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Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.

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## *Competition Law and State-Owned Enterprises*

*- Algeria\* -*

### **1. Introduction**

1. By its very nature, competition law is a market economy law in the sense that it is a law designed primarily to regulate relationships between companies with private status and control their behaviour with respect to market rules. It only applies to state-owned enterprises in the event that the latter submit to its principles and operating rules.
2. The fundamental characteristic of a state-owned enterprise, however, is its hybridity.
3. It is an enterprise and not an administration. It has a market activity.
4. But, unlike other enterprises, it is owned by the state, in that the majority of its capital is held by a public body (or the state).
5. A state-owned enterprise operates in two main areas which interact: the pursuit of the general interest and market behaviour.
6. Its strategic objective is not solely to generate profit but more to fulfil the general interest mission entrusted to it.
7. Naturally, it must balance its books, deal with competition and, as far as possible, generate an operating surplus. But creating wealth for its shareholder (the state) is not its main objective.
8. In some cases, the state collects its dividends due as majority shareholder or sole shareholder, but this surplus must first and foremost be used for investment and improving the service rendered.
9. Over time, and over the period of the development of state-owned enterprises, it is realised that, given their public nature, it is in reality their vocation to be supported by the state.
10. As a consequence, they are a “risk” to competition.
11. Pressure is then placed to move towards their privatisation, preceded by opening to competition and control of state aid (at the European level in particular).
12. Opening to competition the “natural” monopolies (water, energy, telecommunications, postal services, the railways, etc.) is the starting point.
13. The upshot of this opening to competition is control of state aid.
14. The public authority must henceforth refrain from wanting to keep a struggling business afloat at all costs on behalf of the public interest.

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\* Written contribution prepared by Mr Djilali Slimani, Permanent Member of the Algerian Competition Council.

15. However, the 2008 economic crisis (caused by subprime mortgages) showed the limitations of the economic policy followed for so many years by reassessing the role of the state-owned enterprise in the market.

16. Indeed, privatisation trends are neither constant nor definitive as, in terms of public action, the state-owned enterprise represents a means for intervening in the market and in many cases for responding to the crisis.

*“Cross-cutting analyses, for their part, have revealed that at present there is nowhere in the world a one-way movement to restrict the public sector. On a global scale, privatisations and nationalisations balance out relatively evenly, varying depending on the activities and countries concerned” (See Mohand Tazerout – Conference at the Institut de France in Algiers on 9 October 2018).*

17. It should nevertheless be stressed that public sector extensions focus on activities in the public interest, such as energy and transport in particular, as well as on financial activities (banking sector). Outside of these sectors, the state-owned enterprise has seen both its scope of intervention and its policy space shrink.

18. It is not easy to satisfy free market pressures and the expectations of citizens at the same time, or in other terms, to know how to address market realities while remaining loyal to the mission of general interest.

19. Nonetheless, the dichotomy between the public sector and the private sector in Algeria seems to have been overcome in the official texts (see Article 43 of the 2016 Algerian Constitution). The two sectors complement each other and can have a positive impact on each other. “The public sector can find useful examples in the management methods of the private sector. It would be to the private sector’s benefit to acknowledge its social responsibility”.

20. The purpose of this introduction is to avoid jumping to the dangerous conclusion that the most logical solution for avoiding distortions of competition between enterprises with links to the state and private actors would be to privatise state-owned enterprises.

21. Indeed, private companies governed by the same regulatory framework as their peers do not generally tend to distort competition.

22. In Algeria’s case, the failure of the privatisations undertaken during the 2000s nevertheless makes it imperative to have another attempt, this time more with more realism, bearing in mind that some non-strategic state-owned enterprises still remain fully bound to the state sector, thus disproportionately increasing the risks of distortions of competition between the public sector and the private sector.

23. We will examine the subject of “competition law and state-owned enterprises” with regards to Algeria through the following prisms:

- The history of the state as shareholder
- The place of the state-owned enterprise in competition law and the related issues
- The potential distortions of competition
- The practical cases dealt with by the Competition Council
- The recommended solutions for eliminating distortions of competition generated by state-owned enterprises

## 2. The history of the state as shareholder

### 2.1. The history as seen through the texts:

24. The initial format which prevailed in Algeria was the “socialist management of enterprises” (GSE), characterised by the placing under the administration of various ministries manufacturing and distribution companies called “national companies” in the sense that they were fully owned by the state. The private sector had an insignificant role in the national economy.

25. Until 1988, a year marked by the launch of various economic reforms, Article 2 of the Law 88-01 of 12 January on the framework law on state-owned business enterprises specified that, “State-owned business enterprises are socialist enterprises with the legal forms provided for by the present law”.

