

Unclassified

DAF/COMP/WD(2015)7

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

11-Jun-2015

English - Or. English

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

Cancels & replaces the same document of 29 May 2015

ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Latvia --

16-18 June 2015

This document reproduces a written contribution from the Competition Council of Latvia submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

JT03378317

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.



DAF/COMP/WD(2015)7
Unclassified

English - Or. English

COMPETITION COUNCIL OF LATVIA

1. “Competitive neutrality” and the role of the State in the market

1. There are many ways in which the State can distort the correct functioning of a market. These can include cases where the government is directly active as a market player, or owns the controlling stake in a company, or it owns minority stakes which grants it special powers (e.g. golden shares), or when the State grants a company special rights. But there are other situations where control by the State is not a key factor when it comes to government-related distortions of competition. The State can influence the functioning of the market by setting procurement rules, tax rules or regulatory regimes which put private companies at a disadvantage vis-à-vis a State-controlled or State-supported firms, which compete on the market but at the same time pursue a variety of public policy objectives.

1.1 What does competitive neutrality mean to you? Is competitive neutrality a useful or necessary goal for competition? Is it an objective of your competition authority? What is the ultimate goal in promoting a level playing field or undistorted markets in your jurisdiction?

2. Competitive neutrality requires that government business activities should not enjoy competitive advantages over their private sector competitors simply by virtue of public sector ownership. It includes both competitive neutrality in strict sense as well as in wider sense. In a strict sense, competitive neutrality is understood as a legal and regulatory environment in which all enterprises, public or private, face the same set of rules, and government ownership or involvement does not confer unjustified advantages on any entity. In a wider sense, competitive neutrality is seen as a market framework within which no contact with the state brings a competitive advantage to any market participant. For example, when the state acts as a purchaser of goods or services, it is important to ensure that prices are not above competitive levels, and hence, do not include a hidden subsidy. Therefore proper use of public procurement procedures is essential solution to this problem.

3. The competitive neutrality is a necessary goal for competition because competitive neutrality aims to promote efficient competition by minimizing competitive advantages government business activities may enjoy over their private sector competitors simply because they are government owned. General competition law can address some competitive neutrality issues, but it is not well equipped to deal with all aspects of inefficient competition between public and private sector entities. Law provides a legal framework to prevent abuses of market power or attempts to gain market power. OECD already noted, that many competitive neutrality issues may not be reached by competition law, either because the government businesses do not have market power or the advantages they receive do not qualify as abuses covered by competition laws.¹ Therefore it would be necessary to provide additional specific tools in the Latvian Competition Law to address competition neutrality concerns.

4. Competitive neutrality is one of the objectives of the Latvian Competition Council (‘CC’). There should be a common legal regime for private firms and SOEs, which eliminates the various statutory advantages that SOEs may enjoy. Corporatization of SOEs partly achieves this goal as corporations,

¹ OECD Policy Roundtables. State Owned Enterprises and the Principle of Competitive Neutrality. OECD, 2009, p.326 www.oecd.org/daf/competition/46734249.pdf

regardless of whether private or public, are generally subject to the same rules. Since this process often requires legislative changes, the CC focuses on competition advocacy and promotion of the principle of competition neutrality. The CC uses tools available to intervene in the legislation processes, where competition neutrality issue may be affected. Latvian Competition Act foresees the right of the CC to formulate and submit opinions regarding draft regulatory enactments to be examined by the Cabinet of Ministers, before they are passed to the Parliament.

1.2 In your experience, what type of State measures can distort the playing field? Do you think that State-controlled or supported firms enjoy advantages or disadvantages (e.g. higher labour costs due to public status of their employees)? What types of distortions that you are mostly concerned with?

1.2.1 In-house procurement procedure

5. Particularly important for the competitive neutrality is the issue concerning the terms and conditions on which the state or a municipality may purchase products or services directly from the organization it owns (in-house procurements). OECD has already observed, that Latvian Public Procurement Law allows the state or a municipality to make purchases without putting them out to tender (so-called direct purchase). According to Article 3 of the Public Procurement Law it is not applicable if a commissioning party enters into a contract regarding the works or supplies performed or services provided by such institution, which concurrently conforms to the following criteria: it is under complete control of one or several commissioning parties; at least 80% of its annual financial turnover consists of the implementation of specific tasks in the interests of the controlling commissioning parties or other commissioning parties, which are controlled by the commissioning parties controlling the institution; capital shares or stocks thereof completely belong to the commissioning parties controlling it.² So far this has gravely affected **household waste management sector**. If household waste management undertaking belongs to municipality, the whole territory of the respective municipality is closed to competition as no procurement procedure is conducted.

1.2.2. Municipalities as direct or indirect competitors

6. The municipalities are acting as direct or indirect competitors in the market. In many cases municipalities or their undertakings offer services on the market in competition with private undertakings.

