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DRAFT SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES (SOE)

20 October 2009

The Draft Summary of the Roundtable Discussion on The Application of Antitrust Law to State-Owned Enterprises (SOE) is circulated to Competition Delegates FOR APPROVAL BY WRITTEN PROCEDURE. Delegates are requested to submit any proposed changes by 9 April 2010.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES (SOE)

Summary of Discussion

1. Introduction

1. The Chair opened the roundtable discussion on the application of antitrust law to state- owned enterprises, which attracted significant interest among the delegations and drew a high number of contributions.

2. Before opening the floor for discussion with the delegates, the Chair introduced the three experts who were invited to give initial presentations: the Honourable Diane Wood, judge at the Federal Court of Appeals for the 7th Circuit, Mrs. Sandra Lagumina, General Counsel at GDF Suez Group and Prof. Damien Geradin, professor of competition law and economics at Tilburg University in the Netherlands.

3. The Chair invited the three speakers to make their initial presentations.

2. Presentations of the panellists

4. **Judge Wood** began her presentation by stressing the significance of the subject of this roundtable in view of the actions that many governments around the world have taken in response to the financial crisis. State control over an enterprise can take various forms and can be identified in terms of trade, public property, public grant of exclusive rights to a private enterprise and state ownership. One of the very important questions when thinking about SOEs is how, if at all, the existence of an SOE affects competition in an appropriately defined market. For example in the case of Amtrak, which is mentioned in the Issues Paper prepared by the OECD Secretariat, its overall significance in the market for intercity transportation is not too great. It is thus very important to keep in mind what the effects are of an SOE within a properly defined market.

5. In the US, due to its federal organisation, there are many levels of government at which SOEs can exist, namely federal, state and municipal/local, and the consequences for competition policy vary depending on which level is involved.

6. At the federal level, an enterprise, which is part of the US itself is not covered by the antitrust laws because under a 1941 US Supreme Court case the US is not a "person" within the meaning of § 4 of the Clayton Act. Concerning corporations owned by the US, such as Amtrak, the Postal Service and the Tennessee Valley Authority, each has a governing statute whose content determines whether these entities are subject to the antitrust laws or not. The Tennessee Valley Authority was found to be distinct enough from the federal government that it can be sued and held liable for treble damages under antitrust laws. In contrast, the Postal Service is subject to antitrust laws only since a 2007 act of Congress, which overruled a 2004 US Supreme Court decision that found the Postal Service to be exempt from antitrust regulation. The 2007 act adopts a rule, which is rather common in the context of regulated industries that in the areas where the Postal Service performs functions in competition with private enterprises it can be sued under antitrust laws. However, it cannot be sued in areas where it does not compete with private enterprises.

7. The situation is similar at the state level, where the US Supreme Court has held that Congress never intended to subject the state when acting as sovereign entity to the federal antitrust laws. For example, in Hoover v. Ronwyn (466 U.S. 558 (1984)), the US Supreme Court held that a numerus clausus rule for admission to the Arizona bar was outside the scope of federal antitrust laws since it is the Supreme Court of Arizona, as one of the sovereign bodies of the state of Arizona, that decides who gets admitted to the bar. This shows that the rule essentially is that where the state acts as a sovereign, it cannot be sued under antitrust laws (state action immunity). Whether an action qualifies for immunity under the state action doctrine is determined under the Parker v. Brown test (US 317 U.S. 341 (1943)), which is closely looked at in the case of state-owned corporations or private corporations that operate under a delegated authority from the state. Another aspect to mention in connection with state action is that of the Dormant Commerce Clause doctrine. Under this doctrine, states are not permitted to enact legislation that would harm trade or competition among states and hence be inconsistent with the Commerce Clause in the US Constitution. However, where the state acts as a market participant, for example by operating a state-owned cement plant, there is no violation of the Dormant Commerce Clause if such a plant favours in-state purchasers for its output.

8. Local governments (cities, municipalities, water districts) generally do not enjoy state action immunity and are thus subject to antitrust laws, although, with certain limitations as regards remedies, because they cannot be sued for treble damages but only for injunctive relief. However, where the state has clearly delegated the authority to act in a particular area to a local government, there may be scope for invoking the state action immunity.

9. As regards foreign governments, those are generally immune from suit under the Foreign Sovereign Immunities Act (FSIA). However, the FSIA contains a commercial activity exception, which would most likely apply to foreign governments' SOEs.