26. Nevertheless, even if socialist, the state-owned business enterprise is described as follows in Article 5 of Law 88-01, “State-owned business enterprises are joint stock companies or limited liability companies in which the state and/or the local authorities have direct or indirect ownership of all the shares and/or stocks”.

27. It should be noted that the term “socialist enterprises” was removed in Law 88-04 of 12 January 1988 (published on the same day as Law 88-01) amending and completing ordinance No. 75-59 of 26 September 1975 on the Commercial Code and setting the particular rules applicable in state-owned business enterprises.

28. This was in fact the prelude to the introduction of company law through the reform of autonomy for enterprises (1988 to 1990).

29. This period (1988-1990) followed on from the first restructuring of enterprises (1980-1984) which saw the large national companies split into several enterprises considered to be of a “manageable” size compared to the “gigantism” which characterised the national companies.

30. The state remained omnipresent through its ownership of all the shares in the share capital of the enterprises.

31. It was only in 2001 with the promulgation of ordinance No. 01-04 of Aouel Joumada Ethania 1422 corresponding to 20 August 2001 relating to the organisation, management and privatisation of state-owned business enterprises that the state’s strategy of partial economic withdrawal was clearly established.

32. In its Article 2, the ordinance complies (not without some effort) with the international standard for market economy countries when it states:

*“State-owned business enterprises are commercial companies in which the state and any other legal person under public law has direct or indirect ownership of the majority of the share capital. They are governed by ordinary law”.*

33. The state as shareholder no longer owns, or is obliged to own, all of the share capital of the enterprise, even if, however, it in any case remains the majority shareholder in the capital.

34. What is more, the privatisation of state-owned enterprises is clearly expressed in Article 4 of the aforementioned ordinance which specifies:

*“The assets of state-owned business enterprises are transferable and disposable in accordance with the rules of common law and the provisions of the present ordinance. The share capital represents the permanent and irreducible guarantee for the enterprise’s creditors”.*

35. However, as we will see, the provisions of the Articles below (especially Articles 5 and 6 of ordinance 01-04) hold out the prospect of state interference in the “trading sphere” of enterprises, thus exposing the latter to potential distortions of competition.

36. Article 5: “Particular forms of administrative and management bodies may be provided for by regulation for state-owned business enterprises in which all of the capital is held directly or indirectly by the state or any other legal person under public law.

37. The decision to submit a state-owned business enterprise to the particular forms provided for in the paragraph above is made by a resolution of the State Holdings Council referred to in Article 8 below”.

38. Article 6: “Notwithstanding the provisions of the present ordinance, the state-owned enterprises whose activity is of strategic importance to the government’s programme are governed by their internal rules in force or by a special rule established by regulation”.

## **2.2. The history as seen through the reorganisation of the state-owned business sector:**

39. Without dwelling for too long on the result of the privatisations triggered by the texts in 1995 and stopped in 2007 (417 state-owned enterprises privatised out of total of 1200, of which 192 were completely privatised according to the Ministry of Industry and Mines) it is worth noting that the restructuring of the commercially run public sector took place in five phases, none of which resulted in any economic efficiency in terms of the recurring state funding of the financial stabilisation of state-owned enterprises. The five phases of restructuring were:

- The (eight) equity funds: 1988-1995
- The (eleven) public holdings: 1996 -2000
- The (five) holdings (merger of the eleven holdings above): 2000-2001
- The (twenty-eight) participation management companies (SGP): 2002-2015
- The (thirteen) industrial groups: 2014 to present

40. It should be noted that the large state-owned enterprises (often monopolies or quasi-monopolies), for example SONATRACH, SONELGAZ, AIR ALGÉRIE, were not involved in the various restructurings while the most recent restructuring into industrial groups consisted of attaching to the respective line Ministries the state-owned enterprises operating in the same sector (e.g. enterprises working in tourism were attached to the Ministry of tourism, and enterprises in construction and public works were attached to the Ministry of public works).

41. In any event, state-owned business enterprises continue to represent a large proportion of the business sector under state ownership even when most of them have a private sector vocation, such as the enterprises comprising *Groupe Agro-industries*, *Groupe Industries Chimiques*, *Groupe Equipements Electriques Electrodomestiques et*

*Electroniques, Groupe Industries Locales, Groupe Mécanique, Groupe Textiles et Cuirs, Groupe Ciments GICA* etc.

42. The first conclusion to draw is that in this market context where state-owned enterprises figure alongside private companies while competing with each other, there is a risk of potential distortions of competition in different forms (predatory pricing, direct procurements, abuse of a dominant position).

43. The continued efforts by the state to preserve the existence of state-owned enterprises with a private sector vocation in the domestic industrial fabric means that it remains a favourable environment for distortions of competition, especially as they are often state-owned enterprises with recurring financial imbalances.