1.3 In which sectors do you find the highest degree of State intervention and influence?

1.3.1 Sectors that are mostly commercially oriented

7. Information is also available in the OECD 2015 Review of the Corporate Governance of State-Owned Enterprises³.

1.3.1.1 Energy

8. The most valuable SOE is the electricity company Latvenergo which has these subsidiaries: Sadales tīkls (electricity distribution); Elektrum Eesti, Elektrum Latvija and Elektrum Lietuva (electricity trade in Estonia, Latvia and Lithuania); Latvijas elektriskie tīkli (transmission system asset management),

² OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.108. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

³ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

Liepājas enerģija (thermal energy generation and trade, electricity generation); Pirmais Slēgtais Pensiju Fonds; Nordic Energy Link (it is planned to sell its 25% share⁴) and Rīgas siltums. In 2014 began operating Enerģijas publiskais tirgotājs (“Public Trader of Energy”) to perform the public electricity trader functions. The State wholly owns 100% of the electricity transmission company Augstsprieguma tīkli.

1.3.1.2 Transport

9. The State owns 100% of these SOEs: Latvijas Dzelzceļš (“Latvian Railway”: railway infrastructure management); Pasažieru vilciens (“Passenger Train”: railway passenger transport services); Starptautiskā lidosta "Rīga" (Riga International Airport); Ceļu satiksmes drošības direkcija (registration and technical supervision of road vehicles, qualification of drivers, registration of watercrafts intended for inland waterways); Latvijas Autoceļu uzturētājs (maintenance work, construction and repair of state highways and engineering structures and communication systems related); Latvijas Gaisa satiksme (air navigation services); Latvijas Jūras administrācija (maritime services); Latvijas Valsts ceļi (management of the state road network, administration of the State Road Fund); and Autotransporta direkcija (licensing and monitoring of commercial cargo transportation); Latvijas Dzelzceļš’ subsidiary LatRailNet (determination of the rail infrastructure charges and allocation of rail infrastructure capacity).

10. **Air Baltic.** The State owns 99.77% of Air Baltic (after the State’s buyout of BAS shares in 2011). The remaining 0.23% are held by the private persons.

1.3.1.3 Electronic communications and postal services

- *Latvijas Valsts radio un televīzijas centrs.* The State owns Latvijas Valsts radio un televīzijas centrs (operator of the terrestrial radio and television broadcasting network, electronic communication services).
- *Latvijas Pasts.* The State owns the Latvian postal operator Latvijas Pasts. Latvijas Pasts’ compliance with Latvian laws and regulations is regulated by the Public Utilities Commission (PUC).
- *Latt telecom and Latvijas Mobilais telefons (LMT).* The State owns 51% of shares in Latt telecom and 5% shares in Latvijas Mobilais telefons (LMT). LMT shares are held by Latt telecom (23%) and SOE Latvijas Valsts radio un televīzijas centrs (23%).

1.3.1.4 Finance

- *Attīstības finanšu institūcija.* In 2014 was created a new SOE Attīstības finanšu institūcija (“Development Finance Institution” [DFI]) which was the result of a merger between 3 former SOEs: the non-commercial arm of the Mortgage and Land Bank of Latvia (MLB), Latvijas Attīstības finanšu institūcija (Latvian Development Institution) “Altum” ([Altum]); Latvijas Garantiju Aģentūra (Latvian Guarantee Agency) and Lauku Attīstības Fonds (Rural Development Fund).
- *Reverta.* The State owns 84.15% of the financial institution Reverta, which inherited Parex’s (the commercial bank, takeover by the State in 2008) distressed assets. The European Bank for Reconstruction and Development (EBRD) owns 12.74% of Reverta’s shares, and other shareholders own 3.11%.

⁴ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.102. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

1.3.1.5 Agriculture and forestry

11. In 2011 forestry, wood processing and furniture-making represented 6% of Latvia's GDP. SOE Latvijas Valsts Meži is the forestry company is with an equity value above EUR 300 million. The State also holds shares in these SOEs: Sertifikācijas un testēšanas centrs (certification and laboratory services); Piensaimnieku laboratorija ("Dairy Farmers' Laboratory") and these Latvijas valsts meži subsidiaries: (i) Meža koksnes produktu pētniecības un attīstības institūts ("Latvia's Forest and Wood Products Research and Development Institute") (40.22% owned by Latvijas valsts meži) and (ii) Latvijas finieris (0.82% owned by Latvijas valsts meži).

1.3.2 Sectors that are less commercially oriented

1.3.2.1 Healthcare

12. The 14 medical facilities (13 of them hospitals) are operating as SOEs. All hospitals are LLCs governed by management boards responsible to the local or State governments. The services provided by the medical facilities (operating as SOEs) are purchased under an annual agreement with the National Health Service (NHS), which is an administrative institution subordinate to the Ministry of Health. One-third of the hospitals from which the NHS purchases in-patient services are owned by the State; two-thirds are owned at the local level.