10. From this short overview it can be seen that under US law there are various ways in which antitrust principles may apply to SOEs. Judge Wood concluded by listing four areas in which competition policy, as opposed to antitrust laws, can play a very important role:

- During the legislative process
- In administrative rule making, for example as regards regulations in the telecom sector
- Licensing and authorizations for doing business
- When deciding on remedies in enforcement proceedings

11. The Chair thanked Judge Wood for her presentation and turned to Mrs. Lagumina.

12. **Mrs Lagumina** opened her presentation by observing that events such as this roundtable are relevant for addressing the following key question: how, with all its particularities, a SOE can operate as a competitive, profit-maximising market participant.

13. Concerning how competition law affects the conduct of SOEs, Mrs Lagumina noted that post-liberalisation the public service imperative has been broadened to apply to private sector entrants as well as to SOEs. Post-liberalisation, an SOE that retains public service obligations next to other commercial activities will face the issue of how to separate those activities. The organizational impact may be significant, as in EdF/GdF for example, where 60.000 employees were suddenly forced to adopt commercial principles, to apply Chinese walls, to move physically to other locations, etc. The potential for sub-optimal performance should not be underestimated.

14. However, once the organizational hurdles are overcome, the introduction of competition should be seen as creating value for the SOE. Mrs Lagumina cited the example of gas storage in France. Originally integrated into the overall business model of the incumbent operator, liberalisation demonstrated to GdF that there was potential to generate revenue solely from this activity. Broadly speaking, the business model for a historical incumbent faced with competition in liberalised markets should be to accept the loss of market share in its core market but to diversify into neighbouring and related markets. The role of competition and regulation is to manage the way in which it does so, both regarding the exploitation of historic 'sympathy capital' and privileged access to infrastructure.

15. As regards the ways in which competition law shapes the environment in which SOEs operate, Mrs Lagumina noted that in the US, regulation and competition law enforcement operate concurrently, whilst in Europe, historically, regulation precedes and makes way for competition in the former state monopolies. Mrs Lagumina noted, however, that in recent years competition law played an increasing role as a driver of liberalisation. She made two examples. First, the case of lignite in Greece, where the historical incumbent maintained a de facto monopoly over Greek supplies of lignite (essential raw material for electricity generation). The European Commission, relying on abuse of dominance and state aid rules, required Greece to open access to lignite supplies to competitors. Second, the case of nuclear energy in France, where following the Champsaur Commission the issue of providing access to France's nuclear energy resources to other electricity supplies was debated. A similar result to the Greek example was achieved in discussions with the European Commission, though no commitments were given in this case.

16. Mrs Lagumina also noted a trend towards the increased use of commitments as an instrument to engineer structural liberalisation indirectly, with the duty falling as much on companies as on the state (for example the commitments by GdF/Suez regarding the opening of the French energy market). This technique has enabled the European Commission to obtain results that would have been much more difficult to achieve by other means, avoiding the question of essential facilities. In this way, competition is forcing structural changes in liberalising markets, a role which was previously reserved to regulation.

17. With respect to corporate governance issues Mrs Lagumina noted that for an SOE to operate like any other company on a market, it is necessary that its corporate governance structures allow it. This is not necessarily simple. Mrs Lagumina took the recent example of GdF gas tariffs in France. Prices are regulated by the State. In a climate where the cost of gas was consistently rising, prices should have risen. But the state was, for a number of reasons, unwilling to countenance a price rise. As a result, the company was not only losing money, but also exposed itself to allegations of breach of the competition rules, since it was selling gas at a price competitors could not match. This situation was exacerbated by the State representation at board level and highlighted an inherent tension between the company requiring the Board to take decisions in its commercial interest, and certain Board members being subject to a wider set of priorities and demands. This tension can be resolved, most radically, by privatisation, but also by partial share offerings. Anything that brings external scrutiny and 'normal' shareholder expectations is vital to balance out the State involvement in the company's governance.

18. Ms Lagumina concluded her presentation noting that for an SOE in 2009, competition law is a vital driver of change and that understanding that and enforcing a culture of competition compliance is a key element. SOEs perceive the benefits of competition law when they start viewing it as an instrument of diversification and a way to open new sources of revenue.

