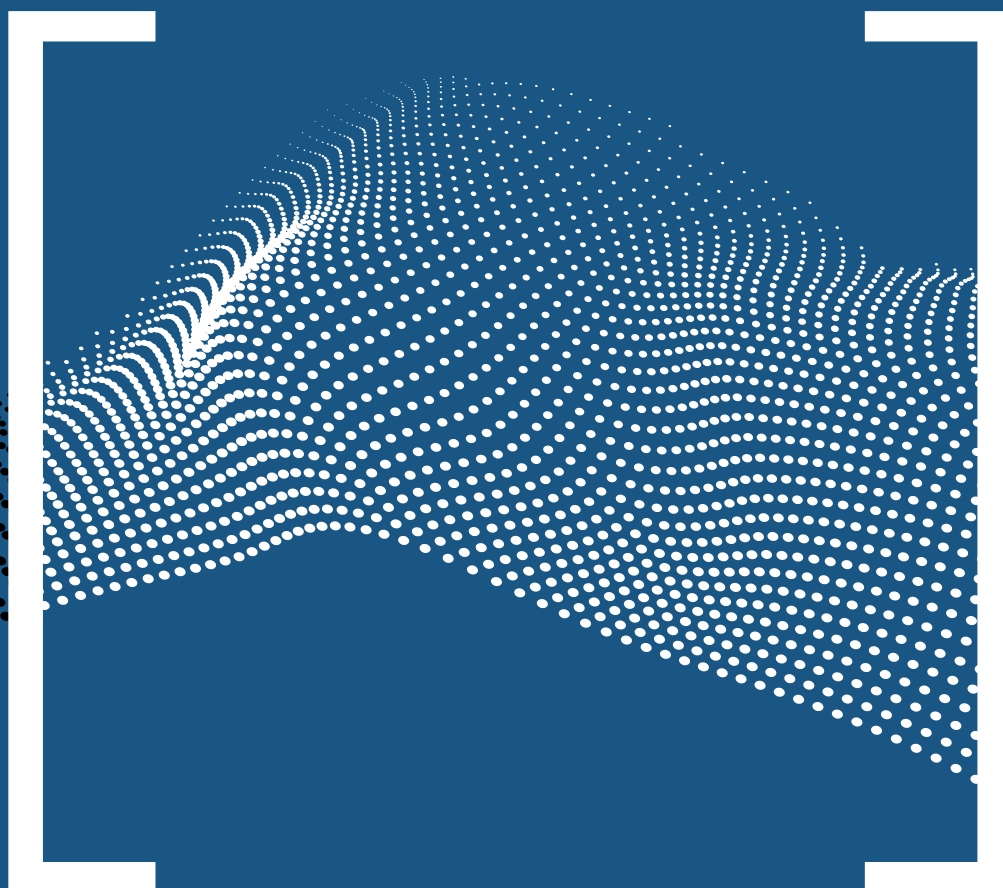


COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Focus on Competitive Neutrality



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
Newsletter no. 15, July 2020



Gazdasági Versenyhivatal
The Hungarian Competition Authority

Inside a competition authority: **MOLDOVA**

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Foreword

Welcome, President Rigó!

This issue of the RCC Newsletter is very special for two main reasons.

The first reason is that the Covid-19 outbreak has changed our lives. Like a gigantic hurricane, it has torn down some of our beliefs and exposed the weaknesses of the global economic system. Many governments are striving to safeguard the health and well-being of their citizens and to promote a more resilient and sustainable economic framework. Competition authorities must deal with new challenges, in the face of disrupted markets and a stronger role of State intervention and industrial policy. This is why the present issue of our Newsletter, which focuses on **competitive neutrality**, may provide precious insights and inspiration. In fact, it presents several stories in which OECD and non-OECD competition authorities were able to ensure that public and private firms could operate under equal conditions. A number of important lessons learned in times of crisis, e.g. during the financial crisis of 2008/09, may prove to be beneficial for Eastern European countries in the coming months.

We also decided to create a **Special Supplement dedicated to policy responses to the Covid-19 crisis**. It includes considerations by the OECD Secretary General Angel Gurría, an article by the Chair of the OECD Competition Committee, Frederic Jenny, and other informative articles and documents that may help to guide the actions of governments and competition authorities in today's challenging times.

The second reason why this is a special issue is that **a number of leading figures of the Regional Centre have changed**. We are happy to welcome Mr. Csaba Balázs Rigó, who in April 2020 replaced Mr. Miklós Juhász as the President of the Hungarian Competition Authority (GVH). Prior to his appointment as the President of the GVH, from 2012 Mr Rigó served as the Vice-President and later, from 2015, as the President of the Public Procurement Authority of Hungary. He has experience as a university lecturer and as a frequent guest speaker at professional events. The extensive experience that he has acquired during his time spent in both the private sector in the operation of local municipalities and in the public administration as a leader and university lecturer, will undoubtedly prove extremely beneficial in his endeavours to protect competition and the interests of the GVH. On his appointment, Mr. Rigó immediately expressed his full commitment to supporting our initiatives: we are sure that the Regional Centre will thrive under his Presidency.



In the same period, our dear friend Andrea Dalmay left the GVH after taking care of the RCC for more than eight years. We would like to express our sincere gratitude to both Andrea and Mr. Juhász for their outstanding contribution, and we would also like to thank the two pillars of the Centre that have ensured its continuity: Vice President, László Bak, and the Head of the International Section, Gabriella Szilágyi. At the same time, we are delighted to announce that Milán Bánhegyi joined the RCC family on 1 July 2020. In these first few days we have already had very promising signs of his skills and enthusiasm.

As you will see, in response to uncertainty about future confinement measures and travel restrictions, the new 2020 Programme of the RCC foresees a set of virtual seminars and additional training materials, aimed at ensuring that the RCC continues to achieve its objectives. However, we believe that virtual seminars are not equivalent to in-person seminars and only represent a temporary solution to the current crisis. As soon as circumstances permit, we will resume our traditional activity based on in-person meetings. Nevertheless, in the future we will continue to create digital training materials, with the hope that they will serve as a valuable complement to the held seminars.

In accordance with the established format of the previous issue, the Newsletter also includes a section in which the Chairperson of one of the beneficiary competition authorities of the RCC is interviewed. The aim of this interview is to obtain an in depth insight into the authority's strategies for dealing with potential future challenges and its enforcement and advocacy records. This time we will **explore the Competition Council of the Republic of Moldova**, which will kindly host the next RCC Outside seminar as soon as circumstances permit.

The next issue of the Newsletter will focus on **abuse of dominance in digital markets**. We would like to learn about investigation, analysis or resolution of abuse of dominance cases in digital markets by your competition authorities, focusing in particular on: *i)* how to assess market power, *ii)* how to deal with big data, *iii)* what are the relevant theories of harm and *iv)* how to structure remedies. We invite you to submit your contributions by **15 October 2020**.

We hope that you are well and maintaining a positive outlook and we look forward to meeting you in person as soon as we are able to take off again with our usual RCC seminars!



PROGRAMME 2020

(in light of the Covid-19 crisis)

After the first Seminar on Competition enforcement and advocacy in the banking and insurance sectors, which was held in Budapest on 18-20 February 2020, the activity of the Centre was suspended due to the Covid-19 pandemic.

In response to uncertainty about future confinement measures and travel limitations, the new 2020 Programme of the RCC foresees a set of virtual seminars (Section A) and additional training materials (Section B), aimed at ensuring

that the RCC continues to achieve its objectives. However, the RCC takes the view that virtual seminars are not equivalent to in-person seminars and only represent a temporary solution to respond to the crisis. As soon as circumstances permit, the RCC will resume its traditional activity based on in-person meetings. Instead, the digital training materials will be further enhanced in the future, as a valuable complement to the seminars.

A. Seminars on competition law

18-20 February
Budapest

Competition enforcement and advocacy in the banking and insurance sectors

The financial sector is characterised by a number of specific features that competition authorities have to consider, including extensive regulation and concerns about financial stability and systemic effects. Furthermore, the banking and insurance sectors are confronted with digital disruption resulting from the emergence of FinTech operators in the provision of financial services. Expert speakers and participants shared their experience on competition enforcement and advocacy in the financial sector and discussed current and future challenges.

1-2 July
Online

Virtual Seminar: Competition Policy Responses to the Crisis

***New**

This two-day virtual seminar proposed four sessions: a policy discussion for top managers on the “Key challenges to competition policy”, followed by three tailor-made session on abuse of dominance (**How to deal with price gouging and exploitative prices**), mergers (**Merger control in the face of uncertainty and State intervention**) and agreements (**Distinguishing lawful and unlawful co-operation between competitors**). Each of the three technical session were followed by breakout sessions in English and in Russian.

22-24 September
Online

Virtual seminar: Introductory Seminar for Young Staff – Competition law principles and procedures

*** Topic of the seminar originally planned for March 2020 in Budapest**

The aim of this seminar is to provide young authority staff with an opportunity to deepen their knowledge of key notions and procedures in competition law enforcement. Experienced practitioners from OECD countries will share their knowledge and engage in lively exchanges with the participants on cartels, mergers and abuse of dominance. We will discuss basic legal and economic theories as well as the relevant case law. Participants will also have a chance to face and discuss procedural issues through practical exercises.

A. Seminars on competition law

October (3 days) Online	<p>Virtual RCC–FAS Seminar in Russia – Enforcement cooperation in cross-border cases</p> <p>* Topic of the same seminar originally planned in Russia</p> <p>Globalisation and the digital economy, as well as the increasing significance of emerging economies and the proliferation of competition regimes, have increased the complexity of cross-border competition law enforcement cooperation. Several initiatives by international organisations (e.g. OECD Recommendation on International Co-operation on Competition Investigations and Proceedings, ICN-led Framework to Promote Fair and Effective Agency Process and UNCTAD Guiding Policies and Procedures under Section F of the UN Set on Competition) aim to explore the ways in which costs can be reduced, inconsistencies can be avoided and procedural fairness can be guaranteed in parallel proceedings. This seminar will explore best practices for formal and informal enforcement cooperation.</p>
November (1 day) Budapest	<p>15th Anniversary Celebration of the OECD-GVH RCC: Heads of Agency Meeting – <i>Reviewing the past to design the future</i></p> <p>* If still not feasible, it will be postponed to 2021</p> <p>In a globalised world, high expertise and international cooperation have become indispensable for competition authorities. Building on the successful experience of the Centre over the last 15 years and the international initiatives in these areas, the event will explore the ways in which the RCC's role as a catalyst for capacity building and enhanced regional cooperation can be further enhanced.</p>
November (3 days) Online	<p>Virtual seminar: Competition policy to ensure a level playing field between private and public firms</p> <p>* Topic of the same seminar originally planned in Budapest</p> <p>It is a fundamental principle of competition law and policy that firms should compete on their merits and should not benefit from undue advantages due to their ownership or nationality. This seminar will address the challenges of enforcing competition rules against state-owned enterprises and the advocacy actions that can help governments to achieve competitive neutrality between publicly-owned and privately-owned competitors.</p>

B. Other training materials and questionnaire

Videos on key competition topics: first video on Antitrust Commitments

Beneficiary economies highly value simple, focused messages on key competition topics. Building on the seminar materials gathered over the years, the RCC intends to prepare a set of short, eye-catching videos. A first pilot video on Antitrust Commitments has already been produced. These tools can help the RCC to continue to provide capacity building even remotely.

Special supplement of the RCC Newsletter on competition responses to the Covid-19 crisis

This July 2020 issue of the RCC Newsletter focuses on the very topical theme of competitive neutrality and includes articles both from the region and from experienced jurisdictions. In addition, a Special supplement on competition responses to the Covid-19 crisis provides the beneficiary economies with advice and good practices from the OECD to cope with the long, medium and short-term challenges stemming from the crisis. Fostering dissemination of such documents (and providing a Russian version of them) may prove highly valuable for RCC beneficiaries.

Questionnaire for Heads of Agency

In preparation for the celebration of the 15th Anniversary, the RCC will circulate a questionnaire aimed at collecting the views and comments of the Heads of Agency on a number of future opportunities for the Centre, e.g. regarding policy discussion, internal dissemination within the agencies, enforcement cooperation and synergies with other RCCs. The replies will be elaborated into a working document to be discussed at the Anniversary.

Competitive Neutrality in Eastern Europe and Central Asia

A key tool to foster economic recovery



Matteo Giangaspero
Competition Expert, OECD



Renato Ferrandi
Senior Competition Expert, OECD

1. What is “competitive neutrality”?

Competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages. In other words, it is a framework within which all enterprises, irrespective of their ownership (state-owned or privately owned) or nationality (domestic or foreign), face the same set of rules and where State action does not result in a competitive advantage for a particular market participant. In light of the key role played by state-owned enterprises (SOEs) in Eastern Europe and Central Asia, this article focuses on the application of competitive neutrality principles in relation to SOEs and their interplay with private firms.

In most jurisdictions, the State has a dual role as policy maker/sector regulator and supplier or purchaser of goods and services. Consequently, in markets open to competition the State also acts as a market participant and interacts with private businesses, most often indirectly, through SOEs. Governments may be tempted to grant SOEs certain advantages, e.g. privileged market position, soft loans, outright subsidies, regulatory exemptions or tax benefits. This creates an un-level playing field and prevents the most capable entities – whether public or private actors – from providing consumers with goods and services at a higher quality and lower prices.