1.3.2.2 Public media

13. The National Electronic Mass Media Council holds capital shares of Latvijas Televīzija and Latvijas Radio, which both are responsible for ensuring the distribution of radio and television programmes. Negative influence infringing the national and EU competition rules have been established in respect of:

1.3.2.3 Riga Free Port Authority

14. In 2011 Riga Freeport Authority was fined for abuse of its dominant position, as the Authority restricted actions of a competitor – provider of tugboat services PKL Flote JSC – in the Freeport territory. Riga Freeport Authority after purchasing its own tugboats and starting economic activity without justification forbid PKL Flote JSC to provide tugboat services and hindered the ability of ships to choose the private provider of tugboat services. Riga Freeport Authority was also fined in 2009 for the blocking PKL flote JSC to provide tugboat services in Riga Freeport. Riga Freeport Authority was also fined in 2010, because it had not fully complied with the legal obligations set out in the decision of 2009⁵, where Riga Freeport Authority had been ordered to immediately allow tugboats of other companies to start supplying tugboat services.⁶

1.3.2.4 Latvijas Pasts (Latvian Post)

15. The postal service provider SOE Latvijas Pasts provided its subsidiary SIA „Mailmaster” (Mailmaster LLC [Mailmaster]), which on behalf of their clients printed and enveloped bills and different

⁵. The CC Repeatedly Fines Riga Freeport Authority for Abuse of Dominant Position. <http://www.kp.gov.lv/en/aktualitates/52-the-cc-repeatedly-fines-riga-freeport-authority-for-abuse-of-dominant-position>

⁶ Fines and Legal Obligations Imposed on Freeport of Riga for Abuse of Dominant Position. <http://www.kp.gov.lv/en/aktualitates/31-fines-and-legal-obligations-imposed-on-freeport-of-riga-for-abuse-of-dominant-position>

notifications, with significantly lower charges for mail delivery than the competitors (AS „OpusCapita” (ex.AS „Itella Information”) and SIA „Drukātava”), ensuring competitive advantages to Mailmaster. As a result, in a public procurement of preparation and delivering Rēzekne municipality’s property tax notifications, with the lowest price won Mailmaster. On 3 December 2014 Latvijas Pasts was fined for abusing its dominant position and discriminating competitors of Mailmaster.⁷

1.3.2.5 Rīgas starptautiskā lidosta (International Riga Airport)

16. A case on abuse of a dominant position (Article 102(c) the Treaty on the Functioning of the European Union (TFEU)) was initiated in 2004 further to a complaint of 6 airlines because the SOE Riga International Airport (Airport) due to unfair discount policy charged the Irish airline Ryanair and the Latvian airline airBaltic substantially lower prices for airport services than those charged to their competitors.⁸

17. This distorted the competition as the airlines receiving the discounts paid less than the actual cost of the services while the remaining costs were covered by other airlines. Decision establishing abuse of dominant position was adopted in 2006, however during litigation CC agreed to sign an administrative agreement with the Airport which was approved by the national court in 2009. Henceforth Airport would apply charges at one fixed rate for all airlines.⁹

18. However, in 2012 CC imposed a fine on the Airport and obligations to apply non-discriminatory payments for its services. The Airport abused its dominant position because for equivalent services (luggage processing, ensuring passenger stairs, aircraft pushback etc.) the prices charged from airBaltic were 82% higher than those charged from Ryanair. The Airport used different methodologies to calculate the payments – airBaltic was charged for every aircraft, while Ryanair for each passenger. Such discriminatory payments therefore influenced the competitiveness of airBaltic.¹⁰

1.3.2.6 Household waste management

19. *In-house public procurement procedure.* The Public Procurement Law allows a municipality to make purchases without putting them out to tender (so-called direct purchase).¹¹ According to the Article 3 of the Public Procurement Law it is not applicable if a commissioning party enters into a contract regarding the works or supplies performed or services provided by such institution, if: it is under complete control of one or several commissioning parties; at least 80% of its annual financial turnover consists of the implementation of specific tasks in the interests of the controlling commissioning parties or other commissioning parties, which are controlled by the commissioning parties controlling the institution; capital shares or stocks thereof completely belong to the commissioning parties controlling it. As the result,

⁷ The CC fines State owned Postal Service Provider. <http://kp.gov.lv/en/aktualitates-en/368-the-cc-fines-state-owned-postal-service-provider>

⁸ Ten Years of Competition Policy Enforcement since Accession to European Union. <http://kp.gov.lv/en/aktualitates-en/269-ten-years-of-competition-policy-enforcement-since-accession-to-european-union>