### 3. The place of the state-owned enterprise in competition law and the related issues:

#### 3.1. The ambiguities in the ordinance on competition as regards the enterprise being subject to competition law:

44. In Algeria, competition law is basically represented in the amended and supplemented ordinance 03-03 of 19 July 2003, as well as by seven implementing decrees and the decision of the Competition Council on internal regulation.

45. As a reminder, competition law in Algeria was established in 1995 (following the economic reforms initiated as of 1988) by ordinance No. 95-06 of 25 January 1995 on competition. This ordinance was repealed in 2003 and replaced by ordinance 03-03 of 19 July 2003 as amended and supplemented in 2008 and 2010 respectively.

46. Article 3 of the amended and supplemented ordinance 03-03 of 19 July 2003 provides the definition of the enterprise within the meaning of competition law. This definition makes no distinction between a state-owned enterprise and a private enterprise and what is more is a very broad definition inspired by European competition law, i.e. that the enterprise is “any natural or legal person of any kind engaged on a lasting basis in production, distribution, service or import activities”.

47. In addition, Article 2 of the same ordinance specifies that the provisions of the said ordinance “apply to production activities, including agriculture and livestock; to distribution activities, including those undertaken by importers of goods purchased for resale in the same condition, agents, horse-traders and meat wholesalers; to service activities, crafts and fishing, as well as activities undertaken by public entities, associations and professional corporations, regardless of their status, form and purpose; to public procurement, from the publication of the tender notice to the final decision awarding the contract.”

48. Nevertheless, Article 2 immediately limits its scope by stipulating, “the implementation of these provisions must not however jeopardise the accomplishment of public services or the exercise of the powers of a public authority.”

49. The current formulation of the last paragraph of Article 2, “the implementation of these provisions must not however jeopardise the accomplishment of public services or the exercise of the powers of a public authority” raises the issue of the application of the principle of non-discrimination between the public sector and the private sector (enshrined in Article 43 of the Constitution amended in 2016) for private enterprises to which the public authorities concede public service tasks, such as the provision of water services, gas

and electricity. These enterprises could adopt anti-competitive behaviours in the course of their activities by invoking their public service tasks.

50. For this reason, the Competition Council suggested, in the framework of a draft series of amendments to the amended and supplemented ordinance 03-03 of 19 July 2003 on competition, removing the terms “the accomplishment of public services” from the last paragraph of Article 2.

51. In this respect, it is interesting to note, for example, that Article 9 of Egyptian Law No. 3 of 2005 on the protection of competition automatically exempts state-managed public services but not public services managed by companies subject to private law. (The latter are entitled to request an exemption from the competition authority provided that they can prove that it will generate benefits for consumers in excess of the impact of the restriction on free competition).

52. Under French competition law, the distinction is even clearer, as decreed by Article L. 410-1 of book IV of the Code of Commercial Law, which stipulates that, “The rules defined in this book shall apply to all production, distribution and service activities, including those carried out by public entities, especially within the framework of public utility concessions”.

### **3.2. The issue of concentrations and mergers in the public business sector with respect to competition law:**

53. At another level, whereas paragraph 4 of Article 22 of the ordinance of 1995 (repealed) stipulated that, “The Competition Council may also formulate recommendations for the restructuring of state-owned enterprises falling within the scope of this present ordinance, so as to avoid dominant and monopolistic positions likely to jeopardise competition and cause abuses, in the event of the disposal of assets or the implementation of actions aimed at their privatisation in any form”, the new ordinance 03-03 of 19 July 2003 amended and supplemented makes no reference thereto.

54. However, it should be noted that, as mentioned above, between 1995 and 2003 at least two restructurings were undertaken (transfer from holdings to participation management companies (SGP)) without the Competition Council having to formulate any recommendations.

55. Neither has the restructuring into industrial groups (2014 to present) generated any requests for an opinion from the Ministries concerned by the said restructurings despite the provisions of Articles 34, 35 and 36 of the amended and supplemented ordinance 03-03 of 19 July 2003 on competition which encourage such requests.

### **4. Potential distortions of competition viewed in relation to the texts:**

56. In the aftermath of Algeria’s independence, the public business sector had a dominant position in the national economy. This position was later strengthened by the 1976 Constitution, which removed the private sector from all economic activities after Algeria declared itself to be socialist.

57. This exclusion was challenged in the 1989 Constitution which enshrined the freedom of commerce and industry, and especially in the 2016 Constitution which enshrined in Article 43 the freedom of investment and commerce:

*“Art. 43 — The freedom of investment and commerce shall be guaranteed, and shall be exercised within the framework of the law. The State shall improve the business environment, encourage without discrimination the development of enterprises to the benefit of national economic development. The State shall ensure the protection of the market. The law shall protect the rights of consumers. The law shall prohibit any monopoly and/or unfair competition.”*

58. Now more than ever the public authorities are denying accusations of preferential treatment for state-owned enterprises to the detriment of private enterprises. And they use the significant development of the private sector to back their claims.