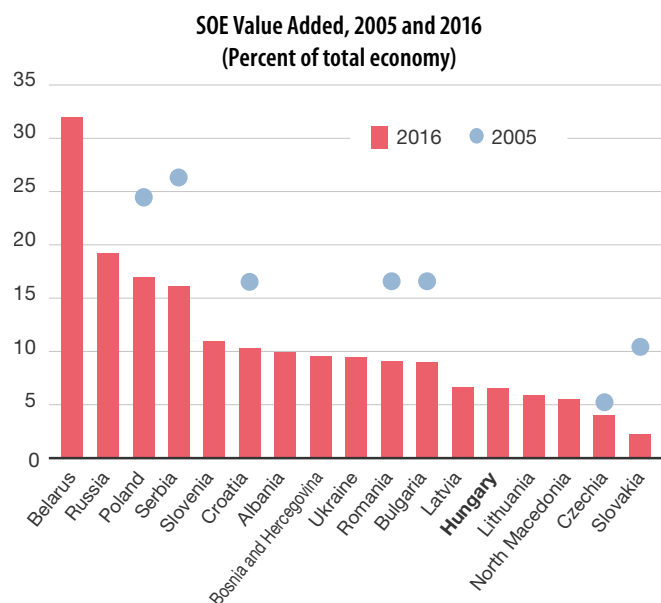
It is important to highlight that competitive neutrality should not be regarded as absolute. In specific circumstances, SOEs may be granted exceptions in the interest of public policy objectives. In some other instances, even privately owned companies can be tasked with public policy objectives and, for such purposes, may benefit from more favourable treatment (e.g. regulatory or financial). Such exceptions from the competitive neutrality principle should be limited to what is deemed strictly necessary for achieving the underlying objectives: the pursued public policy goal should be balanced

against the potential consumer welfare loss, especially if the same objectives can be achieved through less competition-restrictive means, such as competition enforcement and/or regulatory intervention. Moreover, undue compensation and special advantages granted to SOEs in return for public policy obligations can create asymmetric contestability in home markets for foreign competitors and have harmful spill-over effects in other jurisdictions.

2. The role of SOEs globally and in the region

The concept of SOEs encompasses a broad range of entities characterised by the common feature of government control. A broad range of economic, social, political and strategic reasons are given for the existence of SOEs, depending on the jurisdiction in question. SOEs are often originally established in order to provide public services and goods in the presence of a natural monopoly or market failures, which would lead to such goods and services being under-provided. Moreover, especially in emerging economies, SOEs often have a role in national development strategies and can be used by governments as a tool for implementing an innovation-led industrial policy, to create jobs, or to protect national security.

In Eastern Europe and Central Asia, the relevance of SOEs is particularly evident, due to the historical role played by governments in the national economy. Despite falling by 5–10 percentage points in most countries in a decade (see Figure below), the share of SOEs in total value-added in 2016 was still significantly higher than 10% in Belarus, Russia, Poland and Serbia and reached approximately 10% in Slovenia, Croatia, Albania, Bosnia Herzegovina, Ukraine, Romania and Bulgaria. In Russia and Ukraine, SOEs account for approximately 15% of the overall national employment, while in Belarus the share is around 30%.



Source: IMF, *Reassessing the Role of State-Owned Enterprises in Central, Eastern, and Southeastern Europe* (2019)

Although the impact of SOEs may vary depending on the economy in question, their role cannot be disregarded insofar as they usually operate in sectors important to national and international supply chains, such as public utilities, manufacturing, metals and mining, and oil & gas. The electricity and gas, transportation, telecoms and other utilities sectors account for 51% of all SOEs by value and 70% by employment across the OECD plus area. Finance is the largest individual sector, corresponding to 26% of global SOEs by value¹.

In addition, their importance as global players has substantially increased over the last 10 years, also as a result of the surge of SOE-led international M&A activity. As a result, 22% of the world's largest 100 firms are SOEs. The economic crisis caused by the Covid-19 pandemic may further increase the weight of SOEs, with, for instance, States engaging in mergers to rescue distressed firms in sectors deemed crucial for domestic economies.

3. Competition law enforcement

There is a general consensus that competition law should apply in a neutral way to both private enterprises and SOEs that engage in economic activities. In particular, when it comes to anti-competitive conduct, SOEs should be assessed under the same standards as those applied to privately owned businesses. If this is not the case, this may result in an unlevel playing field and in competition distortions between state-owned and privately owned competitors. That being said, enforcing competition rules against SOEs presents enforcers with particular challenges.

First, some jurisdictions provide for exemptions in their competition laws in relation to specific conducts, sectors, and entities (such as SOEs), thereby resulting in adverse effects on competitive neutrality. The scope of these exceptions varies. In some jurisdictions, exemptions are limited to the provision of services of general economic interest and are often accom-

panied by proportionate and appropriate regulation aimed at minimising the risk of market distortions.

Second, even in the absence of exemptions, SOEs may (more so than privately owned companies) avoid liability on a case-by-case basis by claiming a “state action defence”, which can be used to avoid liability for anti-competitive conduct if it was imposed or authorised by law. However, such defence can be invoked only if specific conditions are met, according to the legislative framework in place, and SOEs are normally required to provide substantial evidence to show that their actions were “state-imposed”.

Against this background, SOEs may have stronger incentives and a greater ability to engage in anti-competitive conduct. The stronger incentives result from, *inter alia*, the following factors: (i) SOEs are not necessarily profit-maximising entities, so they may be more concerned about expanding sales and revenues, even if such commercial strategies raise costs and do not generate profits; and (ii) SOEs' conduct may be driven by a sense of immunity, government protection and assistance. The anti-competitive harm may be even greater when caused by SOEs, due to the privileges conferred upon them and the high reliance of customers on their goods/services.

As an example of SOEs' abusive conduct, in Ukraine the national competition authority AMCU recently found that two major SOEs abused their market power by applying different prices to different buyers over the last few years. The companies held a dominant position in the markets of primary salts for industrial processing and kitchen salt, in the first case, and wholesale sale of ethyl-rectified alcohol, in the second. In both instances, the AMCU imposed fines.

A recent case in Georgia is a telling example of enforcement action vis-à-vis a privately owned company that was granted favourable treatment by the government. In February 2020, the Competition Agency of Georgia established an abuse of dominance by a private company that was given an administrative monopoly over the local outdoor advertising market for 12 years following a tender procedure. The company also had the power to authorise third parties to operate the same service. The Competition Agency of Georgia concluded that the company abused its dominant position by creating unjustified barriers to market entry.

SOEs may be more inclined to behave in an anti-competitive manner due to benefitting from a number of privileges such as (i) legal or practical exemptions from bankruptcy rules; and (ii) softer budget constraints because of the possibility of direct financial support from the State (through, for instance, capital injections and non-commercial loans) or the ability to access finance at lower costs due to (actual or implicit) government guarantees over SOEs' commercial loans. These factors may also affect the effectiveness of monetary sanctions as a tool to ensure deterrence. In this respect, it is remarkable that in Russia recent amendments to the Law on State and Municipal Unitary Enterprises and to the Law on the Protection of Competition empowered the Federal Anti-Monopoly Service (FAS) to issue a warning on liquidation

1 OECD (2017), *The Size and Sectoral Distribution of State-Owned Enterprises*, OECD, Paris. Note that figures exclude China.

or to take measures to terminate the activities of SOEs that infringe competition rules.

4. Advocacy - Reforms and policy actions

Distortions of competitive neutrality principles may also be the result of policy and legislative initiatives falling outside the enforcement powers of competition authorities, especially in those jurisdictions without a “state aid” framework. In these circumstances, competitive neutrality may be best ensured through advocacy activities of competition authorities.

In fact, distortions may be caused, for instance, (i) by regulation that grants subsidies on a selective basis (i.e. only to specific companies, often SOEs), (ii) as a result of sector regulation that favours SOEs or other incumbent firms by limiting or discouraging the activities of new entrants; or (iii) through the use of discretion to entrust SOEs or private firms with (directly or indirectly remunerated) the provision of “public services”. Competition authorities may effectively advise against the adoption of these measures by highlighting how they would distort competition.

Competition authorities may also play a key role in the context of privatisation and/or liberalisation reforms, typically jointly or in consultation with sector regulators (where present) and sectorial ministries. In a privatisation context, the main aim of advocacy initiatives should be to ensure that no undue competitive advantage is transferred from a State-owned (often monopolist) company to the (private) acquirer of the SOE’s assets and activities that are being privatised. Similarly, competition authorities may engage in advocacy efforts to ensure that, in a newly liberalised sector, incumbent firms and new entrants are subject to the same set of rules and regulatory burdens. These are initiatives that would mitigate the risks of anti-competitive conducts in the long run.

Finally, competition authorities should advocate for the adoption by SOEs of corporate governance best practices that mirror those of the private sector, particularly in terms of transparency and accountability. Moreover, they should urge governments to increase the efficiency and quality of public services and also to promote competition. This might imply setting stringent limits on the ability of SOEs to create new companies or to acquire new shareholdings, together with obligations to review and dismiss non-core shares, as observed in Italy with the introduction of Legislative Decree no. 175/2016 and the ensuing advocacy role played by the Italian Competition Authority.

Competition authorities in Eastern Europe and Central Asia have been fairly active in advocacy initiatives concerning SOEs.

In Serbia, the Commission for Protection of Competition played an active role in improving the national Law on Amendments to the Law on Public Utilities. In particular, the

Commission issued an Opinion on the draft law highlighting the importance of providing equal conditions for all participants in the public utilities market, and arguing that only competition based on quality and price can lead to economic progress and consumer benefit. The final version of the Law includes amendments suggested by the Commission, for example defining certain utility services as commercial services, which are not exclusively provided by public companies but may be offered by registered enterprises, under equal conditions.

In Moldova, the Competition Council implemented a “Register of State Aid in Moldova”, with the support of the World Bank. The State Aid Register has introduced a monitoring system for state aid and its impact on the competitive environment. Likewise, in Georgia the Competition Agency participates in a parliamentary working group, also involving World Bank representatives, independent experts and academics, which is tasked with identifying and addressing problems arising from SOEs and recently published a report on the efficiency of SOEs. In Ukraine, the AMCU closely followed a monitoring exercise on the efficiency of SOEs carried out in 2019 by the Ministry of Economic Development, which showed that the average level of profitability of SOEs was 2.3 times lower than that of non-state enterprises. Consistently, only 22 SOEs out of 83 received a positive assessment in terms of management efficiency.

In order for advocacy initiatives to be effective it may be necessary to strengthen the advocacy powers and tools available to competition authorities and, in particular, to make it possible for authorities to issue *ex officio* (or upon request) opinions to the government, legislative bodies, sector regulators and local authorities both on legislative initiatives and on the implementation of regulations and specific tender procedures (e.g. with regard to public services such as local transport or water distribution).

5. The OECD work on competitive neutrality

Throughout the years, the OECD Competition Committee has taken several initiatives to analyse competitive neutrality from different angles². Based on the discussions that have been held so far, it has been concluded that competition law alone is not sufficient to ensure a level playing field for SOEs and private enterprises and that a broader competitive neutrality framework – encompassing, for instance, sector regulation and SOEs’ corporate governance – is necessary to complement competition policy. SOEs holding a privileged position may distort competition and it is therefore important to ensure that they are subject to the same competitive pressure as private enterprises, to the greatest extent possible consistent with their public service obligations. For example, it is

2 Regulating Market Activities by the Public Sector (2004): <http://www.oecd.org/daf/competition/sectors/34305974.pdf>; State Owned Enterprises and the Principle of Competitive Neutrality (2009): <http://www.oecd.org/daf/competition/46734249.pdf>; Competition, State Aids and Subsidies (2010): <http://www.oecd.org/daf/competition/sectors/48070736.pdf>; Competitive Neutrality, National Practices (2012): <http://www.oecd.org/daf/ca/50250966.pdf>; Competitive Neutrality, A Compendium of OECD Recommendations, Guidelines And Best Practices (2012): <http://www.oecd.org/daf/ca/50250955.pdf>; Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business (2012): https://www.oecd-ilibrary.org/industry-and-services/competitive-neutrality_9789264178953-en; Roundtable on Competitive Neutrality, issue paper by the Secretariat (2015): [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En); Competition law and state owned enterprises (2018): DAF/COMP/GF(2018)10

important that SOEs have appropriate corporate governance frameworks in order to ensure that they do not create market distortions.

Several competition authorities from Eastern Europe have actively participated in the OECD discourse and have provided their views³, while learning about in-country projects that have allowed other jurisdictions to review their institutional frameworks and regulations through the lenses of competitive neutrality (see a case study in the box below).

Finally, it should be noted that the OECD Competition Committee is currently considering the elaboration of an OECD Recommendation on the principles of competitive neutrality. This Recommendation could allow the OECD Competition Committee to develop a toolkit of guidelines and best practices for assessing the competitive distortions that might arise from government action that benefits a specific market participant(s).

Box 1. Case study: OECD in-country project “Fostering Competition in ASEAN”

Building on the initiatives of the OECD Competition Committee throughout the years, the OECD carries out in-country projects assessing – through the lenses of competitive neutrality – institutional frameworks and sector regulations. The ongoing “Fostering Competition in ASEAN” project illustrates the work of the OECD in this field.

The OECD is supporting the ASEAN Secretariat with the implementation of the ASEAN Competition Action Plan 2016-2025. The project is comprised of two components: (i) a Report based on 10 Prioritised Competition Assessments of the logistics sector and (ii) a Regional Report on the impact of SOEs in relation to small package delivery services.

The OECD aims to provide recommendations about how the special rights and privileges granted to SOEs can be reformed in a pro-competitive manner, and on the ways in which the same socio-economic objectives can be achieved through less restrictive means.

