phone case mentioned above, and in a number of cartel cases). Another example was in the Shenzhen Tally case (China Ocean Shipping Tally and China United Tally), where two SOEs were sanctioned by the new competition regulator, SAMR, for price fixing and market partitioning, even though they were actually part of the same group. In the particular circumstances, SAMR found that the SOEs were independent from an operative perspective and gave the appearance of competing. The SOEs in question argued that the prices for their services were guided by the state and therefore they could not be prosecuted but SAMR said that even in the presence of government regulation the parties were not allowed to collude.

45. Of course, in many jurisdictions governments have a significant degree of control or influence over non-SOEs, but this is not something which competition law generally addresses.

#### 4. State action defences

46. Laws as between jurisdictions vary widely in their approach to defence of anti-competitive conduct by invoking state involvement.<sup>27</sup> Approaches vary from a defence limited to conduct that the state has ordered the conduct to one where the conduct is merely encouraged. But given the nature of SOEs and the role which they play in the economy of some jurisdictions this issue is arguably more likely to arise where they are concerned. A leading example is the on-going and long running Vitamin C case, again involving Chinese SOEs. In 2013, a jury for the US District Court for Eastern New York found Chinese SOEs North China Pharmaceutical Group Corp and Hebei Welcome Pharmaceutical Co Ltd

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<sup>24</sup> Case COMP/M.6801- Rosneft /TSNK-BP.

<sup>25</sup> Case COMP /M.7850-EDF/CGN/NNB Group of Companies.

<sup>26</sup> Riley, *ibid*, 313.

<sup>27</sup> Eleanor Fox and Deborah Healey, When the State Harms Competition- the Role for Competition Law 79 *Antitrust Law Journal* (2014) 769, 796.

guilty of prices of vitamin C exported from China to the US and awarded damages to US purchasers. The Chinese SOEs appealed, claiming that their collusive conduct was mandated by the Chinese government and thus could not be prosecuted by the US antitrust laws. MOFCOM, (at the time one of three Chinese competition law regulators) supported this argument, stating that the SOEs were compelled by China export law to fix the prices. In 2016 the Court of Appeals for Second Circuit accepted this argument and reversed 2013 decision finding that the companies were legally mandated to collude. The Court concluded that China's interests outweighed whatever antitrust enforcement interests the US may have had in this case as a matter of law. It thus recognised China's strong interest in its protectionist policies.

47. The parties claiming damages appealed to the Supreme Court, which unanimously overturned the previous judgment. The Supreme Court stated that a "federal court should accord respectful consideration to a foreign government's submission" but was not bound to give conclusive effect to the foreign government's statements. The Supreme Court stated 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 position on the law. The case was returned to the Court of Appeals for the Second Circuit based on this finding that the standard of deference was incorrect. The matter is thus not finalised by the US courts at this point, but the important lesson is that the statement of a foreign government will be examined and assessed by US courts. Two relevant elements are outstanding: the right of US courts to interpret foreign law differently from a foreign government; and, secondly, whether a state action defence apply?

## 5. Enforcement challenges and the practical limits of power

48. While in most jurisdictions the competition law on the books applies to SOEs, the way in which regulators can realistically apply them in practice is variable. How robustly competition authorities can enforce the law when it touches a state vested interest is an ongoing question? Push-back by governments occurs. One example of this was the former head of the Columbian Competition Commission who opposed the merger to monopoly of Avianca (the state-owned airline) and ACES. The President of Columbia by-passed him as decision maker and he resigned.<sup>28</sup>

49. Most examples of these challenges are not so transparent. Particularly in developing countries there is pressure on enforcement agencies in many cases to avoid enforcement against government favourites, both public and private. Experience shows that while less common in developed countries with entrenched competition laws and independent regulators, it can still occur. Of course, most examples of this conduct are not transparent.

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<sup>28</sup> ICN Curriculum Project, *Developing Countries and Competition*, YOUTUBE (Feb. 26 2014) referred to in Fox and Healey, *ibid*, 798.

## 6. Other important questions

50. Among the many other questions outstanding in relation to enforcement against SOEs is the fact that most competition standards are based on the logic of private sector and profit-maximising economic players. Assessing standards and determining those that are appropriate for SOEs raise significant questions. These include, for example, the tests for predation, and whether recoupment is relevant in all cases.

51. At a minimum, although the same methods may be used for analysis for both SOEs and other entities, when assessing the effects of SOE conduct, agencies need to be aware of all the elements that may differentiate SOEs and use them when considering likely anti-competitive outcomes.

## 7. Conclusions

52. Cases against SOEs abound in individual jurisdictions but a number of general comments can be made about the current state of enforcement. Enforcement is occurring in many jurisdictions, based on research into that question generally. Some comments may be made on general trends, a number of which are predictable. There appears to be a trend of newer jurisdictions taking a very small number of cases relative to their number of SOEs. Jurisdictions, particularly in developing countries, may have one case but often it takes some time for them to develop a string of cases against SOEs. This does not appear to bear a particular relationship to the number of cases being taken against non-SOEs. There is also a trend towards successful cases in newer jurisdictions being overturned on appeal, or at least fines or penalties being reduced on appeal. Some jurisdictions subject SOE corporate restructurings to their merger provisions. Others appear to see these as part of others role of government and not notifiable transactions under their competition laws. Other issues such as the national interest and national security are more likely to be raised in considering SOE mergers. These may be considered as part of the competition law process or under other mechanisms. Either way this presents an opportunity for protectionist decision-making if not considered carefully. However, this also goes back to that dichotomy noted at the outset which exists between the right of government to determine policy in the best interests of its citizens and the application of competition law on the merits. As to questions of single economic entity, this appears to be most acute in relation to the entry of foreign SOEs into jurisdictions. On sheer weight of number this is more likely to apply to Chinese SOEs, although within the EU and other jurisdictions there are examples relating to SOEs from other jurisdictions. While outcomes will be dependant upon the wording of relevant provisions ultimately these questions should be determined around issues of control in the particular circumstances.