59. Indeed, over the past decade, the private sector has made increasingly visible inroads into the non-hydrocarbon manufacturing industry. It benefitted from the momentum generated after the liberalisation of the economy, and in particular the implementation in 1988 of legal and regulatory provisions on the direction of domestic private business investments.

60. These reforms led to the opening of the foreign trade sector and the decline of the public sector, following the liquidation of several unprofitable state-owned enterprises (1989-2006) and the privatisation of 417 state-owned enterprises (2003-07).

61. In 2015, the private sector generated 77% of the added value of the non-hydrocarbon manufacturing industry and accounted for 97% of the 95 447 existing industrial units (compared to 14 000 in 1988). These trends intensified in 2016-2017 and 2018.

62. It is clear, however, that the legislative and regulatory texts since 1988 bestow preferential treatment on state-owned enterprises.

63. These enterprises, established as public joint stock companies (*sociétés par actions à capitaux publics*) have been given the status of public economic enterprises – EPE — with permission to bear the distinctive abbreviation EPE on all their commercial deeds and documents alongside the obligatory statements provided for in the Code of Commercial Law that are the company name, legal form and amount of share capital.

64. In addition, ordinance No. 01-04 of 20 August 2001 for the purpose of governing the organisation, management and privatisation of EPE excludes from the scope of the Code of Commercial Law any state-owned enterprises whose activity is of strategic importance to the government’s programme.

65. Accordingly, Article 6 stipulates that, “Notwithstanding the provisions of the present ordinance, the state-owned enterprises whose activity is of strategic importance to the government’s programme are governed by their internal rules in force or by a special rule established by regulation.

66. In reality, the government’s 5-year programme for 2015-2019 covers a multitude of sectors from banking to public works, tourism, fishing etc., with the upshot that the state-owned business enterprises which make up these sectors all become of strategic importance and therefore cannot be declared insolvent in the sense of Article 715 bis 20 of the Code of Commercial Law.

67. The distinction made between the public sector and the private sector can also be observed in terms of discrimination through the following measures taken by the public authorities:

- The (administrative) documents of state-owned business enterprises are drawn up free of charge by the Land Directorate, while the documents of private enterprises are drawn up by notaries for a fee.
  - State-owned enterprises are only allowed to open accounts in state-owned banks, which means that private-sector banks cannot hold the accounts of state-owned enterprises in their books.
  - The salaries of workers in private enterprises are not covered by the state in the event that their enterprise gets into difficulty, unlike the salaries of workers in state-owned enterprises which frequently receive budget allocations when they are having financial problems in order to guarantee the remuneration of their employees.
68. In addition, there is the issue of debts owed by local authorities (the state) to private enterprises, which are not paid at the contractual maturity.
69. Some legislative texts and regulatory measures actually introduce preferential treatment for a state-owned enterprise over a private enterprise.
70. The presence in the market of state-owned business enterprises benefitting from unfair advantages (favours) prevents free competition, especially when each minister has become the *de facto* manager of the EPE under his authority (cf. the latest restructuring to create industrial groups)
71. By intervening in the economy, the state reduces its capacity to accomplish its role of regulating the economy, which is indispensable for reassuring the economic operators, given that regulating the market consists in supervising behaviours therein upstream and applying penalties downstream when the rule of law is breached. This position of both judge and jury goes against the objectives for which a market economy is effectively being established, and has a negative impact on competition.

#### 4.1. State aid to state-owned enterprises

72. It is common knowledge that the public treasury has on several occasions covered the cost of redressing the financial situation of state-owned enterprises (debt cancellation). These financial restructuring operations are generally launched just before every new domestic restructuring, thereby confirming the failure of the previous organisation.
73. Ordinance 03-03 of 19 July 2003, as amended and supplemented, on competition does not prohibit public sector rehabilitation operations. However, the use of public subsidies to pay for the financial reorganisation of restructured companies can be seen as state aid.
74. This type of assistance can distort free competition insofar as it favours state-owned enterprises by providing them with unfair protection from the sanction of the market.
75. Indeed, the aim of all the various restructurings of public sector enterprises has been to avoid the winding up state-owned enterprises which have used over two thirds of their share capital, thereby falling under Article 715 bis 20 of the Code of Commercial Law.
76. This requires a clarification of the concept of state aid.

## 4.2. The concept of state aid

77. The concept of state aid to state-owned enterprises is not established in the Algerian legal system, whereas under European Union law the notion of aid covers all “measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking”.

78. Only the concept of subsidy is used in Algerian texts, mainly with regard to compensation granted by the state to cover the expenditure of state-owned enterprises subject to public service constraints.