For this study, the OECD has developed a checklist, which includes questions such as whether the relevant SOE is active in both economic and non-economic activities; whether the SOE prices its economic activities at levels not reflecting costs; whether the SOE benefits from favourable regulatory or tax treatment; or whether the SOE benefits from privileged access to public subsidies.

Based on its multi-country assessment, the OECD preliminary findings reveal, for instance (i) that some SOEs are operating at arm’s length from the government (and are sometimes not even corporatised) and that there is no clear separation between regulatory and commercial functions; (ii) that public service obligations without appropriate compensation and accounting separation may affect SOEs’ competitiveness and transparency; (iii) that SOEs are sometimes granted privileged access to public procurement and are not subject to the same regulatory requirements (e.g. licensing) as their private competitors; and (iv)

that SOEs benefit from financial advantages in the form of State direct and indirect financial support (soft loans, state guarantee) or targeted tax exemptions.

See <http://www.oecd.org/daf/competition/towards-a-level-playing-field-logistics-sector-asean.htm>

A number of Eastern European countries have also significantly benefitted from the work of other OECD Divisions. In particular, in 2015 the Corporate Governance and Finance Division published an updated version of the OECD Guidelines on Corporate Governance of State-Owned Enterprises, which were first elaborated in 2005, in order to provide countries with concrete advice about how they could more effectively manage their responsibilities as company owners, thereby helping to make state-owned enterprises more competitive, efficient and transparent. For example, Ukraine used the OECD Guidelines as a benchmark for the corporate governance action plans of individual SOEs, while Bulgaria went through a rigorous review of its SOE corporate governance framework as part of its request to formally adhere to the SOE Guidelines.

6. Considerations in an age of crisis

Over the last 10 years, there has been a surge in the role of SOEs in domestic markets, as well as across countries, as result of SOE-led acquisitions of foreign targets. The current crisis may further increase the role that the State plays through SOEs as a market player in domestic markets. In this context, competitive neutrality principles become particularly relevant and they should be reaffirmed or strengthened.

Competitive neutrality may also be jeopardised by governments’ selective aid or other measures targeting specific companies. The OECD note on “Competition policy responses to Covid-19”⁴ includes several recommendations aimed at preserving competitive neutrality. In particular, it emphasises the importance of competition authorities stepping up their advocacy efforts to ensure that governments are aware of the competition principles that need to be respected in order for markets to remain competitive following the crisis. They should advocate for industrial policies that focus on pro-competitive alternatives to any planned government interventions that may risk long-term harm to markets. Competition authorities should also urge governments to ensure that any support measures that are adopted are transparent and temporary. Finally, competition authorities should resist possible political pressure to adopt a more lenient approach when investigating SOEs’ conduct, and they should strongly oppose any initiative to exempt SOEs from the scope of competition laws.

All this will help ensure that markets remain competitive and that competitive neutrality is not affected following the crisis, which will be crucial for a quick and vigorous economic recovery.

3 See for example the contributions by Bulgaria, the Russian Federation and Ukraine to the 2015 OECD Roundtable on Competitive Neutrality.

4 “Competition policy responses to Covid-19”, ..

Corporate governance of SOEs in Eastern Europe and Central Asia

Policy options for ensuring a level playing field



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Corporate Governance and Finance
Division, OECD

Introduction

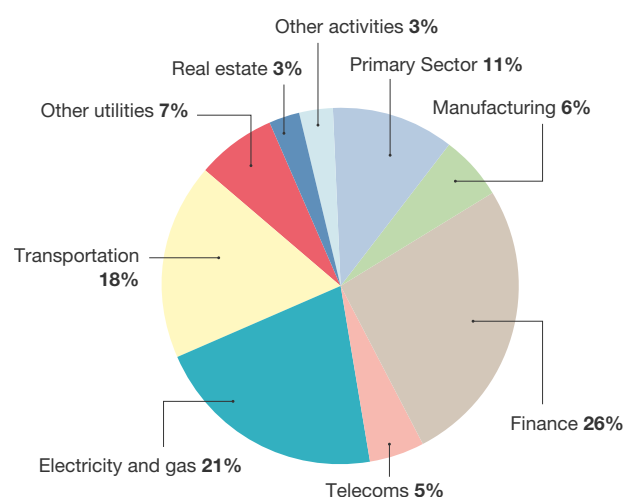
State-owned enterprises (SOEs) in many economies, including in Eastern Europe and Central Asia, provide key public services, such as water, electricity, transport, telecommunications and postal services (Figure 1). In some cases, they also account for major shares of other parts of the commercial economy and constitute an important employer in the corporate sector, especially in transition economies where privatisation efforts may still be ongoing. In OECD economies, the average share of SOEs in economic activity (measured by employment) is 2 percent (OECD, 2017). In emerging economies, the SOE share can range between 5 to 30 percent, depending on the size of the countries' portfolios. In Russia or Ukraine, for example, the share of SOE employment is closer to 15%, while in Belarus the share is around 30% (IMF, 2019). That share may be on the rise as states also consider policy options to rescue ailing companies in view of the economic crisis caused by the Covid-19 pandemic.

Therefore, ensuring SOEs are efficient, transparent and professionally overseen by their state owners is crucial for economic development, public service delivery and the competitiveness of the whole enterprise sector. When governed transparently and efficiently, SOEs can correct market failures, improve public service delivery and play a role in creating fairer, more competitive markets. However, if poorly run, SOEs hamper economic growth and may result in distortions of the competitive landscape.

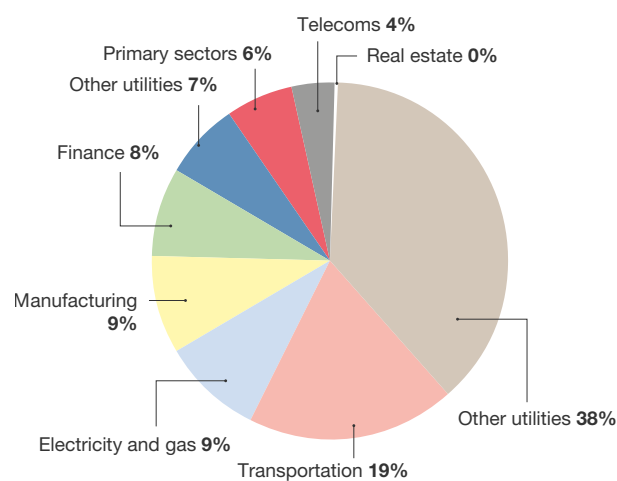
Figure 1. Size and sectorial distribution of SOEs in the OECD plus area

The electricity and gas, transportation, telecoms and other utilities sectors account for 51% of all SOEs by value and 70% by employment across the OECD plus area. Finance is the largest individual sector, at 26% of SOEs by value.

Sectoral distribution of SOEs By value



Sectoral distribution of SOEs by employment



Note: Covers full or partial data from 39 economies covering the OECD area, and including Argentina, Brazil, India, and Saudi Arabia (partially) and covers only majority or fully-state owned companies (50 percent+ shareholding) held at the central level of government.

Source: OECD (2017), *The Size and Sectoral Distribution of State-Owned Enterprises*, OECD, Paris <https://doi.org/10.1787/9789264280663-en>
Dataset available here: https://www.oecd.org/daf/ca/SOE_Data_2015.xlsx.

OECD Guidelines on Corporate Governance of SOEs and implementation trends

Given the importance of well-run SOEs, many governments have taken steps towards improving their state-ownership practices in line with the OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (SOE Guidelines) (OECD, 2015). The SOE Guidelines are an internationally recognised standard and provide governments with advice about how they should manage ownership responsibilities, with the aim of ensuring that SOEs operate efficiently, transparently and in an accountable manner (Box 1). Of direct relevance to the competitive landscape, they include recommendations regarding the rationale for state ownership, accountability and transparency requirements and how to maintain a level playing field where SOEs and private enterprises can (or potentially) compete in the market place. They also recommend good practices for how to avoid the pitfalls of both passive and excessive state intervention, including adequately separating the state's multiple roles as owner/shareholder, policy maker and regulator.

Box 1. Main priorities of the OECD SOE Guidelines

The OECD SOE Guidelines deal with the following priorities:

A rules-based environment. SOEs should be subject to the same rules and regulations as other enterprises. They should compete on a level playing field with private enterprises and not distort competition.

Reinforcing the ownership function. The state administration should exercise SOE ownership on a whole-of-government basis. The state ownership function should be separate from the regulatory function to avoid conflicts of interest.

Equitable treatment of shareholders. The state should not have any undue advantages over other investors in SOEs.

Transparency and disclosure. SOEs' objectives and performance should be disclosed and reviewed.

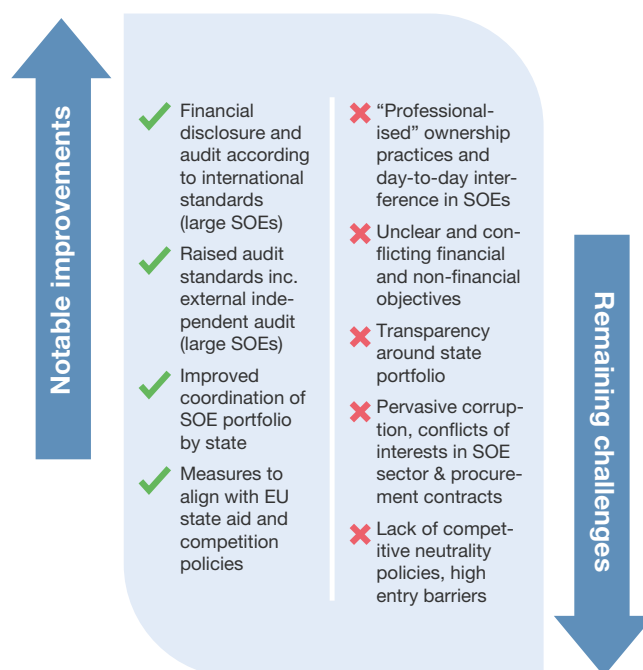
Stakeholder relationship. SOEs and their owners should treat employees, creditors and affected communities fairly and equitably.

Boards of directors. The boards are the highest decision-making bodies within the SOEs. They should exercise their powers free of political interference.

Over the last 15 years, a growing number of countries in the OECD area and beyond have been actively implementing these recommendations (OECD, 2020). This also includes many of the economies in post-transition economies, for which the SOE Guidelines have served as a powerful point of departure for reform. For example, in Ukraine, the SOE Guidelines have been actively used as a benchmark for the corporate governance action plans of individual SOEs (e.g. Naftogaz and Ukrenergo) (OECD, forthcoming and 2019a). Another example is Bulgaria that went through a rigorous review of its SOE corporate governance framework as part of

its request to formally adhere to the SOE Guidelines (OECD, 2019b). As a result of this process Bulgaria has adopted a new Law on Public Enterprises that, in line with the recommendations, establishes a new agency to coordinate and professionalise the country's ownership practices, amongst other aspects. This is part of a growing trend across the OECD area and beyond – which international experience shows can help to build “centres of excellence” within government to champion SOE reform on a whole-of-government basis. According to recent OECD surveys (Figure 2) (OECD, 2018), other notable improvements can be observed within the region and beyond, including in the areas of financial disclosure, independent audit, and a greater awareness within government about the need to appropriately calibrate state aids to avoid competitive distortions.

Figure 2. Notable improvements and remaining challenges for SOE ownership practices observed in select economies of South East, Central and Eastern Europe



Concerns about SOEs and a level playing field

However, challenges remain in implementing internationally agreed good practices. There is still a strong temptation on the part of the state owner to intervene in the day-to-day management of companies, especially in the absence of a functioning system of corporate governance with independent boards and professional management, coupled with underdeveloped or weak independent regulatory bodies often lacking enforcement powers. Far too often SOEs are also subject to weak reporting and accountability, and are subject to unclear financial and non-financial objectives, which in turn can lead to concerns about competitive neutrality. Weak cor-

porate governance also opens doors to rent seeking behaviour and can lead to more serious breaches of integrity, including corruption.

SOEs may enjoy privileges and advantages that private market players do not – which are in many cases formally justified by the public policy or service obligations entrusted to SOEs. When SOEs are operating as “natural monopolies” this may be uncontroversial, but many of them also carry out commercial activities and be active in markets in competition with other firms. SOEs may use their privileges to influence market strategies and distort or restrict effective competition. For example, an SOE may leverage its legal monopoly position into markets where it competes with private participants (e.g., through cross-subsidisation).

SOEs should in general be subject to similar competition disciplines as their private competitors on cartels, abuse of dominance, and mergers. However, there may be circumstances where SOEs are exempt from competition rules in the general public interest, such as in many countries postal services, railways, health care, etc. Exemptions of this nature often are, and should be, limited and accompanied by appropriate regulation to minimise or neutralise the risk of market distortions. (OECD, 2016)

Where competition law generally applies to both private and public economic entities, competition authorities may face distinct challenges when enforcing it against SOEs. This may be the case because SOEs are not always pursuing profit maximisation. The advantages conferred on SOEs are sometimes indirect, for instance in the form of soft budget constraints or unclear objectives around SOEs financial and non-financial objectives. More often than not, SOEs are required to cross-subsidise from their profit-making market activities to subsidise public policy obligations. This might put SOEs at a disadvantage, which is not only equally market distorting but may also pose an additional transparency challenge: public policy objectives may be poorly communicated or conflict with other requirements for SOEs.