⁹ Court dismisses Legal Proceeding in Case on Unfair Discounts applied by Riga International Airport. <http://kp.gov.lv/en/aktualitates-en/41-court-dismisses-legal-proceeding-in-case-on-unfair-discounts-applied-by-riga-international-airport>

¹⁰ Riga International Airport Fined for Abuse of Dominant Position. <http://kp.gov.lv/en/aktualitates-en/50-riga-international-airport-fined-for-abuse-of-dominant-position>

¹¹ OECD Policy Roundtables. State Owned Enterprises and the Principle of Competitive Neutrality. OECD, 2009, p.127. www.oecd.org/daf/competition/46734249.pdf

the clients in the municipality's territory would not be able to freely choose their supplier of the household waste management services.

1.4 Is the State's presence growing or decreasing in your economy?

1.4.1 Energy

20. Enerģijas publiskais tirgotājs ("Public Trader of Energy") is Latvenergo subsidiary that began operating in 2014, which will perform public electricity trader functions. However, Latvenergo still has 90% share of electricity generation market and 73% share of the electricity market.¹²

1.4.2 Electronic communications (fixed voice market)

21. The fixed voice market was opened to the competition in 2003. The State owns 51% shares in Lattelecom which remains the dominant player in the sector, but competitors have steadily grown over the last decade. The number of registered electronic communications service providers has increased from 202 in 2005 to 396 in 2010. Since 2003 the mobile communications market has largely surpassed the fixed voice market, however Lattelecom continues to dominate the fixed voice market.

1.4.3 Postal services

22. This market (includes traditional, express, direct and other postal services) was liberalized in 2013. Since then, 36 of new companies have entered the postal market. These new entrants focus on the most profitable market segments (express and courier mail, delivery in cities only etc.), processing 7% of the total number of postal items in Latvia but accounting for 28% of the total sector turnover.

1.4.4 Finance

- *Altum.* Until 2013, the State was a shareholder in the Hipotēku un zemes banka (the Mortgage and Land Bank of Latvia [MLB]), which after the sale of the bank's commercial operations, was reorganized and renamed in 2014 as Altum. The State has sold its shares in the bank's commercial operations, the State now has no shares in any bank.
- *Attīstības finanšu institūcija.* Attīstības finanšu institūcija ("Development Finance Institution" [DFI]) was created in September 2014 as the result of a merger between 3 former SOEs: the non-commercial arm of the MLB, Altum; Latvijas Garantiju Aģentūra (Latvian Guarantee Agency) and Lauku Attīstības Fonds (Rural Development Fund). The enterprise's objective is to support small- and medium-sized enterprises through the soft loans, equity investments, and guarantees. The DFI is also expected to ensure more efficient monitoring of invested resources and optimizing costs.
- *Reverta.* Reverta was one of the financial institutions, which was created out of the failed Parex Bank in 2008. Reverta focused on the failing assets ("bad bank" model). The State owns 84.15% of Reverta, which inherited Parex's distressed assets. EBRD owns 12.74% of Reverta shares and other shareholders own 3.11%.

¹² OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.42. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

1.4.5 *Household waste management*

23. The presence of municipalities in waste management sector will definitely grow in connection with the exclusion of the Article 18 Paragraph ten from the Waste Management Law. After this exclusion the companies – waste producers in the municipality’s territory will not more have rights to freely choose their suppliers of the household waste management services and this function will be solely allocated to the municipality.

1.5 *What is the weight of SOEs, regulated companies and/or public services in your economy?*

- *SOEs.* As of end-2012 the State fully owned 69 SOEs, owned more than 50% shares in another 8 enterprises and owned between 10% and 50% shares in 17 enterprises and held less than 10% shares in 51 enterprise. Also the SOEs held shares in 114 other enterprises.
- *Municipalities.* In 2012 the municipalities were the sole shareholders of 323 enterprises and had decisive influence in 39 enterprises. In 243 enterprises municipal governments held less than 50% of capital shares. The turnover by the SOE sector accounts for around 18% of annual GDP which is larger than OECD averages¹³.

1.5.1 *Rules and tools to address competitive neutrality distortions available to competition authorities*

1.5.1.1 Rules/Tools

24. Competition authorities may have limited tools to address and remedy the causes of the competition distortions due to the State intervention in the market. Distortions due, for example, to State ownership, control, subsidies, sector regulation, special rights, privileges, public service obligations, industrial policy, public procurement, concessions, municipalisation, re-nationalisation, sponsoring of national champions may not be directly tackled by competition law. The questions below seek views on the rules and tools that can be used by competition authorities to address competitive neutrality distortions.