19. The Chair thanked Mrs Lagumina for her presentation and turned to Prof. Geradin.

20. **Prof. Geradin** began his presentation by discussing whether SOEs fall, or should fall, under the scope of competition rules. In his opinion, they certainly should because an SOE can, just like a private company, act anticompetitively and hurt consumer welfare. EU competition law applies to "undertakings",

which the European Court of Justice has defined as "any entity engaged in an economic activity regardless of its legal status and the way it is financed". It is irrelevant whether a company is private or public because this is a functional definition. As to whether natural monopolies should be automatically excluded from this definition, Prof. Geradin argued that the answer should be no, as a company that has a natural monopoly in one segment of its activity may be in fact in competition with other actors in other segments of its activity. Moreover, technological progress may gradually relieve a natural monopoly of its status, for example in the area of telecom infrastructure where former natural monopolies face competition from wireless providers and so on. Therefore, in Prof. Geradin's view the principle that all undertakings are subject to EU competition rules should extend to SOEs as well.

21. Prof. Geradin submitted that SOEs are not more likely than private enterprises to violate competition rules. It may appear to be the case only because they often are present in liberalising markets, and as any incumbent, be it private or public, they do try to maintain their dominant position through a range of measures, some of which may be in violation of competition rules.

22. Concerning the question of whether SOEs raise specific difficulties for competition agencies with respect to enforcement, Prof. Geradin mentioned that the challenges may be three-fold. First, governments may try to interfere with the investigations and although, as Prof. Geradin noted, most agencies he has come into contact with are highly independent, there still may be a risk of interference. Second, when an SOE does not have a corporate form but is a part of the state, particular challenges may arise in connection with the lack of proper accounting structures and so on. Last, in contrast to private companies, SOEs may have goals other than maximizing profit. For example, maximizing revenue and size of the workforce can also be very important objectives for an SOE. In those cases, the utility of traditional competition law tests, such as recoupment, may be limited.

23. It is not only the conduct of an SOE that may be problematic. States themselves can distort markets through adopting measures that favor their SOEs or granting them advantages to compensate for the duty to provide unprofitable public services. In contrast to the US, the EU has legal means to challenge such measures thanks to Articles 86 and 87 of the EC Treaty.

24. Prof. Geradin explained that Article 86 EC prohibits state measures that discriminate in favor of an SOE or of firms that benefit from special or exclusive rights in violation of the Treaty. He referred to the lignite case example given by Mrs. Lagumina, in which the Greek government granted a monopoly-like position to a Greek public lignite mining company.

25. Article 87 EC, prohibits state aids that distort or threaten to distort competition in the common market. Under this provision, any aid that gives a competitive advantage to a particular company is prohibited. The fact that the EU is a supranational organization makes such a provision easier to apply since the European Commission is better sheltered from possible government pressures.

26. Prof. Geradin explained that SOEs can legitimately benefit from advantages in cases where they are also subject to public service obligations, such as the duty of a postal operator to carry out postal deliveries at a uniform price throughout a whole country. The second paragraph of Article 86 EC contains an exemption from this general prohibition. However, as even in these cases there is scope for possible anticompetitive distortions on the market, the European Court of Justice developed a test in the Altmark case (C-280/00) to ensure that any compensation given to a firm providing a public service obligation is not disproportionate to its cost.

27. Lastly, drawing on his past experience working in a program focused on market opening reforms in the Middle East-North Africa region, Prof. Geradin pointed out the tension between liberalisation and privatisation. While states may prefer privatisation of state-owned monopolies as a way of obtaining large

revenue and also to increase efficiencies at such firms, it is market liberalisation that may lead to greater long-term gains and increased consumer welfare. It is therefore important, in Prof. Geradin's view, to find the proper balance between the policies of liberalisation and privatisation.

28. The Chair asked each panelist to comment on the various presentations.

29. **Judge Wood** observed that there appears to be a common approach in thinking about each of the functions an organization has and judging them appropriately. However, there may be efficiencies in bundling different activities together in one entity and one should not, in the interest of maximizing competition, put such great restraints on firms so they are forced to behave inefficiently. Further, she added that an SOE is a rather blurry concept as it may encompass both state-owned enterprises and private utilities, which operate under heavy regulatory schemes. There is a continuum between a private enterprise and a pure SOE, and competition concerns vary according to where an entity sits on this continuum. **Mrs Lagumina** agreed with Prof. Geradin that companies now pay great attention to competition law, both at European and national level. She further noted with interest the distinctions US law draws between companies on federal and municipal/local level with respect to competition law that had been described by Judge Wood. In reaction to Judge Wood's presentation **Prof. Geradin** noted that, in his view, the fact that there are no means in US law to control state subsidies is a serious limitation, for example in attracting foreign investment. He wondered what the reason behind this may be. Following up on Mrs. Lagumina's presentation, Prof. Geradin observed that competition law has in recent years become a prominent part of the legal considerations of any major corporation.