79. However, state aid to state-owned enterprises has mainly consisted of allowing the latter to benefit from various measures such as recapitalisation, debt rescheduling, operating aid (reconstitution of working capital), tax relief, priority in the award of public contract and various other aspects of state aid.

## 4.3. The problems caused by state aid

80. In turn, the amended and supplemented ordinance 03-03 of 19 July 2003 on competition overlooks the concept of state aid to state-owned enterprises whereas, paradoxically, in its Article 1 it introduces the notion of “economic efficiency”, a purely economic concept which refers to containing and reducing company costs and to optimising profitability through the use of all the human, material and financial means at the company’s disposal.

81. By supplying aid to enterprises, “the state alters competition by artificially upsetting the ability of privately-owned enterprises and state-owned enterprises to compete on an equal footing and consequently the chances for enterprises entering into competition”.

82. In addition, the enterprises in question avoid the sanction of the market, which is the insolvency of any non-viable business.

83. It is in this manner that state aid distorts competition in that “it removes the sanction of the free market economy, which is the removal of uncompetitive businesses”.

84. On the other hand, the provisions of the Code of Commercial Law reveal that state-owned enterprises are not ordinary commercial companies and that they retain a “waiver specificity” set out in Article 217 of the Code of Commercial Law which provides that, “Companies in which some or all of the capital is publically owned are subject to the provisions of the present title on insolvencies and legal settlements. Measures to satisfy creditors may nevertheless be taken by the public authority empowered to do so by way of regulation. The measures referred to in the paragraph above entail the termination of ongoing procedure in accordance with the provisions of Article 357 below”.

85. It therefore follows that it is in principle possible to invoke competition law against the state (in terms of its provision of financial aid to state-owned enterprises).

86. However, this does not seem feasible for two reasons:

- The Competition Council is not competent in the case of an administrative act. The administrative courts are authorised to overrule the act on the grounds that it contains restrictive effects on free competition.

- The measures for providing financial aid to state-owned enterprises are taken through legislation and are set out in the budget laws.

#### 4.4. The tasks imposed by the state on state-owned enterprises

87. While state aid to state-owned enterprises remains harmful to competition, it nevertheless contains some exemptions justified by the specific tasks that the state may impose upon them:

*“It is therefore not so much the status of state-owned enterprise per se which justifies adjustments to the competition regime as the specific task attributed to these state-owned enterprises. It is often the case that this task weighs upon them and that the adjustments are of particular benefit to them” Pierre DELVOLLE, “State-owned enterprises and competition law”.*

88. Two types of exemption are provided for under Algerian law:

- The case of the performance of public-service tasks (Article 57 of the framework law on state-owned business enterprises); we will go into this issue in greater detail;
- The case of the performance of administrative duties which have traditionally been the responsibility of the public administration (Article 55 of the framework law on state-owned business enterprises).

89. When a state-owned enterprise performs these kinds of task, which fall outside the remit of its commercial and industrial activities, the state is entitled to subsidise the enterprises in question on the grounds that they are subject to public constraints which are unrelated to their corporate purpose.

#### 4.5. The submission of state-owned enterprises to public service constraints

90. Article 57 of the framework law on state-owned business enterprises provides that, “When a state-owned business is subject to public service constraints, it is allocated, according to budgetary procedures, funding equivalent to the expenses incurred to this end, and assessed in accordance with the regulation in force. In all cases, the said subsidy is predetermined”.

91. Moreover, Article 7 of ordinance No. 01-04 of 20 August 2001 relating to the organisation, management and privatisation of state-owned business provides that, “Agreements may be reached between the State represented by the State Holdings Council referred to in Article 8 below and the state-owned business enterprises subject to public service constraints”.

92. At this level, it can be observed that the state-owned business enterprise may legally replace the public institution by taking responsibility for public service activities (see in particular the concession of public service as introduced in Presidential decree No. 15-247 of 2 Dhou El Hidja 1436 corresponding to 16 September 2015 on the regulation of public procurement and public service contracts).

93. In Algeria, various legislative texts impose a series of public constraints on state-owned enterprises which are justified by public service tasks. These include, for example, the constraints on air transport or on public network services (e.g. electricity and gas as well as rail transport and telecommunications).

94. In all these situations, the financial compensation granted by the state which, should it need to be pointed out, cannot be considered as state aid, is not such as to distort free competition insofar as it is related to public service constraints which are not part of the specific economic activity of a state-owned enterprise and therefore not part of its corporate purpose.

95. To conclude this section, it is clear that the depth of the relationship of Algerian state-owned enterprises with the state cannot be properly understood without reference to the governance of state-owned enterprises (which we will attempt to do in the last part of this paper by comparing it to the 2015 edition of the OECD Guidelines on Corporate Governance of State-Owned Enterprises).

96. However, it emerges in principle that the public authorities, for the purpose of social equilibrium (maintaining public sector employment), are struggling to detach themselves from an administered economy.