To compensate for these shortcomings, state owners sometimes decide to forego dividends from SOEs or accept lower rate-of-return (as compared to their private competitors) in “exchange” for carrying out weighty public policy obligations. However, this is far from transparent, especially if proper accounts between commercial and non-commercial activities are not maintained. Moreover, these indirect compensation mechanisms prove to be difficult to measure and evaluate in terms of effectiveness, value-for-money and impact on the competitive landscape. Competition authorities may also lack sufficient statutory power, particularly regarding SOEs that are subject to oversight by sector regulatory agencies. This problem is further exacerbated where there is no proper separation between ownership and regulatory responsibilities within government – which is often observed in Eastern Europe and Central Asia.

Policy options to level the playing field?

With relatively few countries having competitive neutrality frameworks in place to address concerns about a level playing field (OECD, 2012), a good starting point is to implement

key aspects of the SOE Guidelines. Some policy options include:

- *Establish a degree of clarity around the objectives – economic and otherwise – that a given state-owned enterprise is asked to pursue by its owners.* This means establishing a clear rationale for ownership of SOEs as expressed through a “state ownership policy”. Clearly mandating public policy objectives SOEs are required to carry out and ensure the requisite transparency, disclosure and accountability mechanisms. Ensure that accounts between commercial and non-commercial objectives are kept separately, and that compensation for non-commercial activities is transparent and proportional to the objectives carried out.
- *Reinforce governance structures in SOEs to safeguard against ad-hoc political interventions, which can undermine the independence and autonomy of the governing bodies of SOEs.* In practice this requires a clear separation of the ownership and regulation of SOEs within government in order to avoid conflicts of interest. Moreover, the boards and management of SOEs should be independent from government, and the government should abstain from intervening in the day-to-day operation of SOEs. State-owner’s commercial and non-commercial objectives should be communicated to the entire board, and be made transparent.
- *Ensure that information relating to the SOE sector and individual enterprises is disclosed in a timely and comprehensive manner.* Transparency is key to maintaining a level playing field. This not only includes understanding what the SOE portfolio in a given jurisdiction looks like in terms of the size of the sector, the sectorial spread and ownership stake, but also requires an assessment of the overall performance of the portfolio. Many countries are increasingly publishing annual “aggregate” reports on their SOE sectors. Individual companies, especially large ones, should be subject to financial and non-financial reporting obligations in accordance with internationally-accepted accounting standards, and should also be subject to an independent external audit.
- *Implement credible measures to ensure a level playing field in the case of competition between SOEs and other enterprises.* Ensuring that SOEs do not benefit from immunities or privileges, such as exemptions from competition law or bankruptcy; that they do not benefit from preferential regulation or access to inputs (e.g. energy or land on preferential terms) and, furthermore, that they face market consistent conditions regarding access to debt and equity finance.

The OECD’s work on the Corporate Governance of State-Owned Enterprises

The OECD works with its members and Partners to support SOE reform through the Working Party on State Ownership and Privatisation Practices, which is responsible for developing and overseeing the implementation of the SOE Guidelines. The Working Party brings together policy makers from across governments that are responsible for managing

ing and overseeing SOE portfolios in their jurisdictions. The Working Party engages actively with countries in Southern, Eastern Europe and Eurasia that are committed to enhancing their SOE ownership and governance practices. Recent and ongoing work includes, but is not limited to, undertakings with Bulgaria, Croatia, Kazakhstan, Mongolia, Romania, and Ukraine.

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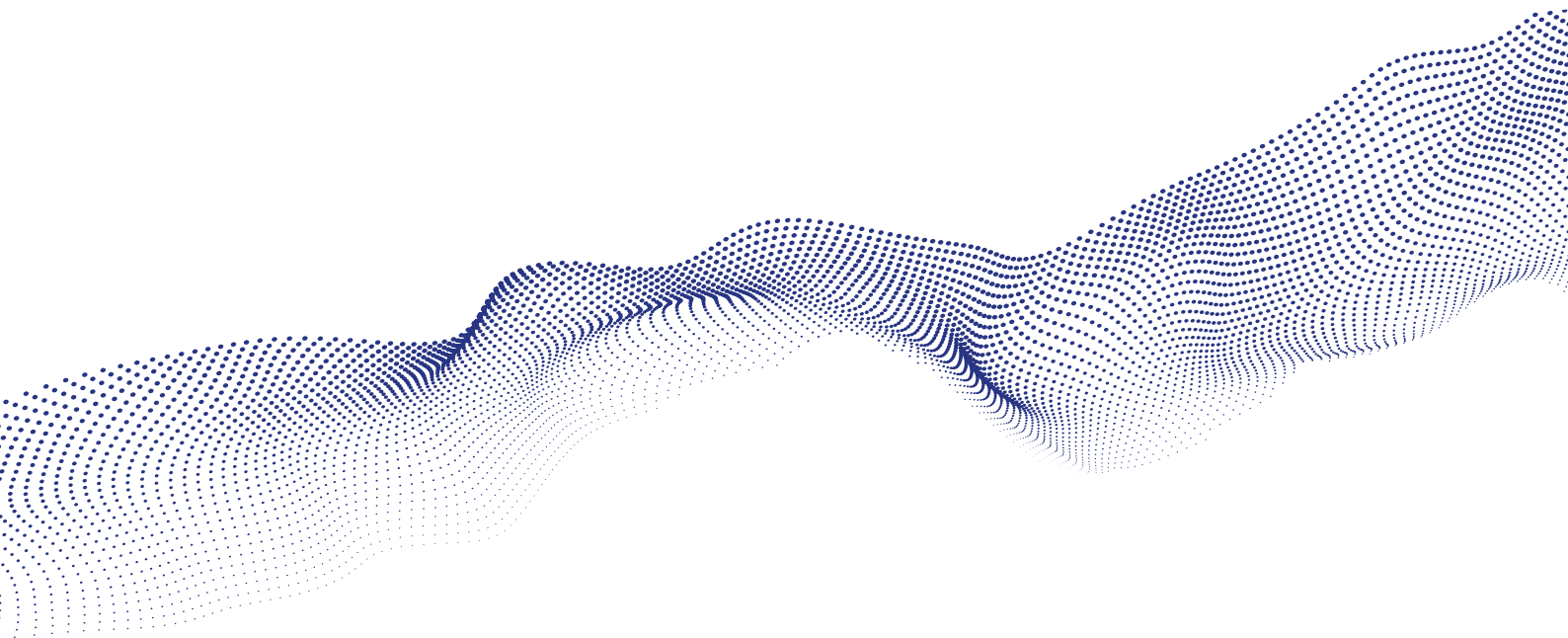
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Competitive Neutrality and the Role of the Commission for Protection of Competition of the Republic of Serbia



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Introduction

Competitive neutrality is a concept of high importance for the Republic of Serbia.⁵ It is recognised in the Serbian Constitution, which guarantees the equal treatment of all undertakings, irrespective of whether they are publicly or privately owned, either by a national or foreigner. The principles of competitive neutrality are enshrined in Articles 82, 84 and 86 of the Constitution, which state that the economic system in Serbia is based, among others, on equality of private and other types of assets; everyone has equal legal status on the market, foreign persons are treated equally on the market and all types of assets have equal legal protection.⁶ The Constitution also stipulates that acts, which are contrary to the law and restrict free competition by the creation or abuse of a monopolistic or dominant status, are strictly prohibited.

The neutrality principle is also reflected in the application of the Law on Protection of Competition,⁷ which mandates the Commission for Protection of Competition of the Republic of Serbia (hereafter, Commission) to take action to ensure competition in the national market, both in the context of enforcement and advocacy. Therefore, the fundamental role of the Commission is to ensure a level playing field between all undertakings, meaning that Serbian competition law is an important tool for dealing with competitive neutrality problems. In general, Serbian competition law is neutral in terms of both the ownership and nationality of undertakings.

Application of the competition rules to state-owned enterprises

The most basic step in enabling undertakings to compete on an equal footing is the equal application of competition rules to both state-owned enterprises (SOEs) and private enterprises in order to ensure that no business entity is advantaged (or disadvantaged) solely because of its ownership. In line with Article 3, the Law on Protection of Competition applies to all undertakings, including: 1) domestic and foreign

companies and entrepreneurs; 2) state authorities, bodies of territorial autonomy and local government; 3) other natural and legal entities and associations of undertakings (unions, associations, sports organisations, institutions, cooperatives, holders of intellectual property rights, etc.); 4) public enterprises, companies, entrepreneurs and other undertakings that perform activities of public interest, or those that have been given a fiscal monopoly through an act of the competent state authority, unless the implementation of this Law would prevent them from performing these activities or delegated tasks.

In addition to the above, since 2008, the Republic of Serbia and its competition law have been formally exposed to the influence of the EU acquis, including the relevant case law, due to the Stabilisation and Association Agreement with the EU (hereafter, SSA), under the framework of which Serbia has formalised its commitment to gradually approximate and harmonise its legislative framework with that of the EU. The SAA, among other things, imposes an obligation upon Serbia to treat designated monopolies and state-owned enterprises in such a way as to ensure a level playing field to the extent practicable. Thus, Article 74 requires that public undertakings and undertakings to which special and exclusive rights have been granted are subject to competition law, expressly referring to Article 106 of the Treaty on the Functioning of the European Union.⁸

Consequently, when assessing the conduct of SOEs, the Commission does not distinguish between SOEs and other firms when applying the competition rules related to restrictive agreements, abuse of dominance and merger control to firms in all sectors of the economy, and when using the range of its investigative and repressive powers.

The Commission has dealt with numerous cases involving the enforcement of the competition rules on SOEs, including privatisation cases. The economic weight of the SOEs is still relevant in the Serbian economy, especially in the public utilities sector at a local level. The reasons for this are that they are often significant market participants, they hold a monopoly or they have emerged from former monopolies in key sectors of the economy (e.g., energy, railways, telecommunication, postal services, public utilities).

According to the World Bank report, Serbia scores high in the Product Market Regulation public ownership sub-indicator that is mainly driven by the number of sectors of the economy with SOE presence. In addition, difficulties in ensuring competitive neutrality between private and public operators (through enforcement of state aid rules, for example) and is-

⁵ The usual disclaimer applies. The author is grateful to Nina Vasić for helpful comments and suggestions.

⁶ See Constitution of the Republic of Serbia ("Official Gazette of the RS", 98/2006), <http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution>.

⁷ See Law on Protection of Competition ("Official Gazette of the RS", 51/09, 95/13), <http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf>.

⁸ See SSA, http://europa.rs/upload/documents/key_documents/2008/SAA.pdf. Article 106 of the TFEU clearly establishes that public companies fall under the scope of competition law and that member states of the EU are not entitled to act in a manner that is contrary to this rule.

sues related to the corporate governance of SOEs add to the challenges posed by public ownership.⁹

Application of the competition rules in the context of the economic crisis and declining markets

The application of the competition rules in the context of the economic crisis and declining markets represents an additional challenge for the Commission. There is a need to maintain a level playing field as one of the tools to pave the way to economic recovery, as was the case after the 2008 financial crisis and as necessitated by the crisis resulting from the current coronavirus disease (COVID-19). In this sense, although not directly addressing the point, the Commission is aware that the competition rules ensuring competitive neutrality should not be relaxed.

A question arises as to whether the competition policy and its requirements should possibly be adjusted since the financial and economic crisis may place a large number of firms in financial distress. From the standpoint of the Commission, there are no exemptions to Serbian competition rules, even in times of crisis, which is a position that is very much in line with comparative practice. The Commission applies the competition rules strictly, independently of short or long term fluctuations in market conditions.

For instance, despite the economic crisis, in the course of 2008 and 2009, the Commission did not review a number of mergers directly associated with the financial and economic crisis. The Commission received one merger notification referring to the crisis, in which the failing firm defence was raised. In that case, the Commission concluded that the failing firm defence criteria should not be relaxed in times of crisis and did not accept the failing firm argument.¹⁰

To conclude, the economic crisis and declining markets do not directly affect the criteria of the failing firm defence in merger control. The Commission does not favour a more lenient approach to the failing firm defence or more generally a more lenient SIEC test.

Competition advocacy activities

In addition to its enforcement work, the Commission promotes the principle of competitive neutrality in its advocacy work, as a complementary method of dealing with such issues. In instances when a decision by the government or legislator

favours an SOE over its competitor from the private sector, the Commission has the opportunity to recommend changes in legislation and sub-statutory regulation in the field of economic activity performed by the SOE in question. According to the Law on Protection of Competition, the Commission has at its disposal different means to deal with the issue of competitive neutrality depending on the particular case in question, such as providing opinions to competent authorities on draft regulations, as well as on current regulations that have an impact on market competition, cooperating with other state authorities, i.e. independent sector regulators, and the use of market studies. This paper focuses on the part of the advocacy experience of the Commission related to competitive neutrality.¹¹

Opinion on the Draft Law on Amendments to the Law on Public Utilities

The Commission often has to use persuasion, rather than coercion, to obtain political support and convince the government to pursue policies that promote competitive neutrality. One such situation followed the adoption of the Law on Amendments to the Law on Public Utilities when the Commission issued the Opinion on the Draft Law on Amendments to the Law on Public Utilities.¹²

The Commission stressed the importance of providing equal conditions for all participants in the public utilities market, and in this context drew attention to the negative effects of the creation of a statutory monopoly. It expressed concern that the Ministry of Construction, Transport and Infrastructure opted for solutions that would further limit the potential for competition in the public utilities market and noted that only competition between competitors, through quality and price, can lead to economic progress and the well-being of society, especially for the benefit of consumers.¹³

The Ministry eventually accepted the comments and suggestions of the Commission expressed in the Opinion and amended the Draft Law. In the final version of the Draft Law, the Ministry also included the Commission's suggestion that certain services, which can be performed independently and which are related to the utility services, be clearly defined as commercial services (e.g. burial service) that can be provided by registered enterprises, under equal conditions, and not exclusively by public companies or companies in which the Republic of Serbia or local authorities own a minimum 51% stake.¹⁴

9 See Country Economic Memorandum 2019 – Serbia New Growth Agenda: Removing Regulatory Barriers to Competition, <http://pubdocs.worldbank.org/en/535691577293870277/SRB-CEM-Removing-Regulatory-Barriers-to-Competition-wq.pdf>, 15.