3. General discussion

30. The Chair thanked the panelists and opened the discussion on issues raised by the Secretariat background paper and the panelists' presentations: (i) definition of an SOE and its effect on the modern economy, (ii) possible special competition rules applicable to SOEs, (iii) experiences with the enforcement of competition rules vis-à-vis SOEs, and (iv) possible antitrust exemptions for SOEs. He invited the delegates to discuss each topic in turn.

4. Definition of an SOE and its effect on the modern economy

31. To start this part of the discussion, the Chair turned to Finland whose contribution showed how diversified the spectrum of state ownership can be.

32. The **Finnish** delegation noted that in Finland there is a long history of state-owned enterprises. There are large SOEs, in particular in the market for natural resources, which have a strong and somewhat sheltered market position. Competition policy has been successful in positively influencing various aspects of their activities, such as distribution, and the state has also improved their governance principles. However, many competitive problems remain due to the strong market position of these companies. The municipal sector, for example, is a very strong player in Finland particularly with respect to the provision of public welfare services. These have been organized through municipal and state enterprise models, which are a mix between a commercial corporation and a political agency. However, the European Commission has decided that such a model constitutes state aid in contravention of Article 87 EC due to beneficial tax conditions and special bankruptcy rules. There is therefore an ongoing reform in Finland whereby municipal and state activities of a commercial character will be carried out through limited liability corporations. In summary, in Finland there are SOEs of nearly private character with respect to which some competitive problems remain. As regards municipal limited liability corporations, they will be gradually gaining in importance due to the ongoing reform and will undoubtedly compete against private actors in the markets for services which they provide.

33. The Chair thanked the Finnish delegation for their contribution and invited Brazil, which has SOEs in a number of sectors, to explain its public policy on SOEs.

34. The **Brazilian** delegation noted the principle in Brazilian competition law that the public objectives of SOEs and competition rules must both be respected and that the principle of the level playing field is key. A number of SOE financial institutions have started a policy of offering exceptional loans on preferential terms for the poorer sections of Brazilian society resulting in a range of economic and social benefits. This was compatible with the competition rules which allowed public policy considerations to be taken into account in the same manner as other benefits.

35. The Chair turned to Korea, which has a legal definition of an SOE to explain the conditions that must be fulfilled for a company to qualify as an SOE and what its obligations are.

36. The **Korean** delegation described that to qualify as a public institution a company must meet two conditions. First, it has to be established and operated through shareholding or financial aid by the government. Second, it has to be designated so by the Ministry of Strategy and Finance under the Act on Management of Public Institutions, which was adopted in 2007 in order to reform the management system of public institutions and improve transparency and accountability. The Act regulates corporate governance, accounting disclosure and management assessment by the government.

37. The Chair noted the presence of two special guests to the roundtable, India and China, and invited China to discuss the approach to SOEs taken by its recent antimonopoly law.

38. The **Chinese** delegate explained that the antimonopoly law applies to undertakings, which is a definition encompassing legal persons or any other organizations that engage in selling products or providing services, whether they are state owned or not. Clause 7 of the antimonopoly law, which applies specifically to SOEs, states that they should conduct their business in a way that does not harm consumer interest and should not abuse their dominant position and restrict competition.

39. The Chair thanked the Chinese delegate and noted that there is a wide interest in the evolution of antimonopoly law in China. He asked India to comment on its approach to SOEs and the policy issues that have arisen in relation to them.

40. The **Indian** delegation described that in India there is a large number of SOEs operating at different levels of government: federal, state and municipal. In fact, the federal public enterprises comprise about 26% of the national GDP. Interestingly, competition law applies to all SOEs regardless of whether they are incorporated under government ownership or departmental enterprises, such as highways, construction of houses, educational and health services, the postal service and the railways. The definition of an enterprise subject to the competition act is thus very broad and exempts only activities relating to sovereign duties of the government like defense, space and nuclear energy. In India, there has been more liberalisation than privatisation, however enforcement has been slow and hence competition in the market, irrespective whether between SOEs and private companies, has been gradual.