1.6. *What is the scope of your competition law vis-à-vis State activities in the market?*

25. The CC is entrusted with supervising compliance with national and EU competition rules in Latvia. The national competition rules contain classical distinction among possible competition law infringements – prohibited agreements, abuse of dominant position and merger control. Addressees of the competition law are all market participants (undertakings) irrespective of their source of finance or legal form. The functional approach in identifying market participants allows to ensure that State-related commercial activities abide by the same competition law provisions as would privately owned companies.

26. The national law does not contain any exemptions or immunities from sanctioning State activities in the market and the CC has imposed fines on multiple public undertakings, however fines imposed on SOEs for dominance cases have been generally lower compared to private undertakings.

27. Effective enforcement by a competition authority relies not only in a full set of powers (scope of application or investigative tools) but also capacity and independence of the authority investigating infringements. The CC is institutionally supervised by the Ministry of Economy that holds control over incumbent operators in energy sectors. In the light of critical OECD’s 2015 review of the corporate

¹³. OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.99. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

governance of state owned enterprises in Latvia¹⁴, there is a need to “separat[e] the state ownership function from other functions influencing SOEs” to ensure level playing field when SOEs are competing with private enterprises. This in combination with OECD accession review 2014 report at the Competition Committee which calls for greater independence of the CC creates uncertainty for foreign investors as to country’s commitment and ability to ensure level playing field and allow undertakings to compete on merits.

28. Currently, the CC has right to provide opinions and to promote changes in legislation indirectly. According to the Section 7 Paragraph two of the Competition Law the CC is entitled to evaluate draft legislation and other documents prepared by other institutions and to provide opinions in respect of them, if they include provisions restricting free operation of market mechanisms and competition.

1.6.1 Amendments to the Competition Law

29. In order to provide increased powers related to the control of public persons’ commercial activities, amendments to the Competition Law were proposed by the CC to Ministry of Economics. However, at this moment the proposal is not on the agenda and discussions have stopped.

Draft proposal to the Latvian Competition Law

Section 4¹. Duty of institutions performing the functions and tasks of state administration to ensure free and fair competition:

- Institutions performing the functions and tasks of state administration ensure free and fair competition. It is prohibited for institutions to create advantages, discriminate market participants or association of market participants, create different competition conditions, or to perform activities in result of which development of competition is hindered or in result of which a hindrance, restriction or distortion of competition have created or could create.
- To ensure the observance of the Paragraph one of this Section, the Competition Council is carrying out negotiations with the institution. If the negotiations do not yield the observance the Paragraph one of this Section, the Competition Council is entitled to adopt a decision imposing legal obligations which prevents the violation of the Paragraph one of this Section.
- Decision mentioned in the Paragraph two of this Section may be appealed in accordance with procedures prescribed by Section 8, Paragraph two.”

1.7 When a State-related distortion of competition amounts to an infringement of the competition law, what powers do you have? Can you also rely on rules other than competition law? E.g. subsidy control or state aid laws, rules governing public services obligations, competitive neutrality frameworks?

30. Irrespective of nature of the enterprise that has breached the competition rules, the CC may adopt decision finding of infringement, as well as to impose interim measures. The infringer may be subjected to financial sanctions and the CC may attach behavioural or structural remedies. Where the infringement

¹⁴ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

stems from an anti-competitive national law the CC may require that the relevant national measure is disapplied¹⁵.

31. The CC has no powers to supervise other national laws besides Competition Law and Advertising Law, however requirements arising from other rules are taken into account when assessment of the market conditions is carried out. Moreover, the CC has recently publicly expressed concerns over some decisions of public bodies (mostly, municipalities) whether they observe conditions of State involvement in carrying out commercial activities laid out in Article 88(1) of the State Administration Structure Law. Under this provision, the State may establish or continue to own or control a commercial enterprise only where market failure exists.

1.8 *What other, non-enforcement powers do you have to tackle anti-competitive State measures? E.g. market studies, advocacy powers, regulatory intervention, control over public procurement processes, subsidy grants and bailouts?*

1.8.1 *Market supervision, Opinions on market participants' activities & Views and Recommendations*

32. According to the Section 7 Paragraph one Clauses 1, 2 and 4 of the Competition Law CC is entitled to: 1) carry out a market inquiry(..); 2) provide opinions regarding conformity of the activities of market participants with regulatory enactments governing competition; (..) 4) publish the views and recommendations of CC.

1.8.2 *Waste management market study*

33. CC is currently performing the waste management market study in cooperation with the competent authorities of the Scandinavian countries (Sweden, Denmark, Finland, Norway, Iceland, Greenland and the Faroes).

1.8.3 *Opinions on the draft legislation and other documents*

34. In addition, according to the Section 7 Paragraph two of the Competition Law CC is entitled to evaluate draft legislation and other documents prepared by other institutions and to provide opinions in respect of them, if they include provisions influencing the market mechanism, the implementation of which may directly or indirectly restrict competition.