10 See www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/lufthanza.pdf.

11 For more information on the Commission's advocacy activities, see Ivana Rakić, "The Role of Competition Advocacy: The Serbian Experience", in: Bego-
vić B., Popović D. (eds) *Competition Authorities in South Eastern Europe. Contributions to Economics*, Springer, 2018, 111-132, https://link.springer.com/content/pdf/10.1007%2F978-3-319-76644-7_7.pdf.

12 See Opinion and press release dated 23 May 2016, <http://www.kzk.gov.rs/komisija-uputita-misljenje-na-nacrt-zakona-o-izmenama-i-dopunama-zakona-o-komunalnim-delatnostima>.

13 See press release "Commission expressed concern about the proposed amendments to the Law on Public Utilities", dated 2 December 2015, <http://www.kzk.gov.rs/en/komisija-izrazila-zabrinutost-povodom-predlozenih-izmena-zakona-o-komunalnim-delatnostima>.

14 See press release "The Ministry Accepted Comments and Suggestions of the Commission on the Draft Law on Amendments to the Law on Utility Services", dated 24 July 2016, <http://www.kzk.gov.rs/en/ministarstvo-usvojilo-primedbe-i-pre>.

Advocacy with local authorities

The promotion of competitive neutrality throughout the country is a difficult task for the Commission because achieving this aim requires it to encourage negotiations at the local, i.e. municipal level, and to obtain additional political support, as well as to increase the awareness and knowledge of competition principles. Furthermore, economic reforms in Serbia, like in other developing and transition countries, often result in the ownership of communal service facilities (assets) by local authorities which causes a conflict of interest in situations where the local authority is also entitled to adopt decisions regarding those facilities. Under competition law, in such cases, the Commission cannot legally intervene, through enforcement, against the local authorities and their decisions. Thus, competition advocacy is the only tool that can be used to change such anticompetitive practices and achieve competitive neutrality.

The Commission has, nevertheless, succeeded in influencing some local authorities to change their policies on the

provision of utility services relating to burial and cemetery management in order to enable certain burial services to be provided by all interested parties, i.e. not only by the public utility company, but also by other companies, entrepreneurs, and business entities.

After undertaking an analysis of the initiative for the assessment of possible competition infringements, the Commission sent opinions to the assemblies of the City of Novi Sad and the City of Pančevo in which it stressed the necessity for the amendment of provisions of their decisions regulating burial and cemetery management utility services, in order to prevent the distortion of competition and the creation of monopolies for the public utility companies in those cities. The assemblies of both the City of Novi Sad and the City of Pančevo positively reacted and informed the Commission that they had drafted amendments to modify the provisions of the disputed decisions regulating public utility burials and cemetery management services, which they would be adopting.¹⁵

¹⁵ See press releases available at <http://www.kzk.gov.rs/en/grad-novi-sad-obavestio-komisiju-da-je-spreman-da-izmenom-odredbi-odluke-koja-ureduje-komunalnu-delatnost-sahranjivanja-i-upravljanja-grobljima-omoguci-obavljanje-pojedinih-pogrebnih-usluga-svim-zainteresovanim-ucесnicima> and <http://www.kzk.gov.rs/en/grad-pancevo-ce-izmenom-propisa-omoguciti-obavljanje-pogrebnih-usluga-svim-zainteresovanim-ucесnicima>.

Administrative Monopoly

A New Threat for Competition Neutrality?



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Introduction

After the collapse of the Soviet Union many former State owned enterprises (SOEs) were privatised, although a significant number still operated as SOEs. As the temptation to establish an SOE was always high, the number of SOEs was constantly increasing. However, after a number of years of benefitting from the shared best practices of EU countries and international organisations, the number of SOEs in Georgia is now decreasing. The present article will provide an overview of the current situation regarding SOEs and administrative monopolies, and will examine their possible effect on the principle of competition neutrality.

1. Definition and Challenges related to SOEs in Georgia

There is no clear legal definition of state owned enterprises under Georgian legislation, although two particular terms can be found in legal acts. The first term is “state owned enterprise” and the second one is an “enterprise in which the state holds shares”.¹⁶ While the term “state owned enterprise” is to be understood as the rights and functions that the state has in the company as a shareholder, rights and functions are not always linked to the number of shares.¹⁷ Under the liberal company law regime of Georgia, companies are free to regulate almost every aspect of the corporate structure through the agreement of the concerned partners (charter). A “company in which the state holds shares”, is a company in which the state owns at least 50% of the shares. The two terms are sometimes used synonymously in different legal acts¹⁸, which with-

out a doubt causes many misunderstandings. Consequently, in the remainder of this article the term “state owned enterprise” will be used.

In general, the Ministry of Economy and Sustainable Development of Georgia is responsible for determining the policy about the management of SOEs. Companies can be managed by ministries, by the LEPL National Agency of State Property, but can also be established by any state authority, local municipalities, by legal entities of public law or by other state owned companies.¹⁹

According to the latest data from the National Agency of State Property, it manages (fully or partially) 96 state owned enterprises.²⁰ A further 19 companies are managed under the JSC Partnership Fund.²¹

In recent years, the state has announced a policy to decrease the number of state owned companies and the National Agency of State Property is actively involved in ensuring the effectiveness of this process. This aim is logical, as according to the Report of the State Audit Office of Georgia, most state owned companies make no profit, face financial difficulties and completely rely on funding from the state budget.²²

In 2019, the Parliament of Georgia established a working group to highlight the problems arising from SOEs and to set goals for resolving them. After months of intense research into the current situation, with the involvement of World Bank Experts, independent experts, academia, the parliamentary working group published a report.²³ Although the report highlighted several issues, in this article we will focus on the competitiveness of these companies on the relevant markets. SOEs operate in different business sectors, including in those sectors that are mainly dominated by private companies and

¹⁶ State owned enterprises in Georgia, existing legal regulation, challenges and recommendations, Maisuradze D, Narmania G, Lazishvili M, Tkeshelashvili M, Shakiashvili I, Zvieryev I, Ilia State University, Tbilisi, 2018, p 25, <https://iliauni.edu.ge/uploads/other/49/49832.pdf> (available in Georgian language under this link).

¹⁷ A good example is LLP “Anaklia development Consortium”. While the state only owns 0.01 % of shares in this company, this minute percentage provides the state with broad possibilities and allows it to influence all of the company’s important decisions, for example relating to mergers, acquisitions, liquidation and etc., see in Maisuradze D, Narmania G, Lazishvili M, Tkeshelashvili M, Shakiashvili I, Zvieryev I, op.cit, p 27.

¹⁸ Georgian Law on Entrepreneurs, Georgian Law on State Property, Georgian Law on Securities Market and etc.

¹⁹ Report: Efficiency of SOEs (in Georgian)

²⁰ http://nasp.gov.ge/pages/?%E1%83%A1%E1%83%90%E1%83%AC%E1%83%90%E1%83%A0%E1%83%9B%E1%83%9D%E1%83%94%E1%83%91%E1%83%98=&page_id=22&lang=ge

²¹ <http://www.fund.ge/>

²² <https://sao.ge/files/auditi/efeqtianobis-angarishi/2015/sacarmota-martva.pdf>

²³ Report: Efficiency of SOEs (in Georgian)

in which there is relatively strong competition (e.g. medical and building companies²⁴).

According to the OECD Guidelines on Corporate Governance of state-Owned Enterprises²⁵ it is vital that fair competition between SOEs and private companies is ensured through the adoption of various measures, such as transparency of state finances when conducting economic activities and a clear separation between the state's ownership function and other state functions. One of the main recommendations of the parliamentary working group was clearly related to this principle. According to the recommendation in question, there should be a high degree of transparency in relation to SOEs (the amount of funding, reasons for funding, expenditures, profits) and the elaboration of a state policy regarding SOEs.

2. Exclusive authority under special permission for selected companies

It is also very important to highlight those cases in which companies carry out activities of a high public interest, but in relation to which the state does not hold any shares or participate in the management of the companies. In such instances, the power to exercise these activities is directly derived from the state, with the purpose of ensuring and protecting the safety of life and human health, the security of human habitation and cultural environment or protecting state and public interests.²⁶

These firms are called “public enterprises” if they hold an exclusive license or permit²⁷ issued by the administrative body or they are the only company authorized to carry out specific high public interest activities, hence owning the so-called “Administrative Monopoly”²⁸.

The state provides private companies with the exclusive authority to carry out certain activities of high public interest related to the constitutional principles of the welfare state for a number of legitimate reasons, such as to save administrative resources or to reduce the workload of administrative bodies.

In practice, this is achieved via a competitive tender procedure, in which the issuer of a permit or licence sets out, through administrative proceedings, the specific criteria that must be fulfilled and stipulates any additional conditions that are necessary to ensure the selection of the company that can best achieve the pursued public interest.

Obviously, the company that is granted a licence or permit through a competitive tender procedure is selected extremely carefully, given the fact that the state is entrusting this company to achieve highly important public objectives in a specific field for a certain period of time or indefinitely.

3. Georgian case study – Administrative monopoly as a potential tool of abuse of dominance

The Competition Agency of Georgia recently concluded an investigation into a very complex case in which it established that an outdoor advertising company had abused its dominant position.²⁹ The case concerned a permit for the placement of outdoor advertising that was awarded exclusively to a private company by a local self-government body through a tender procedure for a period of 12 years. According to the registered data of the concerned company, the state did not have any shares in the company or participate in its operation in any form.

On the selection of the private company via a special tender, the administrative body (without delegating its authority) handed over full and exclusive competence, as defined by the relevant legislation, to the company in the form of a permit. This permit, on the one hand, gave the company the right to carry out the economic activities to which the permit directly related, and, on the other hand, enabled it to transfer all or parts of the rights obtained from the permit to other interested undertakings in the form of a service contract.

As part of the investigation, the agency identified an outdoor advertising authorisation service market (upstream market) and an outdoor advertising service market (downstream market).

The company that won the tender procedure had a dominant position in the upstream market and, as the owner of a permit, possessed the key necessary for other undertakings to enter the downstream market and/or carry out economic activities. As a result of this “administrative monopoly” it was not merely difficult, but impossible, for undertakings to enter this market for 12 years. Accordingly, there were barriers to market entry arising from the applicable legislation and the concerned tender procedure.

As a result, the authority to pursue high public interest activities, especially in the form of an administrative monopoly, was transferred to a private company for a long period of time, which would otherwise have been exercised by the administrative body itself. Henceforth, the selected private company had the power to determine and implement the policy for outdoor advertising in the relevant area.

The agency determined that the company subject to the investigation was the only contractor and a necessary trading partner for other interested undertakings. The company's acquisition of the permit was a necessary and unconditional means of starting an economic activity on the downstream

24 <https://forbes.ge/news/1367/ekonomikis-uCinari-metastazebi>

25 2015 Edition, available at: <https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1587978405&id=id&accname=guest&checksum=D9AA96E66CAE2B9CCF5B5FE6FF488E4D>

26 Law of Georgia on licenses and permits, Article 2 (2), available at: <https://matsne.gov.ge/en/document/view/26824?publication=62>

27 According to the law of Georgia on licences and permits, a licence is the right granted to a person by an administrative body under an administrative act to carry out a specific type of activity if the person meets the conditions laid down by law, while a permit is a right granted by an administrative body to carry out an action for a definite or indefinite period as provided in the law in the area in question.

28 See: ECLI:EU:C:1986:421, Case 226/84, “British Leyland” § 9, ECLI:EU:C:1986:421, Case 26-75, “General Motors” § 9

29 Decision of the Georgian Competition Agency of 2 February 2020, available on: <https://competition.ge/decisions/abuse-of-dominant-position/by-prohibition>

market³⁰, which could not be replaced by any other alternative source. Consequently, the company was in a dominant position and its refusal to contract amounted to an abuse of this position.

Conclusion

Experience has shown that it is especially important to evaluate and control the activities of companies that are not qualified as SOEs but which operate on the basis of state li-

cences and permits and which hold administrative monopolies, given the fact that such monopolies can effect the proper functioning of competitive markets and breach the principle of competitive neutrality. Problems arise with the principle of competitive neutrality as a result of the significant competitive advantage obtained by companies that have the exclusive right to conduct activities of high public interest. Consequently, administrative monopolies often become a tool for gross violations of competition rules.

30 Outdoor advertising services market

Competitive Neutrality in the Russian Federation



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In Russia the principle of competitive neutrality is provided for in the text of the basic law of the country, namely in the Constitution of the Russian Federation, which states that „in the Russian Federation, private, state, municipal and other forms of ownership are recognised and protected equally.”³¹ The application of equal principles and rules of competition to business entities of all forms of ownership and categories constitutes the main approach and goal of the FAS Russia’s work.

The FAS Russia is a multifunctional regulator that operates in many areas. In addition to antitrust regulation, the FAS Russia monitors compliance with legislation on public procurement, including in the field of defence and security, on advertising, on foreign investments in strategic business companies, on trade, in terms of compliance with antitrust requirements, and controls the provision of state aid, anti-competitive actions of state authorities, and is also charged with tariff regulation.