41. Advocacy was stressed by the Indian delegation as an important part of its current work. Concerning enforcement, the authority has been careful in areas of natural monopolies, where despite recent unbundling, the problem of large sunk costs remains. Liberalisation has also taken place in areas of legally created monopolies where licensing systems have been removed and therefore any private enterprise can enter the market. The process of liberalization has affected even the postal service, which is a governmental department entity. However, with respect to railways the process has been somewhat slower.

42. Finally, the Indian delegation pointed at the important role played by sectoral regulators following the unbundling and liberalisation that has taken place in various markets. However, their role is narrowly defined by the relevant sectoral regulatory acts, which do not specifically deal with competition. In this area there is therefore a lot to be done from a competition policy perspective.

43. The Chair thanked the Indian delegation and noted that a tension between competition enforcement agencies and sectoral regulators is probably a common theme among many delegations. He turned to the Czech Republic to describe its experience with transition from a centrally planned economy to the free market and the effect that SOEs had on the market during this transition and the competition concerns involved.

44. The transition from a centrally planned to a market economy presented the **Czech Republic** with challenges in particular with respect to ensuring that former state monopolies would not simply be transformed to private monopolies through privatisation. The Ministry of Economic Competition, which played an important role in the privatisation process, was entrusted with the role of ensuring that public monopolies were transformed to private monopolies to the least extent possible. Privatisation was thus seen as a unique opportunity to break up large state monopolies, which had little incentive to innovate but were preventing market entry of private enterprises due to the low prices they were charging. As a consequence, development in areas such as telecoms was slowed down significantly.

5. Possible special competition rules applicable to SOEs

45. The Chair asked the delegates to discuss the issue of special competition rules that may apply to SOEs when compared with private enterprises. In many cases SOEs enjoy privileges and immunities unavailable to the private sector, which are due to government ownership rather than to better business acumen and may significantly distort competition in the market. He asked the Netherlands to comment on a bill on markets and governments that is currently being discussed in the Dutch Parliament, and how, if approved, it may impact competition rules.

46. The **Dutch** delegation explained that the goal of the new bill is to level the playing field between private enterprises and SOEs engaged in commercial activities in the market. The bill covers all areas where the government or SOEs sell products or provide services to the market. It includes local governments, water councils and so on. However, certain activities such as public education, research, public broadcasting and sheltered workshops are excluded from its scope. In addition, certain activities may be excluded *ad hoc* following a decision by a relevant government entity (including the Competition authority) that a particular activity is of public interest. The bill in effect shifts the emphasis from an *ex-post* to *ex-ante* regulatory approach and gives the Dutch Competition Agency (NMA) the authority to ensure that SOEs comply with their obligations, although it cannot impose fines on them.

47. Concerning the obligations that the bill would impose. For example, SOEs would have to include in their prices all costs associated with providing a particular service and they will have to ensure that they share the information gathered in their role as a public body with private parties or refrain from using it in their commercial activities. With respect to the relationship between competition law and the pending bill, the Dutch delegation explained that while predatory pricing is prohibited under competition law, if an SOE complies with the obligation to include all costs mentioned earlier, it cannot be held liable for predatory pricing. However, that does not mean that it could not be held liable for other competition infringements.

48. The Chair invited Russia, whose contribution listed a number of measures that can be taken to prevent negative effects of SOEs on competition, to comment on how Russian competition rules apply to SOEs and what other measures the Federal Antimonopoly Service (FAS) considers appropriate to reduce the negative impact of SOEs on competition.

49. The **Russian** delegation explained that there are two types of SOEs in Russia, state corporations and municipal-owned enterprises. The Russian written contribution focused on state corporations, which are non-commercial organizations established by law whose purpose is to carry out socially useful functions, for example implementation of large scale investment and innovative projects to ensure state interest in defense and other fields.

50. The FAS is concerned with the effect SOEs have on competition on the market. Although they are subject to competition laws, they can negatively affect competition on the market. Therefore, the FAS has suggested a number of measures to mitigate the potentially negative effects of SOEs on the market. Some of the suggestions concern the expansion of tendering procedures by SOEs and the use of auctioning of tenders, which would reduce costs and increase transparency. Moreover, the FAS actively opposes the creation of new SOEs and lobbies for a moratorium on their creation until an effective system to monitor their activities is established.