1.8.4 *Competition advocacy*

35. When CC receives a complaint from the market participant or any other information regarding possible competitive neutrality issues, CC examines this complaint (the information) and evaluates the available information and the legislative acts.

36. If necessary, a meeting may be organized with the market participant and/or the representatives of the involved SOE (and its supervisory institutions) in order to discuss and look for the most appropriate solution for the competitive neutrality issues. Additionally, CC may send the letter to the involved SOE (and its supervisory institutions) with recommendations for the SOE (and its supervisory institutions) how to solve the competitive neutrality issues. At the same time, the amendments to the Article 88 "Commercial Activities of Public Persons" of the State Administration Structure Law are planned.

¹⁵. Based on primacy of EU law (European Court of Justice C-198/01 CIF); the CC has applied this against the State-owned airport which based on a state measure had applied discriminatory discounts to airline service providers (CC's decision No.134 of 22.11.2006 Riga International Airport)

Amendments are currently deliberated before the Parliament. The objective of the amendments is to involve the CC in the process, when municipalities opt to engage in commercial activity and enter a market. It is clear, that they will only have the right to submit an opinion and it will not have a binding effect. However, there is a debate whether opinion of the CC is mandatory.

37. Proposed draft amendments to the State Administration Structure Law. Article 88 “Commercial Activities of Public Persons”

1. If it is not otherwise prescribed by law, public persons for more effective fulfilment of functions may perform commercial activities if one of following conditions: to preclude market failure; In result of commercial activity produced goods or services are strategic important for further development of states or municipalities territory or states security.
2. A public person before establishing any company or acquiring shares in a capital company, shall carry out an evaluation of that such public person action is proportionate to the society’s welfare or public security and there is no more effective way of achieving the objectives referred to in the first paragraph of Article. During preparation of the assessment, public person shall consult the competent institution in the field of competition protection and entrepreneurs associations, as well as provide compliance with the provisions regulating state aid for commercial activity.

2 Challenges

38. For competition authorities to enforce the rules and tools described above in a market context distorted by the State can prove challenging. Challenges may arise from the fact that the State has an interest in the company that is under investigation, and therefore has stakes in the outcome of your investigation. Challenges may also arise from the fact that there are gaps in the tools available to the authority to address these distortions and that cooperation of other government entities is necessary.

2.1 *What challenges do you face when applying competition law to a State-influenced activity or entity? Is there any difference if the State-induced restriction of competition is at Federal/central level or at a local level? Have you encountered any undue State pressure or involvement when scrutinising the conduct of a State-influenced activity or entity?*

2.1.1 *Competition Law and CC*

39. SOEs are not excluded from competition rules under Latvian Competition Law. The Riga Freeport Authority (it is not an SOE held at the national level. According to Article 7 (1) of the Law On Ports, a port authority belongs to the public administration established by the relevant local government city council and which is under the supervision of the Cabinet of Ministers¹⁶) was involved in 3 cases; the Riga International Airport was involved in 2 cases; Lattelecom was involved in 2 cases and Latvijas Pasts was involved in 2 cases. For violations of Art.13 (abuse of dominance), fines imposed against SOEs were lower than those imposed against private sector companies. It was done due to the fact that the SOEs have higher turnovers than the private enterprises (relatively in Latvia), and therefore due to proportionality the fines for the SOEs were reduced. The operations of the Riga and Ventspils port authorities are managed by an Executive Body (or administration), which reports to an eight-member board of directors. Half of the

¹⁶ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.106. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

directors are officials from the municipal governments, and the other half are government officials nominated by the ministers (including the Minister of Economics).¹⁷

2.1.2 Independence of CC

40. It can be argued that there is the potential for a conflict of interest in the application of Competition Law to SOEs owned by the Ministry of Economics, given the CC subordination to the Ministry of Economics.¹⁸ According to the Section 8 Paragraph six of the Competition Law directions regarding the commencement of an investigation of a case in a particular case, as well as regarding the manner in which the investigation shall be conducted or a decision taken, may not be given to CC by the government, the Minister for Economics or other persons. However, in practice possibility of an indirect interference is not precluded by the law.

41. The municipalities (the local governments) may regulate the market (restrict competition) with municipal binding regulations in accordance with their competence and only in their own territory. For example, in connection with the waste management market: exclusion of the Article 18 Paragraph ten from the Waste Management Law. After this exclusion the clients in the municipality's territory will not be able to freely choose their supplier of the household waste management services.

2.2 *Is it easier or more difficult to enforce your powers when the State is involved in the creating the distortion of competition that you are investigating (e.g. when a 'national champion' is involved)?*

42. The law does not prescribe for a possibility to treat public or private undertakings differently in comparable situation. However, enforcement track shows, that some SOEs are prone to violate competition rules repeatedly and have less regard for the CC than a private company would in a comparable situation.