It is also worth noting that the FAS Russia operates in collaboration with other federal executive bodies, the Central Bank of the Russian Federation, government bodies of the subjects of the Russian Federation, local authorities, public associations and other organisations.³² In order to ensure adherence to the principle of competitive neutrality the FAS Russia undertakes an assessment of the impact of industry policies on competition and sets out its findings, which are then submitted to the Government of the Russian Federation in advance of their adoption.

To combat anti-competitive practices that have a negative impact on competitive neutrality, the FAS Russia has a number of tools at its disposal.

Russian competition law is applied uniformly and contains no exceptions as regards to the actions of the government on the market. The procedures for proving violations of antimonopoly laws are the same for companies of all forms of ownership, since enterprises in the Russian Federation keep accounting and tax records on the basis of the same model forms.

This can be seen, for example, in the FAS Russia’s consideration between 2008-2011 of three waves of cases relating to the abuse of a dominant position by several oil companies, each of which had a different form of ownership: OJSC Rosneft (state-owned company), OJSC Gazpromneft (compa-

ny with government participation), OJSC Lukoil (a commercial company) and TNK-BP (a private company with foreign equity). The cases were investigated and reviewed in accordance with the Russian antitrust laws, regardless of the form of ownership and structure of assets. The investigations resulted in the imposition of fines amounting to a total of more than 470 million euros.³³

As mentioned above, the FAS Russia exercises state control over compliance with antimonopoly laws by federal executive bodies, state authorities of the subjects of the Russian Federation, local governments or other bodies or organisations performing the functions of these bodies, as well as state extra budgetary funds, business entities and private individuals, in particular in relation to the use of land, mineral resources, water and other natural resources.

The FAS Russia and its regional offices may conduct anti-trust investigations against authorities if they carry out measures and issue regulatory legal acts that adversely affect competition.

Article 15 of the Law on the Protection of Competition³⁴ prohibits authorities from carrying out actions or inactions that prevent, restrict or eliminate competition. Such actions include the introduction of restrictions on the creation of business entities in any economic sector, the establishment of unreasonable requirements for business entities, the introduction of restrictions on the free movement of goods, the prioritisation of access to information to certain economic entities and the creation of discriminatory conditions.

In addition, Article 16 of the Law prohibits authorities from entering into agreements with each other and with business entities, if such agreements lead to the prevention, limitation or elimination of competition, in particular via the increase, reduction or maintenance of prices, the unjustifiable establishment of different prices for the same product, the division of the product market or the establishment of barriers for new players to enter the market.

Administrative liability in the form of a fine or disqualification for up to three years results from violation of these standards by officials.

The FAS Russia also monitors compliance with the principle of competitive neutrality in bidding. If tenders or requests for quotations are organised by authorities, then it is prohib-

31 Part 2, Article 8, Constitution of the Russian Federation: <http://www.constitution.ru/>

32 In accordance with the Decision of the Government of the Russian Federation of 30 June 2004 No. 331 «On approval of the Regulation of the Federal Antimonopoly Service»: <https://rg.ru/2004/07/31/fas-doc.html>

33 Report on the 3 waves of the FAS Russia cases against oil companies: <http://en.fas.gov.ru/documents/documentdetails.html?id=14678>

34 Federal Law of 26.07.2006 No. 135-FZ «On protection of competition»: <https://legalacts.ru/doc/FZ-o-zawite-konkurencii/>

ited to restrict or prevent economic entities from participating in such tenders.

Competitive neutrality can also be affected by the unlawful provision of state preferences. Antimonopoly legislation determines the procedure for the provision of state preferences and provides a closed list of preferences that the state is permitted to grant.

When identifying anti-competitive practices on the part of the authorities, the FAS Russia uses a warning mechanism, which provides for a fairly quick reaction to such violations and enables their effective elimination.

For example, the Federal Antimonopoly Service of Russia issued a warning to the Ministry of Education³⁵ and obliged it to cancel the previously made changes to the Federal List of Textbooks. Such changes entailed the unjustified exclusion from the list of a large number of textbooks of individual publishers, making participation in public procurement impossible for them and thereby resulting in a restriction of competition.

A preventive measure that was introduced to reduce the number of violations by the authorities was the adoption, in accordance with the National Competition Development Plan for 2018-2020³⁶, of the Methodological Recommendations on Antimonopoly Compliance for the authorities,³⁷ which determine the main goals, objectives and principles for setting up and managing antitrust compliance by the authorities, the content and the procedure for the adoption of relevant legal acts, as well as the procedure for the setting up and operation of an authorised unit responsible for the development and implementation of antitrust compliance within executive bodies of authority.

It should be noted that the FAS Russia is currently pursuing an active policy aimed at reducing the share of state enterprises and phasing them out of competitive markets.

The FAS Russia believes that state-owned enterprises should remain in those sectors of the economy where there is no incentive or expediency to develop competition. This is especially true for sectors important for the defence and security of the state, such as the defence industry, the space industry, nuclear energy and geological exploration of the subsoil.

The creation of state-owned enterprises in competitive sectors of the economy negatively affects the neutrality of competition. The practical experience of the FAS Russia demonstrates that state-owned enterprises are one of the most frequent violators of antimonopoly laws, since companies take advantage of the possibility to cover losses from the federal budget. Also, there are cases where the state seeks to

“play along” with its own companies during the bidding process.

The participation of unitary enterprises in economic activity has the most negative impact on market competition and slows down the development of particular industries. This is due to the fact that their owners provide for both unlimited access to budget funds and secure demand for their products. Consequently, unitary enterprises can easily be involved in crowding out competitors or other discriminatory actions. The presence of a unitary enterprise usually creates high barriers to entry into the market.

Most of the unitary enterprises in Russia operate in areas with developed competition, for example in heat supply, water supply, sanitation, housing management, trade and services.

When a certain number of unitary enterprises are identified as having economic management over a significant number of heterogeneous, unrelated facilities, in most cases it turns out that such enterprises do not carry out any core activities, but just lease out these facilities.

The elimination of such enterprises in all competitive sectors of the economy is one of the measures required to eliminate excessive state regulation.

In this regard, the FAS Russia has developed amendments³⁸ to the Law on State and Municipal Unitary Enterprises³⁹ and the Law on the Protection of Competition, according to which the FAS Russia is empowered to issue a warning on liquidation or to take measures to terminate the activities of a unitary enterprise that has been created or carries out activities in violation of antimonopoly legislation requirements.

In addition, the FAS Russia is authorised to exercise control over mergers. In this regard, there is also no preferential approval regime for state enterprises and all merger transactions are considered in accordance with the general rules of antimonopoly law. The only exception to this rule is when a merger transaction is removed from under antimonopoly control by a relevant resolution of the President or the Government of the Russian Federation.

Worth mentioning in particular are the recent changes that have taken place in the Russian financial sector. In 2019, as part of the implementation of measures to promote competition in the banking services market,⁴⁰ the Government of the Russian Federation supported the strategic approach developed by the Ministry of Finance of Russia in direct participation with the FAS Russia for maintaining competitive neutrality as regards permitting credit institutions to provide certain types of banking services and their participation in preferential financing programmes.

35 FAS Russia Warning No. IA/31216/19 of 16.04.2019: <https://br.fas.gov.ru/ca/upravlenie-kontrolya-sotsialnoy-sfery-i-torgovli/84b49405-921e-4b26-b4b1-e54d8e807f78/>

36 Approved by Decree of the President of the Russian Federation of 21.12.2017 No. 618: <http://kremlin.ru/acts/bank/42622>

37 Order of the Government of the Russian Federation of 18.10.2018 No. 2258-r «On the approval of methodological recommendations for the setting up and management by federal executive bodies of a system for ensuring internal compliance with the requirements of antimonopoly legislation»: <http://publication.pravo.gov.ru/Document/View/0001201810220005>

38 Article 2 of the Federal Law of 27.12.2019 No. 485-FZ «On amendments to the Federal Law «On State and Municipal Unitary enterprises» and the Federal Law «On Protection of Competition»: <https://rg.ru/2019/12/31/konkurenciya-dok.html>

39 Federal Law of 14 November 2002 No. 161-FZ «On State and Municipal Unitary Enterprises»: <https://rg.ru/2002/12/03/unitar-dok.html>

40 Pursuant to paragraph 1 of Section XIV “Financial Markets” of the Action Plan (“roadmap”) for the development of competition in the sectors of the economy of the Russian Federation and the transition of certain areas of natural monopolies from a state of natural monopoly to a competitive market for 2018-2020, approved by the Order of the Government of the Russian Federation of 08.16.2018 No. 1697-r

In Russia in order for a credit institution to obtain permission to participate in lending subsidy programmes it must have a certain amount of capital. According to the opinion of the FAS Russia, this criterion does not adequately reflect the actual level of financial stability of such an organisation and leads to the exclusive selection of only large credit organisations.

Also, a credit institution must have a certain level of credit rating, which is associated with the participation of the Russian Federation and (or) the Bank of Russia in supporting its activities.

The participation of the state in this case unreasonably leads to a reduction in the number of credit organisations allowed to participate in relevant selective programmes and, consequently, to a restriction of competition between them. Therefore, if a group of credit organisations obtains non-market advantages over competitors as a result of state participation, the ability of other credit organisations to compete with them is virtually eliminated.

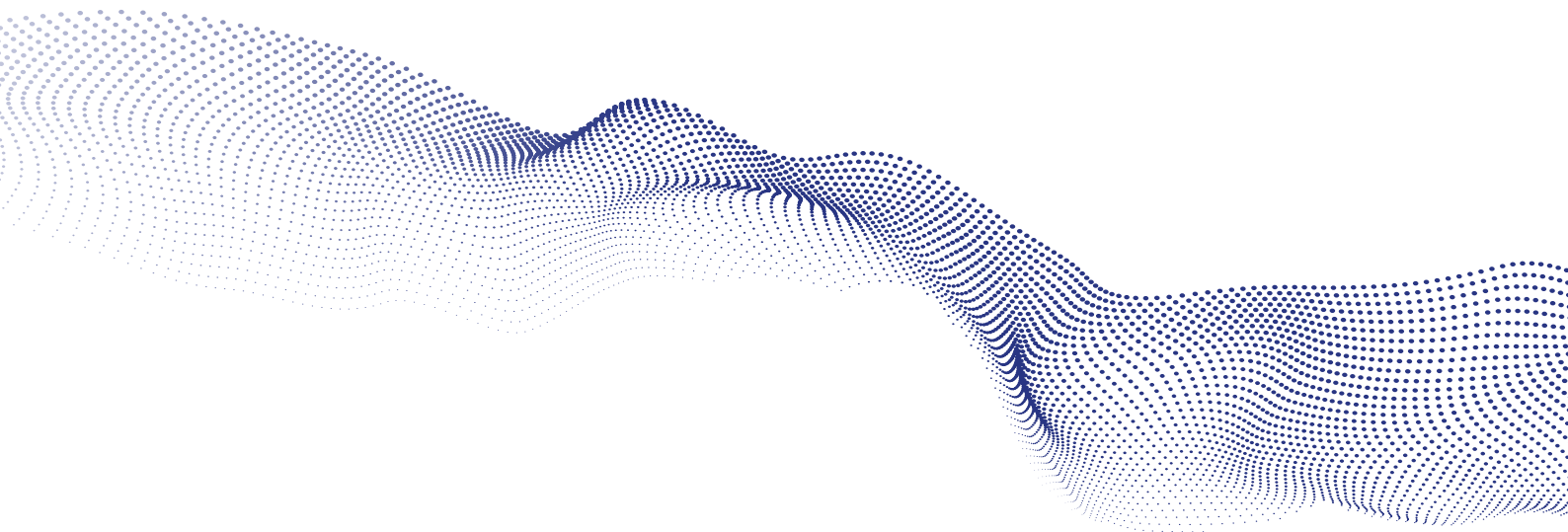
According to the FAS Russia, the use of the criterion of a certain level of credit rating, as assigned by independent credit rating agencies, should be the only requirement that credit organisations need to fulfil in order to obtain access to funds from the federal budget, state extra-budgetary funds and

from certain types of legal entities, as well as to access bank guarantees.

Currently, work is underway to amend the relevant regulatory legal acts at the federal and regional levels.

Despite the extensive functions of the FAS Russia in relation to government actions in the market and in maintaining competitive neutrality, a number of problems persist in the Russian Federation. In particular, the FAS Russia faces administrative pressure when investigating cases involving state enterprises. Despite this fact, the FAS Russia has always managed to overcome this problem. A further problem relates to the imposition of sanctions, specifically the judicial reduction of fines for state-owned companies and the reluctance of the courts to apply sanctions involving the disqualification of senior company officials or civil servants.

Nevertheless, the FAS Russia does not consider its role in regulating state activity as a burden, but rather as opportunity to improve its own activities. Consequently, when dealing with cases involving state-owned companies, companies with state participation or the executive bodies of authority, the FAS Russia should conduct a more thorough analysis of the market and substantiate its conclusions with more detailed proof in order to ensure that the decision reached is fair, legitimate, and based on a comprehensive in-depth investigation.



Enterprises under Public Ownership and Competition

An overview of problems in Ukraine



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Public Sector in the National Economy of Ukraine

During the 1990s market reforms, large-scale privatisation took place in Ukraine, which left the private sector with a dominant role in the national economy. Nevertheless, there is still a sector in the country that is focused on economic agents based on public ownership, namely, state-owned enterprises (SOEs) and communal or municipal enterprises (MOEs).

As of 1 July 2019, 3789 SOEs were registered in Ukraine, employing more than 0.9 million workers, accounting for about 5% of the national workforce; the total value of their assets amounted to about UAH 985.4 billion (EUR 37.5 billion), or 21.4% of the total value of production assets in Ukraine.⁴¹ However, the number of SOEs has been decreasing in recent years: compared to 2013, it has decreased by 37.6%.