51. Turning to the United Kingdom, the Chair invited its delegation to comment on the BetterCare case, which highlighted some of the differences between the UK and EU laws when it comes to enforcing competition rules to SOEs.

52. The **UK** delegation described that the UK Competition Act follows Articles 81 and 82 of the EC Treaty in that it applies to undertakings that engage in an economic activity regardless of the way they are financed. Therefore, its coverage extends to SOEs. The issue raised by the question from the Chair is that the outcome reached by the Competition Appeals Tribunal (CAT) in the BetterCare case in 2002 may appear to a certain extent inconsistent with a subsequent case decided by the European Commission in relation to the system of purchasing used by the Spanish health care system.

53. The BetterCare case concerned the provision of nursing services by a local authority health trust. The trust was using third party contractors to provide the services and the costs were covered through taxes and direct contributions from the patients. The Office of Fair Trading (OFT) considered that the trust was not an undertaking in the sense of the Competition Act, however the CAT reversed this decision, holding that the trust was acting as an economic entity in the purchasing as well as in the direct provision of care services. The CAT's decision focused on whether the trust was engaged in an activity that the Competition Act seeks to cover.

54. The Spanish case, which was assessed by the European Commission also involved an alleged abuse of dominant position related to purchasing. It was based on a complaint that the Spanish national health system was allegedly abusing its dominant position in making purchases on the market for health products. The complaint was dismissed and both the Court of First Instance and the European Court of Justice held that making purchases in itself does not constitute economic activity. Purchasing could be an economic activity only where the goods are used subsequently in offering products or services. As a result of this case, the situation in the UK is less clear than after the CAT ruling in BetterCare. The health system continues to evolve and it remains to be seen how a case of purchasing by a centrally funded health body would be assessed in light of the case law of the European Courts.

6. Experiences with the enforcement of competition rules vis-à-vis SOEs

55. The Chair noted that as a number of OECD countries provide for enforcement of competition rules against SOEs it would be interesting to discuss the particular challenges enforcers face, especially with respect to the difficulties in calculating the appropriate measure of cost. He invited Norway to comment on this issue, since its contribution discussed a predatory pricing case involving an SOE.

56. The **Norwegian** delegation explained that since May 2004 Norwegian law has a provision very similar to Article 82 EC and this provision was the basis of the SAS case, described in detail on page 9 of its contribution. So far there have been two cases of abuse of dominance in Norway and it has been very difficult to convince courts that a wrongdoing has occurred. In particular in the SAS case, the court went with SAS, which is 50% owned by the three Scandinavian governments, in holding that its conduct did not constitute abuse. In the end due to resource considerations the competition authority settled with SAS, finding a breach of the law but not imposing a fine. The conclusion is that these cases are more resource intensive than anticipated prior to the adoption of the 2004 law. Another observation is that it was the dawn raids carried out at SAS which appear to have brought real change in the company's behavior with respect to pricing on the domestic market. This actually enabled a smaller competitor to survive.

57. Another issue discussed is that of cross-subsidization and the Chair invited France, whose contribution touched upon it to comment.

58. The **French** delegate from the Conseil de la Concurrence explained that cross-subsidy is not considered *per se* illegal by the French Competition authorities, who look rather at the end result of the cross-subsidy, e.g. if it enables predatory pricing. The test is that there must be a 'lasting distortion' of the market. This was demonstrated in the Française des Jeux case where a subsidiary was able to lower prices below variable costs thus affecting opportunities for competitors on that market. The authorities (and the courts on appeal) concluded that there had been a lasting distortion of competition given the weight and influence on the market enjoyed by the Française des Jeux subsidiary. As regards sanctions, the factors taken into account in penalizing illegal cross-subsidies include the *damag*e to the economy, the gravity of the conduct, the situation of the company in question and any recidivism.

59. Another French delegate reinforced the points made by the representative of the Conseil de la Concurrence that two main difficulties may arise in penalizing cross-subsidies. First, it is not always possible to identify distinct 'public' and 'commercial' activities. For example, in the Ile d'Yeu ferry case, where the ferry service was held to be a commercial operation in high season and a public service the remainder of the year. Issues of cross-subsidy are almost impossible to identify and treat in these circumstances. Second, there are problems in calculating incremental costs accurately.