43. **Riga Freeport cases.** In 2011 Riga Freeport Authority was fined for abuse of its dominant position, as the Authority restricted actions of a competitor – provider of tugboat services PKL Flote JSC – in the Freeport territory. Riga Freeport Authority after purchasing its own tugboats and starting economic activity without justification forbid PKL Flote JSC to provide tugboat services and hindered the ability of ships to choose the provider of tugboat services. Riga Freeport Authority was also fined in 2009 for the blocking PKL flote JSC to provide tugboat services in Riga Freeport. Riga Freeport Authority was also fined in 2010, because it had not fully complied with the legal obligations set out in the decision of 2009¹⁹, where Riga Freeport Authority had been ordered to immediately allow tugboats of other companies to start supplying tugboat services.²⁰

¹⁷ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.23. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

¹⁸ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.43. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

¹⁹ The CC Repeatedly Fines Riga Freeport Authority for Abuse of Dominant Position. <http://www.kp.gov.lv/en/aktualitates/52-the-cc-repeatedly-fines-riga-freeport-authority-for-abuse-of-dominant-position>

²⁰ Fines and Legal Obligations Imposed on Freeport of Riga for Abuse of Dominant Position. <http://www.kp.gov.lv/en/aktualitates/31-fines-and-legal-obligations-imposed-on-freeport-of-riga-for-abuse-of-dominant-position>

2.3 *Have you faced any difficulty in enforcing your decisions (e.g. on remedies or on fines) when the State is involved?*

44. Mostly, we have faced no difficulties in enforcing our decisions on remedies or on fines when the State is involved.

2.4 *Are other public authorities, such as sector regulators, entrusted with powers to address competitive neutrality distortions?*

45. Other public authorities such as Public Utilities Commission (PUC) and Ministry of Finance and the Ministry of Agriculture (state aid) have limited powers to address competitive neutrality distortions only related to fulfillment of their direct tasks.

- *The Public Utilities Commission (PUC).* The PUC's responsibility to oversee the provision of services of general economic interest in Latvia is developing as regulated sectors continue to become further liberalized²¹ according to the common EU Policy. Providers of public utilities are responsible for suggesting to the PUC fees for the public utilities they provide, according to the PUC-developed methodology for determining tariffs. Under the Postal Law, the PUC determines the obligations of the universal postal services, approves tariffs for providing these services, and the selection of post operators. PUC provides basic requirements and quality targets. For example, former monopoly Latvijas Pasts is responsible for processing and delivering postal items of up to two kilos, inland and cross-border postal parcels under 10 kilos, cross-border postal parcel items (including insured items) that are received from other EU states under 20 kilos, and periodicals. Most SOEs are reimbursed for losses incurred from providing universal services, and these reimbursements must be properly recorded in SOEs' books and records.²²
- *State aid – the Ministry of Finance and the Ministry of Agriculture.* Law on Control of Aid for Commercial Activity sets forth requirements and restrictions that state and municipal institutions should comply with in planning granting of State aid. The Law determines the allowable aid objectives, costs to be supported and maximum aid intensity, as well as national control of aid for commercial activities procedures in order to reduce the negative effect of aid on competition and to prevent the possibility of obtaining economic advantages by receiving unlawful aid. According to the Article 9 of the Law on Control of Aid for Commercial Activity the authorities responsible for the distribution and the administration of state aid are: 1) the Ministry of Finance; 2) the Ministry of Agriculture – only in connection with the agriculture, the fishery, the aquaculture and the forestry sectors.
- *Cooperation with the international institutions.* If necessary, CC cooperates with the competition authorities from other EU member states within the framework of the Regulation No.1/2003. The CC cooperates internationally with the Scandinavian competition authorities in the waste management market study.
- *Domestic cooperation.* The CC cooperates with other Latvia's institutions, such as the State Audit Office, the Financial and Capital Market Commission, the Procurement Monitoring Bureau (in connection with the application of the in-house public procurement procedure) and the PUC.

²¹ OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015, p.42. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

²² OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD, 2015. <http://www.oecd.org/daf/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>

3. Specific issues related to public and private competition enforcement

3.1 *What are the most common competition law violations occurring through State-influenced activities? Are they more frequent and likely in certain sectors? Why?*

46. Predominantly the enforcement record of the CC in activities of SOEs deals with abuse of dominance cases. Exclusionary conduct comprises most common type of harm to competition. Since SOEs are more common in utilities (e.g. heating, water and gas supply, postal sector, ports) industries and port management, these industries have been subject to multiple CC's investigations and fines. The similarities among the cases (incumbent creates barriers to new entrants or leverage of statutory monopoly power to neighbouring markets) creates a trend that casts doubts of SOEs ability to compete with private enterprises. Inefficiencies arising from the lack of a detailed set of rules on transparency and accountability of the SOE top management puts the SOEs at a less competitive position in the markets and encourages to leverage their position through public powers, decision making of which is usually not clearly separated from making commercial decisions.