As of 1 December 2019, 13774 MOEs were registered in Ukraine, employing about 333,000 people (about 2.2% of the national workforce).⁴² The aggregate income of MOEs engaged in economic activity in 2018 amounted to 114.43 billion UAH, which represents 2.03% of the total output (excluding the output of entrepreneurs - individuals), or 1.24% of the total volume of sales.

Unlike SOEs, the number of which has a constant tendency to decrease, the dynamics of the number of MOEs in recent years is ambiguous:

Table 1

Year	2015	2016	2017	2018	2019	2020
Number of MOEs as of 1 January	14974	13778	11438	11677	11640	12842
The dynamics compared to the previous year is indicated in percent (%)	-7.9	-16.9	+2.1	-0.3	+10.3	+8.1

According to the State Statistics Committee of Ukraine

SOEs operate in at least 11 networked and 17 non-networked sectors in Ukraine. Most of the MOEs created in 2017-2019 are multifunctional: according to the statutory documents, 1126 enterprises are engaged in 9934 activities, that is, on average, 1 enterprise carries out 9 activities.

Therefore, SOEs and MOEs in Ukraine operate in markets that can be roughly divided into three groups:

- natural monopoly markets;
- competitive and potentially competitive markets for goods or services of particular social importance;
- other competitive and potentially competitive markets.

Economic efficiency of the public sector of the Ukrainian economy

One of the most pressing problems of the public sector of the national economy of Ukraine is low economic efficiency.

Although, as noted above, the share of the value of public sector assets as of 1 October 2019 was 21.4%, the share of net income of SOEs for the first nine months of 2019 was only 10.7%.⁴³ The ratio of income to asset value in the public sector in 2017 was 0.167, while in the non-government sector it was 0.329. Thus, the efficiency of use of property assets in the public sector is almost two times lower than in the non-state sector.

The average level of profitability of SOEs in Ukraine in September 2019 was 2.3 times lower than that of non-state enterprises. As a result of 2018, the total net loss of SOEs was 13.3% of the total value of their assets.⁴⁴

According to the results of the monitoring conducted by the Ministry of Economic Development, Trade and Agriculture of Ukraine into the efficiency of the operation of SOEs for the first nine months of 2019, only 22 SOEs out of 83 received

41 Ministry of Economic Development and Trade of Ukraine (2019), *Information on the results of a single monitoring of the efficiency of management of state property objects for the 9 months of 2019*, <https://www.me.gov.ua/Documents/Download?id=6c924fa1-f2e3-4563-a6f4-25e242c69447>.

42 Centre for Economic Strategy (2020, March 2), *Як фінансування комунальних підприємств обмежує конкуренцію?* [How Does Utility Financing Restrict Competition?], <https://ces.org.ua/presentation-utility-companies/>.

43 Ministry of Economic Development and Trade of Ukraine (2019), *Information on the results of a single monitoring of the efficiency of management of state property objects for the 9 months of 2019*, <https://www.me.gov.ua/Documents/Download?id=6c924fa1-f2e3-4563-a6f4-25e242c69447>.

44 Ministry of Economic Development and Trade of Ukraine (2019), *Звіти Міністерства економічного розвитку і торгівлі України 2018 року* [Ministry of Economic Development and Trade of Ukraine 2018 report], www.me.gov.ua/Documents/Download?id=6c924fa1-f2e3-4563-a6f4-25e242c69447.

a positive assessment according to the “management efficiency” indicator.⁴⁵

An example of the economic inefficiency of the public sector can be evidenced by the situation in the alcohol sector, which until recently had a legal state monopoly. In 2018, out of 21 SOEs in the industry, only eight were profitable, while 11 were in bankruptcy. Low economic efficiency is offset by the high price of alcohol, which is 50%, 37% and 40% higher than in Russia, Belarus and the EU.⁴⁶

From the number of MOEs that conducted business in 2018, 9.6% had negative or zero income (as a rule, they were in a state of discontinuation), another 38 MOEs had an annual income of less than UAH 10 thousand (about 360 Euros), while 82% of MOEs had zero profitability (68% among other enterprise categories).⁴⁷

Impact of the public sector on competition in the Ukrainian economy

The legislation of Ukraine, including the legislation on the protection of economic competition, establishes the principle of equality of economic entities before the law regardless of the form of ownership.

However, publicly owned enterprises have advantages in terms of access to state and municipal resources and protection against foreclosure in the case of mismanagement.

Of the decisions on the compatibility or incompatibility of State aid taken by the Antimonopoly Committee of Ukraine (AMCU) in 2018, 82% concerned state or municipal companies.⁴⁸ At the same time, Ukraine provides for the possibility of overwhelming support for municipal enterprises at the expense of local government resources.

The mechanisms of forced alienation of property of insolvent SOEs in Ukraine are limited. Concerning insolvent SOEs, the state authorities make decisions on the expediency of providing them with state support; even if an SOE decides to declare itself bankrupt, the law establishes a moratorium on the enforcement of property of SOEs.

The inefficient management of state and communal enterprises and the artificial prevention of the transfer of their property to more efficient owners have resulted in the massive loss of assets of SOEs and MOEs. Thus, as of 1 July 2019, 1511 SOEs (45% of the total registered number) did not carry out economic activities, and as of 2018, 5252 municipal enterprises (45% of those registered) did not carry out economic activities.

Implementation of the legislation on the protection of economic competition concerning SOEs and MOEs

Restrictions of competition may arise from the adoption of specific decisions by the authorities in relation to certain categories of SOEs and MOEs. The adoption of such decisions is considered a violation of competition law unless justified by specific laws, acts of the President, the Cabinet of Ministers or the National Bank of Ukraine.

For example, in 2017, decisions by a number of regional councils set reduced rental rates for the use of communal property for communal drugstores, which created an advantage for them over private competitors. The AMCU has provided guidance on establishing a level playing field regardless of ownership.

An analysis of the enforcement practices of the AMCU bodies shows that SOEs and MOEs commit a small proportion of violations of the legislation on the protection of economic competition (see Tables 2 and 3).

Table 2

Violations	MOEs			MOEs, % of total		
Year	2017	2018	2019	2017	2018	2019
AAAB	5	2	1	0.82	0.44	0.22
ACP	2	0	0	0.64	0	0
AMD	223	44	39	28.05	20.37	14.55
UC	0	0	0	0.00	0	0
Total	246	59	52	10.10	4.40	2.50

AAAB - anticompetitive actions of administrative bodies; ACP - anticompetitive concerted practices of economic entities; AMD - abuse of market dominance; UC - unfair competition.

Table 3

Violations	SOEs			SOEs, % of total		
Year	2017	2018	2019	2017	2018	2019
AAAB	0	0	0	0.00	0.00	0.00
ACP	2	3	0	0.64	0	0
AMD	12	9	16	1.51	4.17	5.97
UC	1	0	0	0.39	0	0
Total	27	13	26	1.40	0.96	1.30

The most common type of competition law violation for SOEs and MOEs is abuse of market dominance. Thus, during 2015–2016 the SOE “Artemsil”, which held a monopoly (dominant) position in the markets of primary salts for industri-

45 Ministry of Economic Development and Trade of Ukraine (2019), *Information on the results of a single monitoring of the efficiency of management of state property objects for the 9 months of 2019*, <https://www.me.gov.ua/Documents/Download?id=6c924fa1-f2e3-4563-a6f4-25e242c69447>.

46 Ukrainian Institute of the Future (3 December 2019), СПИРТОВА РЕФОРМА: ГІРКО КОВТАТИ, ШКОДА ПОВЕРТАТИ [SPIRITUAL REFORM: BITTLE TO SWITCH, PITY TO RETURN]. / Український інститут майбутнього, <https://www.uifuture.org/publications/news/25212-spyrt-low-zakon>.

47 Economic Strategy Center (2 March 2020), Як фінансування комунальних підприємств обмежує конкуренцію? [How Does Utility Financing Restrict Competition?], <https://ces.org.ua/presentation-utility-companies/>.

48 Annual report on the granting of state aid to undertakings in Ukraine for 2018 (15-pn) (2019), Antimonopoly Committee of Ukraine, <https://www.amc.gov.ua/amku/doccatalog/document?sessionId=D08E82494383BBFFD78A11782FA5C9BC.app1?id=151925&schema=main>.

al processing and kitchen salt, unreasonably applied different prices to buyers under sales contracts and dealers under dealer contracts, as well as creating obstacles for buyers to access their product markets. Consequently, a fine was imposed on the SOE.

Due to the exclusive right to wholesale alcohol in Ukraine, the SOE “Ukrspirt” has market dominance in the national market for the wholesale sale of ethyl-rectified alcohol. In 2017–2018, the SOE set different prices for different buyers, without reference to purchase volumes or other reasonable criteria; furthermore, it haphazardly and opaquely set discount terms and unjustifiably cancelled discounts for individual buyers. The SOE was fined and obliged to eliminate the causes of the violation.

In early December 2019, the Parliament of Ukraine passed a law abolishing the state monopoly on alcohol production. In order to avoid any further potential problems related to the monopoly, the state decided to grant licences for the production of spirits to private companies from 1 July 2020. Moreover, the SOE “Ukrspirt” is planning to be transferred for privatisation via the Prozorro platform by 1 July of the current year.

The anticompetitive concerted practices of economic entities are uncharacteristic of state and communal enterprises: in 2017–2018 only seven such violations were established, while in 2019 no violations at all were established.

MOEs have experienced isolated cases of anticompetitive actions by administrative bodies exercising control functions and business activities. For the most part, they consisted of creating administrative barriers to entry for potential competitors in the markets for which MOEs had control functions.

Possible solutions to the problems

The following measures could be taken in order to address the problems of SOEs and MOEs:

- Clear separation between the state’s ownership function and other functions that may influence the conditions for SOEs and MOEs with regard to market regulation.
- SOEs and MOEs should not receive priority access to the resources of the state and territorial communities over private enterprises.
- Alternative public procurement of works/services should always be considered when establishing SOEs and MOEs.
- SOEs and MOEs should not be given administrative authority over the markets in which they operate.
- State (municipal) support for SOEs and MOEs whose economic activities are systematically unprofitable and which do not perform specific social functions should be prohibited or restricted.

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Using the Competition Toolkit to Ensure a Level Playing Field

Indecopi's experience enforcing the Unfair Competition Act



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This paper discusses the legal framework under which Indecopi, the national competition authority of Peru, can investigate and intervene in cases in which State-Owned Enterprises (SOE) may be competing in the market with private firms on unfair grounds. The authority's mandate in such cases is to achieve a level playing field in markets where the public sector plays a role in the provision of goods and services. Through the use of relevant case law we will describe Indecopi's recent experience in the application of the antitrust toolkit and standards when enforcing unfair competition. It is especially important to undertake a careful and thorough analysis in such investigations at times of economic recession, crisis or long episodes of depression, given that claims of unfair competition can increase rapidly as private firms are more likely to consider the presence of a public firm as a serious threat to their efforts to continue to operate in the market.

The Peruvian Constitution of 1993 proclaims the subsidiary principle of the productive activities of the State.⁴⁹ It sets out the extent to which the State can intervene in the economic life of the country and the areas in which citizens can exercise their freedom to do business. It also explicitly provides for the non-discriminatory treatment of private investments and activities, regardless of their origin.⁵⁰

In line with this principle, the Constitution limits the State's role in the performance of economic activities to those markets or sectors where there is not enough private supply of goods and services. The State, at its different levels and areas of operation, can only engage in business activities where this

is expressly provided for by law. This ensures that the State does not overreach its powers and that public spending is not allocated to the production of goods and services that can be provided, under the same conditions and to meet the same objectives, by private activity.

Legal Decree 1044 (DL 1044), Law of the Repression of Unfair Competition, prohibits and sanctions unfair competition among private firms, as well as public entities that engage in economic activities that are incompatible with the subsidiary role of the State.⁵¹

Through the Commission for the Supervision of Unfair Competition (CFD), Indecopi prosecutes infringements of the DL 1044 at the first administrative instance. CFD decisions can be challenged at Indecopi's Court of Appeal, which constitutes the second administrative instance. Parties may also challenge Indecopi's final administrative ruling before the judiciary.

According to the case Law involving the application of the DL 1044,⁵² the CFD should address cases on the subsidiary role of the State using a three-step standard. Firstly, it should be established if there is a legal basis that allows the public entity to engage in entrepreneurial activities.⁵³ Secondly, the CFD should analyse whether such activity may be reasonably regarded as subsidiary. The latter analysis entails verifying that the consumers served by the SOE - or more generally State-owned economic activities - are either not served at all by alternative private firms or that private supply is insufficient to cover their consumption needs.⁵⁴ Finally, the third step involves verifying whether the objective that the business activity intends to satisfy is of high public interest or manifest national convenience.⁵⁵

In economic terms, the subsidiary role of the State in productive activities is justified by a superior interest to provide a good or service. This role is more tangible when the provision of such goods or services produce positive externalities and increase the general welfare of the country, in which case private supply may be regarded as suboptimal from an efficiency point of view.

49 According to Article 60: "[...] Expressly authorised by law, the State may subsidiarily engage in business activities, directly or indirectly, for reasons of high public interest or clear national convenience. Business activity receives the same legal treatment, whether public or private." Political Constitution of Peru.

50 The Constitution also adopts the principle of freedom of private entrepreneurship as the main driver of the Peruvian social and economic organisation.