60. The Chair thanked the French delegation and opened the floor for possible interventions.

61. The **Greek** delegation reported on the approach to SOEs in Greece and highlighted a few recent cases. Both private enterprises and SOEs are treated alike in Greece, as it is expressly stipulated in the National Competition Act. The Hellenic Competition Commission (HCC) examined the competitive behavior of SOEs in a number of cases in various sectors of the economy. Moreover, the Hellenic Telecom and Post Commission, which is responsible for the application of antitrust laws in the Telecom area, recently fined the Hellenic Telecom company for abuse of dominance in the form of margin squeeze in the market for broadband internet access. The Greek delegation further highlighted some cases dealt with by the HCC, including price fixing between the two major refineries in Greece; restrictive vertical agreements between the Hellenic Port Authority, operator of the Piraeus port, and the liner company MSC; and exclusive supply clauses in contracts between the state-owned electricity supplier and high voltage users.

62. The **Australian** delegation described the situation in Australia, where the government enjoys immunity from competition law. Until recently there was also a doctrine of "derivative crown immunity" under which companies that contract with the government enjoyed immunity from competition law as well. This was however changed in a case involving a health service purchasing authority, which was contracting for the purchase of sterile fluids with a seller, who was bundling products in which it had a monopoly with others where it did not. The competition authority found this to be a violation and litigated

the case all the way to the High Court, which rejected the application of derivative crown immunity doctrine in these circumstances.

63. The delegation from **Chinese Taipei** posed a question to Judge Wood concerning the criteria in applying the function test to determine whether a particular activity of an SOE falls under the antitrust laws or not. **Judge Wood** described that the function test has been introduced with respect to the Postal Service by Congress in 2007, following a ruling by the Supreme Court in 2004, which held that the Postal Service is too close to the government to be a person within the meaning of antitrust laws. There is currently a debate about which of its functions are in fact in competitive markets and which are not. The function test is widely known to US courts in the context of the Foreign Sovereign Immunities Act where the courts have grappled extensively with what constitutes commercial activity.

64. The **Canadian** delegation raised the issue of the treatment of foreign SOEs, which had not been discussed so far. In Canada, domestic and foreign SOEs are treated equally under the Competition Act when they are engaged in commercial activities in the public marketplace. Domestic SOEs are not afforded preferential treatment in this regard.

65. The Chair thanked the Canadian delegation for its contribution and noted that the issues of treatment of foreign SOEs could be taken up in the afternoon section of the roundtable.

66. **BIAC** stressed that in its opinion competition law should be applied to all market actors, irrespective of whether they are SOEs or private enterprises. This approach is necessary to ensure a level playing field and it is particularly important that all countries adopt it in view of increasing global trade. The BIAC delegation hence welcomes the developments in so many countries that bring SOEs under the umbrella of competition law.

7. Panellists' closing remarks

67. **Prof. Geradin** noted that most of the presentations somehow related to liberalisation of network industries, which is where most SOEs operate in OECD countries. When looking at liberalisation there are in fact three issues to consider. First, liberalisation has to be mandated by law, which in itself is a rather political issue. Second, it is important to devise a proper regulatory scheme that allows for development of competition in the liberalised industries. Last but not least, competition rules have to be enforced in the newly liberalised markets.

68. **Mrs Lagumina** observed that this discussion emphasized the challenges in reconciling the competition rules and economic policy, but it also shows clear convergence, in that no one seems to be suggesting there should be 'separate' competition rules for SOEs. Mrs Lagumina also noted that it should be conceivable to give some consideration to elements of public policy and obligation to which SOEs are subject. This would make the whole debate more credible.

69. In **Judge Wood**'s view there are three broad questions that countries have to tackle with regard to SOEs. First, the philosophical question of whether SOEs should be subject to competition law in the same way private enterprises are appears to be well answered. Second, the real challenge appears to be in the area of enforcement because of the complexity that SOEs present due to the variety of their activities. There it is very difficult to analyze whether an SOE is cross-subsidizing, pricing below competitive levels or engaging in other forms of anticompetitive conduct. This will require a lot of work and international cooperation, and knowledge sharing has a lot to offer in this respect. Last, it is important to determine which creates the more significant competition problems between SOEs that have a monopoly and those that compete with other actors in the market.

70. The Chair thanked the panelists and the participants and invited everyone for the afternoon session on corporate governance and the principle of competitive neutrality for SOEs where some of these philosophical enforcement challenges will be discussed.