3.2 *Have you experienced any difficulty arising from substantive standards being ill-suited to act upon State interventions in the market place? Do the standard and burden of proof vary when the State is involved or when a public service is at stake? Does the State benefit from any presumption?*

47. The competition law in its classical scope does not address impact of national measures on competitiveness of markets and validity of State involvement in carrying out commercial activities. Lack of effective tools to ensure level playing field in the market place between SOEs and private enterprises and ability to review government/municipality measures having distortive effect on the markets, creates an inefficient protection and promotion of effective competition by the competition authority. The CC considers that need for such powers increasingly gains importance since inter alia markets become more open and incumbent enterprises are subject to more potential entrants or new solutions. Since SOEs are not exempted from competition law, they retain ability to gain unfair advantage by acting under protection and discretion of public intervention, over which the competition authority has no jurisdiction. This contradicts the authority's responsibility for supervising conditions of competition in the markets.

3.3 *What obstacles do you face when applying turnover-based rules (e.g. for calculating corporate fines, or for merger jurisdictional purposes) to the State as a market player? For example, if the maximum sanction is turnover-based, how is this computed when fining a State-owned company? Or what is the appropriate method for computing the "group turnover" in case of State-owned enterprises?*

48. So far no difficulties have been observed in determining turnovers when fines had been calculated for breach of competition rules by the SOEs. In merger control the group of undertakings is determined according to state institution which exercises control rights over the particular SOEs, thus undertakings whose share capital is assigned to (held by) the same ministry would form a separate group of undertakings.

3.4 *What obstacles do you face when applying control-based rules in establishing whether two or more State-controlled players are independent from each other? For example, are three State-controlled companies responding to different Ministries considered as a single economic entity when applying cartel rules? Or when calculating market shares in a merger control context?*

49. As noted above, the CC has not considered two SOEs controlled by two distinct ministries to comprise single economic entity. Such matters have not caused concerns particularly due to the fact that

more than one SOE is normally not present in a single market. Rights of the State arising from ownership of shares in undertakings are usually exercised (held) by a ministry which is responsible for policy making in particular sector where the undertaking operates. Therefore, it is highly unlikely that a cartel could be created among SOEs accountable to different ministries. Nevertheless, ability to control the commercial activity of the SOEs held by separate ministries would be assessed on case by case basis.

3.5 *Have you used competition law remedies to ensure competitive neutrality? Should remedies be far-reaching and aim at restoring competitive neutrality (e.g. imposing privatisation or structural separation)?*

50. The CC is not precluded and in its practice has used behavioural and structural remedies against SOEs to ensure competitive neutrality. In 2009 the CC adopted a decision ordering the Riga Freeport Authority to divest its tugboats to an independent third party, in order to ensure undistorted operation of a privately owned tugboat service company. The decision also contained a series of behavioural remedies.

3.6 *What obstacles do you face in designing remedies when the government has already negotiated or 'sealed' the deal? Which remedies have proven effective or ineffective when applied to State-influenced entities? What obstacles do you face in designing effective remedies and in monitoring compliance in this context?*

51. The CC has not come across a situation, where government would have 'sealed' the deal and by that seized jurisdiction over an outcome of an enforcement process pending before the CC. Design, obstacles in monitoring or enforcement would not differ from that addressed to a private undertaking.

3.6 *To what extent is your fining policy suited to deter anti-competitive conduct by State-controlled companies? (Notably since corporate fine may simply consist in a money transfer from one public budget line to another.)*

52. OECD already observed, that in the level of penalties imposed on SOE's is generally below that imposed onto privately owned undertakings. However, deterrence level of a fining policy can be verified by the level of recidivism. Only on a rare occasion the imposed fine was insufficient to deter from repeated infringements. This was the case of the Riga Freeport Authority for the abuse of a dominant position relating to the tugboat services in the Riga Freeport. However, comparing to the EU practice, it is not uncommon, that even private undertakings engage in repeated infringements. Therefore, fining policy as such is optimal and in case it is necessary to ensure specific deterrence, national fining rules allow for a sufficient room increase the fines.

3.7 *Is it more or less difficult for consumers to seek private recovery against a State-related entity? Where a State exemption, immunity or defence is successfully invoked, does it bar public enforcement only?*

53. Recovery of damages is equally possible from State and privately owned undertakings. In fact, three private damages cases currently pending in the courts are against SOEs. Though none of the litigations is final, lower courts have already recognized the right to a compensation and awarded damages, though not in full amount claimed.