97. For example, in 2016 the Algerian economic environment registered the purchase by the state of the METAL-SIDER steel group (in which Indian group LNM-ISPAT had a 70% shareholding) and this after over ten years of privatisation. This operation was followed by the purchase by the state of the telecoms operator DJEZZY, a subsidiary of ORASCOM (with the state taking a 51% stake in the capital).

98. These two operations mark a step backwards in the implementation of a market economy, and therefore of competitive steel and mobile telephony markets.

## 5. The practical cases dealt with by the Competition Council

### *Reminder:*

99. The Algerian Competition Council was established in 1995 and performed its duties until 2003. Between 2003 and 2012, its activities were frozen pending the renewal of the members of the Council, which only took place in January 2013. Since then, the Competition Council operates within the framework of the amended and supplemented ordinance 03-03 of 19 July 2003 on competition, which replaced repealed ordinance 95-06 of 25 January 1995. At present, the Competition Council is fulfilling its second four-year mandate (2017-2020).

### 5.1. The referrals concerning state-owned enterprises dealt with by the Competition Council:

#### *5.1.1. Period from 1995-2003:*

100. In 1998 and 1999, the Competition Council was called on to deal with cases of anti-competitive practices attributable to state-owned enterprises.

101. This led it to issue two decisions punishing abuse of a dominant position attributable to state-owned enterprises, one concerning the practices put in place by the tobacco and matches enterprise SNTA (decision No. 98L03 of 13 December 1998), and the other (decision No. 99L01 of 23 June 1999) on abuse of a dominant position by *Entreprise Nationale des Industries Électroniques* (ENIE) in Sidi-Bel-Abbès.

102. In decision No. 98L03 of 13 December 1998, the Competition Council called on the SNTA to “cease forthwith the abusive practices of which it was accused and which

were qualified as the practising of concomitant and discriminatory sales” in respect of the provisions of the ordinance of 1995.

103. In the decision of 23 June 1999, the Competition Council called on state-owned enterprise ENIE to cease the practices in which it engaged in breach of the provisions of the ordinance on competition and in particular Article 7 of the ordinance of 1995 on abuse of a dominant position.

104. In both of the aforementioned cases, the two state-owned enterprises (SNTA and ENIE) were punished with fines of 786 000 dinars and 4 348 560 dinars respectively.

### *5.1.2. Period from 2013-now:*

105. During this period, the Competition Council dealt with few cases of anti-competitive practices attributable to state-owned enterprises.

106. It should be specified that with regard to concentrations and mergers carried out within the framework of the successive public business sector restructurings, the Competition Council received no notifications, and this in view of the legal vacuum regarding, in this area, ordinance 03-03 of 19 July 2003 amended and supplemented on competition.

- **A review of 2014** shows that out of 20 referrals dealt with by the Competition Council, three (03) concerned state-owned enterprises acting as project managers in public procurement contracts and against which complaints were made by economic operators for “favouritism”. The three referrals were dismissed as inadmissible on the grounds that the complaints raised objection that fell within the jurisdiction of the administrative court and not the Competition Council.
- **A review of 2015** shows that out of the twelve (12) referrals dealt with by the Competition Council, there was only one (1) referral which concerned anti-competitive practices attributable to the state-owned hydrocarbon enterprise SONATRACH in a dispute between SONATRACH Spa and the professional association of private lubricant distributors which reported to the Competition Council the transfer by manufacturer SONATRACH to its own subsidiary NAFTAL of the supply to private lubricant distributors, and this with the complacency of the hydrocarbon regulatory authority (ARH).

107. On the basis of Article 60 of the amended and supplemented ordinance No. 03 -03 of 19 July on competition which provides that, “the Competition Council may decide to reduce the amount of the fine or to not impose a fine on companies which, in the course of the investigation of the case concerning them, recognise the infringements of which they have been accused, contribute to speeding up the case and undertake to no longer commit infringements related to the application of the provisions of the present ordinance. The provisions of paragraph 1 above are not applicable in the event of a repeat offence, regardless of the nature of the infringement committed”, the committee of the Competition Council decided in its session of 16 April 2015, at the request of the Chairman and CEO of SONATRACH following the injunction of Competition Council and not disputing the objections levelled at it by the latter, to apply the commitment procedure to SONATRACH.

108. The written commitments by SONATRACH resulted in the following correspondence:

- No. 73/DG/2014 of 21 January 2015 in which it reports on the effective recuperation of the lubrication retail activity and the organisation in this respect of

working meetings with the private lubricant distributors with a view to establishing sales contracts, the contractual clauses of which are currently being negotiated.

- No. 77 /DG /2015 of 21 February 2015 in which it is highlighted that all the measures have been taken to comply with competition regulations in the lubricant market.

109. On the basis of the aforementioned correspondence, the Chairman of the Competition Council in Decision No. 01/2016 of 03/02/2016 appointed a rapporteur to monitor the execution of the commitments laid down in Competition Council decision No. 20/2015.

110. On 03/03/2016, the rapporteur visited the headquarters of the trading division of SONATRACH and was able to observe that in effect Articles 1, 2, 3, and 4 of the sales contract between SONATRACH and lubricant distributors (private and public) had been amended in order to integrate the commitments imposed upon SONATRACH by the Competition Council.

111. As a result of this, both parties signed new sales contracts between themselves as of 2015.

112. The commitment procedure therefore had the desired effect i.e. compliance with competition rules, stabilisation of the lubricant market and the impartial treatment of both public operators (NAFTAL in particular) and private operators (the 85 distributors).

113. We consider that this case allowed the Competition Council to put an end to distortions of competition observed in the national lubricant market while restoring undistorted competition and removing abusive contractual clauses imposed by the largest state-owned enterprise in the country.

114. **A review of 2016** shows a referral in the form of a request for an opinion from a private insurer ALLIANCES ASSURANCES Spa with regard to state-owned enterprise COSIDER Spa which was accused by the complainant of anti-competitive practices at the time of the launch of a restricted domestic invitation to tender for putting in place insurance cover.

115. Indeed, ALLIANCES ASSURANCES Spa accused COSIDER Spa of opening the tender process solely to insurance companies with a share capital of at least four billion dinars, thereby excluding all private insurance companies to the benefit of public insurance companies.

116. The review of this request by the Competition Council committee revealed that it concerned a restricted invitation to tender launched by state-owned enterprise COSIDER in compliance with regulations on public procurement, that the latter (COSIDER) had no intention to exclude private insurance companies provided that a private insurance company met this criterion and was put on the shortlist of procurers, and finally that the minimum capital requirement requested by the contracting service did not represent per se a barrier to entry to the insurance market in question but was much more a guarantee of the protection of the significant assets at COSIDER's disposal.

## **5.2. The conclusions to be drawn from the practical cases dealt with by the Competition Council:**

- In the current stage of the development of the market economy, state-owned enterprises - in light of the low number of referrals submitted to the Competition

Council either by themselves (to defend their market share in a spirit of healthy competition) or in accusation thereof (complaints by private and public operators which have been the victims of anti-competitive practices) – do not seem to represent a major source of distortions of competition and do not seem to suffer from anti-competitive behaviour by private enterprises.

- In our opinion, this paradoxical situation remains the result of the low level of culture of competition among both private and public operators, which are still reticent to submit their competitive disputes to the Competition Council. The latter is currently fully devoted to changing this state of affairs by multiplying the number of study days designed to clarify competition law but also by launching in 2018 programmes to comply with competition regulations with the support of the European Union’s P3A programme.
- However, the “silence” observed by state-owned enterprises in terms of “broadcasting” competition law can be traced back to, as we pointed out in the previous section, the recurring state aid granted to state-owned enterprises, which has mainly consisted of allowing the latter to benefit from various measures such as recapitalisation, debt rescheduling, operating aid (reconstitution of working capital), tax relief, priority in the award of public contract and various other aspects of state aid. Given the existence of the support structure by the public authorities, the state-owned enterprises seem indifferent to anti-competitive practices provided that they are not at risk of insolvency; they can also however perpetrate anti-competitive practices without risking any major consequences other than fines, the effect of which can be passed on to the taxpayer and the consumer.
- Between 2013 and now, there was actually only one referral by a private enterprise which considered itself to be a victim of anti-competitive practices submitted to the Competition Council, and it was the complaint about “favouritism’ in the granting of public procurement contracts by businesses owned by the state as shareholder. We have previously explained that the Competition Council observed that the case concerned contentious relations between the project manager and the procurer, and as such fell within the jurisdiction of the administrative court and not within the competency of the Competition Council.
- This indicates that in order to apply competition law to state-owned enterprises the latter must embrace an approach based on profit maximisation, just like a private enterprise, which would then allow for investigations of situations where their behaviour is likely to harm consumers in the market.
- The Competition Council is aware that when it investigates anti-competitive behaviour in a state-owned enterprise it may run into problems when analysing the objectives fixed by the state for the state-owned enterprise in question, such as the achievement of public policy objectives.

## 6. The recommended solutions for eliminating distortions of competition created by state-owned enterprises

117. In this section, we reviewed the 2015 edition of the OECD Guidelines on Corporate Governance of State-Owned Enterprises, with a focus on the guidelines which referenced the market in particular.

118. We discovered the following recommendations, which the state as shareholder and Algerian state-owned enterprises would gain from by considering:

- When state-owned enterprises carry out economic activities, there should be a clear separation between the state's ownership function and other state functions.
- Stakeholders, including creditors and competitors, should have access to efficient redress through unbiased legal or arbitration processes when they consider that their rights have been violated.
- Where state-owned enterprises combine economic activities and public policy objectives, high standards of transparency and disclosure regarding their cost and revenue structures must be maintained, allowing for an attribution to main activity areas.
- Costs related to public policy objectives should be funded by the state and disclosed. This would allow the taxpayer (consumer) to ensure the rational use of public money.
- State-owned enterprises undertaking economic activities should not be exempt from the application of general laws, tax codes and regulations.
- Laws and regulations should not unduly discriminate between state-owned enterprises and their market competitors. State-owned enterprises' legal form should allow creditors to press their claims and to initiate insolvency procedures such as provided for in the Algerian Code of Commercial Law. State-owned business enterprises are generally joint stock companies or limited liability companies subject to insolvency, however, as we have pointed out, legal exemptions are applied to them to keep them afloat.
- The economic activities of state-owned enterprises should face market consistent conditions regarding access to debt and equity finance. In particular:
  - The relations of state-owned enterprises with all financial institutions, as well as non-financial state-owned enterprises, should be based on purely commercial grounds.
  - The economic activities of state-owned enterprises should not benefit from any indirect financial support that confers an advantage over private competitors, such as preferential financing, tax arrears or preferential trade credits from other state-owned enterprises.
  - The economic activities of state-owned enterprises should not receive inputs (such as energy, water or land) at prices or conditions more favourable than those available to private competitors.
  - The economic activities of state-owned enterprises should be required to earn rates of return that are, taking into account their operational conditions, consistent with those obtained by competing private enterprises.
- When state-owned enterprises engage in public procurement, whether as bidder or procurer, the procedures involved should be competitive, non-discriminatory and safeguarded by appropriate standards of transparency.

- The annual financial statements of state-owned enterprises should be subject to an independent external audit based on high-quality standards. Specific state control procedures do not substitute for an independent external audit

## 7. Conclusion

119. The study of the issue of “Competition law and state-owned enterprises” in Algeria inevitably takes us back to the governance of state-owned enterprises.

120. It focuses on a major player, in this instance the state as shareholder which, despite the reforms initiated, is not managing to withdraw from the productive sector including the sector comprising non-strategic state-owned enterprises as we demonstrated in the paragraph on the recent restructuring of the participation management companies (SGP) into thirteen industrial groups.

121. We highlighted that this situation increased the risk of distortions of competition as the scope of state ownership was considerably extended by the presence of non-strategic state-owned enterprises of a purely commercial nature (e.g. agri-food and tourism enterprises).

122. The only explanation for this is that the state-owned enterprises are involved in maintaining social equilibrium and consequently find themselves diverted from their natural economic purpose (maximise profits for reinvestment).

123. In this context of development, it is not possible for opening to competition to produce the results set out in all competition policies, even if they are established in the implementing texts for said policy, i.e. the stimulation of economic efficiency and the improvement of consumer welfare (see Article 1 of ordinance 03-03 of 19 July 2003 amended and supplemented on competition).

124. Indeed, by maintaining extensive decision-making powers, funding powers and intervention powers in state-owned enterprises, the state seems to be using state-owned enterprises as a substitute for its regulation policy or an indirect regulation instrument.

125. However, these ambivalent roles are an anathema to the notion of “market” and in particular “market economy” (see the article by Malika AHMED ZAID-CHERTOUK Laboratory of Economic Reforms and Local Dynamics (REDYL) Mouloud Mammeri de Tizi-Ouzou University, Algeria).

126. Moreover, this observation is corroborated by the following quote, “In order to enhance market discipline in this country, the Algerian public authorities would have to move away from the practice of clearing the accounts of state-owned enterprises, adopt a more policy of selective and more competitive public funds, and put an end to public subsidies and to the repeated recapitalisations of loss-making businesses” (Labaronne, 2013)

127. Repeated injections of capital into state-owned enterprises contributed to putting a brake not only on their privatisation but also on reforms as a whole.

128. The various phases of public sector restructuring have never gone beyond the stage of administrative reorganisation, with actually managing to strengthen the governance of enterprises through greater market discipline.

129. In Algeria, the state plays a major role in the economy, with its high level of involvement in state-owned enterprises reflected in the fact that it is not just a shareholder but also a manager, thus increasing the risk of distortion of competition in the market.

130. The solution lies in adopting new approaches, with the state as shareholder in the role of guarantor of the quality of services and of the functioning of the market (protection of competition). This would require a policy of protecting state-owned enterprises considered to be of strategic importance to the country's economy, and divesting the purely commercial enterprises.

131. In accordance with the OECD guidelines (see section V), the state must act to establish a clear separation between its ownership function and other state functions in order to guarantee a level playing field and competitive economic environment free of conflicts of interest.