51 Article 14.3: "A business activity carried out by a public entity or State company that is in violation of article 60 of the Political Constitution of Peru shall constitute an act of violation that will be determined by the authorities that apply this Law. In such cases, it will not be necessary to prove that a significant advantage has been obtained by those responsible for carrying out the business activity in question." DL 1044.

52 Resolution No 3134-2010/SC1-INDECOPI established the precedent based on a case of complaint about a violation of the subsidiarity principle of the National University of Puno (UNAP).

53 A preliminary step for assessing whether a legal basis exists for the State's exercise of the contested conduct, whether through a public company or a State entity, involves the determination of whether the activity in question is of a commercial nature. In the negative, the behaviour shown by the State is not subject to the limits of the subsidiary principle established in the Constitution.

54 In other words, if the economic performance of the State, in a certain market, is carried out in the face of the actual and potential absence of private initiative to meet its demand.

55 It should be noted that business activity will only be considered as legal if the State's business intervention satisfies each of the three successive requirements mentioned.

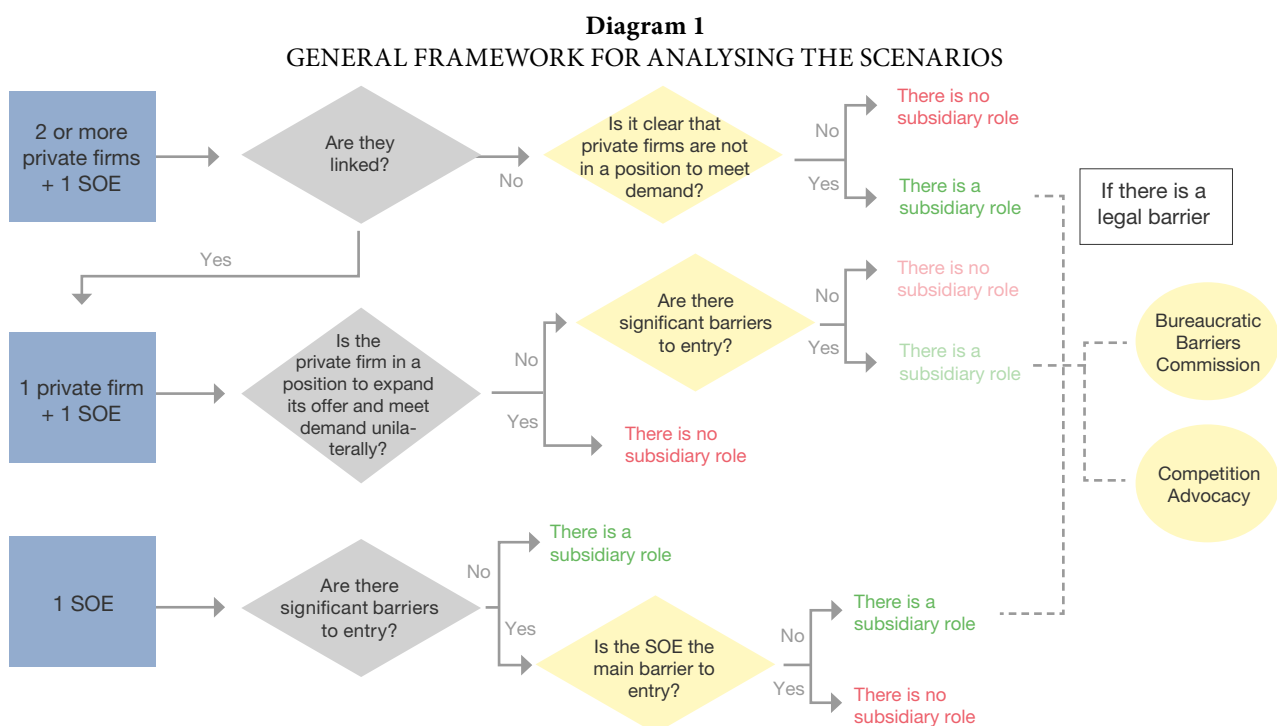
From a general public policy perspective, SOE activities that are conducted outside of the State's subsidiary role may distort the market mechanism. Specifically, under the generally accepted assumption that such activities are not oriented by profit-seeking, goods and services may be provided under cross-subsidy mechanisms that could, for example, distort equilibrium prices. This may result in established private providers, new private firms or potential private entrants facing unfair competition from the State, thereby reducing their incentive to continue to operate in the market or to enter the market, even if such private firms are cost efficient.

To assess whether the participation of an SOE distorts the dynamics of competition in the market, a key factor is the identification of the market in which the alleged rivalry

takes place. The same relevant market assessment that would have been applied in an antitrust case is used to identify rivalry and the geographical area in which the competition takes place. Once these elements have been appropriately identified, the subsidiary nature of the State activity will be determined through an examination of the following three scenarios:

- Scenario 1: If there are two or more unrelated private firms and one SOE.
- Scenario 2: If there is a private firm and an SOE.
- Scenario 3: If there is only one SOE.

Diagram 1 summarises the economic analysis process that is undertaken in order to assess the subsidiary nature of an activity developed by an SOE.⁵⁶



Source: Decision N° 2471-2010/SCI-INDECOPI.

Elaboration: Economic Studies Office.

Recent cases brought by private firms before the CFD include complaints against public postal services, electricity generation firms, specialised health institutes and the Peruvian Institute of Sport, the activities of which were regarded by private agents to be incompatible with the subsidiary role of the State. Older cases include air passenger transportation services and several further economic activities by public universities or municipalities.

Regarding postal services, by its Decision N° 164-2017/CCD-INDECOPI, the CFD found no evidence in support of a complaint made by a private provider of parcel and docu-

ments delivery services against SERPOST, an SOE devoted mainly to universal postal services. The CFD applied a standard of analysis common in antitrust practice by first defining the relevant markets in which SERPOST operated.

After confirming the existence of a legal mandate, the CFD defined the relevant markets of SERPOST's business activity and concluded that there was not enough actual and potential private supply to justify challenging the subsidiary role of the State.

Recently, the division of the Court of Appeal with jurisdiction to review competition cases (SDC) upheld a decision

⁵⁶ At a later stage, an additional decision step was considered for cases in which the subsidiary role of the SOE was not excluded. In such cases the CFD is able to forward the case to the Commission for the Elimination of Bureaucratic Barriers, which will then investigate whether the private firms operating in the markets are at an disadvantage due to the application of illegal or irrational red tape requirements. The Commission may even issue a recommendation, much in the same vein of a competition advocacy, to remove bureaucratic barriers that are affecting a level playing field in the market.

of the CFD that found no evidence that four specialised public health institutes⁵⁷ were engaging in unfair competition practices against private medical centres. A number of private medical centres claimed that the concerned public institutes had allegedly developed business activities involving the provision of health services under a so-called Differentiated Tariff (SBTD)⁵⁸, which breached the requirements established by the Constitution and DL 1044.

Decisions 060-2019/SDC-INDECOPI, 061-2019/SDC-INDECOPI, 062-2019/SDC-INDECOPI and 063-2019/SDC-INDECOPI, confirmed that there were no private health facilities offering services in the relevant markets in which the national institutes operated. These decisions were based on a careful analysis of both the complexities of the services offered by the national institutes and the catchment area and consumer profile attracted. Furthermore, the CFD and later the SDC concluded that given the level of investment and specialised human resources required to provide services comparable to those of the public medical institutions it was unlikely that private firms could do so in the short run.

Finally, the SDC considered that the aforementioned activities served a high public interest, given that Article 2 of the Law of the Ministry of Health (Law N° 27567) provides for the provision of health services through determined specialised institutes. Therefore, the SDC concluded that the business activities carried out by INEN, INMP, INSN and INO, through the SBTD, complied with the requirements of the subsidiary role of the State and were carried out to meet a high public interest; consequently, the requirements established in Article 60 of the Political Constitution of Peru were fulfilled.

The role of the State as a provider of goods and services can intensify in times of social crisis, such as the one we are currently experiencing due to the COVID-19 Pandemic. It is likely that challenges to the action of the State as a provider of goods and services will occur as private firms struggle to stay afloat. Nevertheless, our recent experience leads us to believe that antitrust tools are sophisticated and robust enough to investigate cases of alleged unfair competition of SOEs even in situations of social and economic instability, which may give rise to an increasing number and more complex conflicts between private firms and public enterprises.

57 The complaints were presented against the National Institute of Neoplastic Diseases 'Dr. Eduardo Cáceres Graziani' (INEN), the National Institute of Child Health (INSN), the National Maternal Perinatal Institute (INMP) and the National Institute of Ophthalmology (INO) by the private clinic Santa Teresa.

58 It includes all the specialised medical services that health entities provide at higher process than the regular service provided, so that patients receive care with different characteristics (shorter waiting time, choice of treating doctor and/or fewer beds per room, in case of hospitalisation).

Tools for Addressing Competitive Neutrality



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1. Introduction

To maximise the benefits of competition, it is important that the terms of competition do not favour one group of competitors over another. This is particularly true in Norway, which has a relatively large public sector and in which publicly owned enterprises engage in economic activity and compete with private firms in a wide range of areas. In 2017, the public sector constituted 58.1 per cent of GDP, compared to the OECD-average of 44.6 per cent.⁵⁹

The Norwegian Competition Authority (hereinafter referred to as NCA) has limited enforcement means to address concerns related to a lack of competition neutrality. In addition to enforcing the prohibition against abuse of dominance, which also applies to the economic activities of public enterprises, the NCA can highlight the distortive effects of public 'measures', propose less distortionary alternatives, and require a response from the responsible public body.

On the other hand, if a measure distorts trade in the area of the EEA, the Efta Surveillance Authority (hereinafter referred to as ESA) has more effective tools at its disposal. In recent years the ESA has dealt with complaints relating to regulatory measures (tax exemption), cross-subsidies and implicit guarantees allegedly benefitting public firms and has initiated formal procedures against the Norwegian government.

Against this background, a number of years ago the Norwegian government appointed a committee with the mandate to review the terms of competition between public and private firms, i.e. the extent to which the existing regulations are competition neutral, and to propose measures to make the regulatory framework comply with EU/EEA State aid rules.

This article will present the current tools at the NCA's disposal, the main findings and recommendations of the committee report and the main concerns raised in the hearing statement of the NCA.

2. Potential Sources of distortions

The normative standard of competition neutrality is difficult to reach. The terms of competition can be affected in many different ways relating to the various roles of the government, e.g. as tax collector, regulator, administrative body,

owner, allocator of public funds, and in the provision of public services.

The diagram below shows the host of different potential sources causing a lack of competition neutrality, working both in favour of and against giving public enterprises a competitive advantage – or disadvantage; all of which may potentially affect the market structure and the behaviour of the firm receiving the advantage.

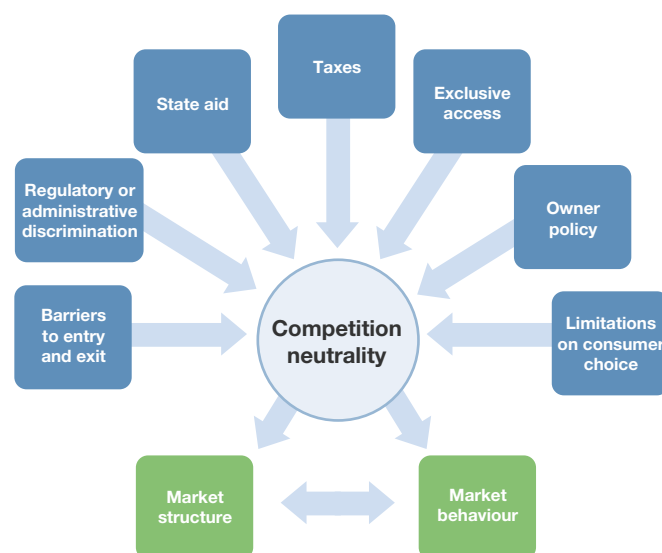


Figure 1. Sources of distortions

State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.⁶⁰ Here, the Market Economy Operator Principle (hereinafter referred to as MEOP) is central. This is a concept which has been developed by the EU Commission to determine whether a transaction entered into by a public body gives an advantage to a particular economic undertaking and therefore falls within the State aid regime. State aid rules could be triggered if a market operator, of a comparable size to the public body, operating in the normal conditions of a market economy could not have entered into a transaction on the same terms. Thus, an economic transaction carried out by a public body must be carried out in line with normal market conditions to not constitute State aid.

It is important to note that the MEOP-principle applies not only to transactions by the state as an investor; the principle also applies to other transactions or measures by a public body, for instance as a creditor, a debtor, a guarantor, a supplier or a purchaser. For instance, the granting of unlimited guarantees by a public body for economic activity can also constitute a distortive factor, as they remove the element of risk that the concerned enterprise would otherwise have to bear. Furthermore, the existence of differential treatment with respect to *taxes and fees* for economic entities competing in the same market is another potential source of distortion.

⁵⁹ Source: Revised National Budget for 2017.

⁶⁰ See, e.g. http://ec.europa.eu/competition/state_aid/overview/index_en.html

The remainder of the article will focus in particular on State aid and the interrelated issue of differential tax treatment. For the NCA, the existence of blurred lines between monopoly activity and commercial activity, for example in publicly owned waste management companies, has also been a source of concern.

All of the factors on this non-exhaustive list of possible sources for non-neutrality may have an impact on *market structure*, for instance in the form of a more concentrated market due to artificial competition advantages. An artificial advantage can also have an impact on *market behaviour*, for instance if a lax ownership policy leads to an aggressive growth policy instead of the payment of dividends and the maximisation of the profit of owners, thus increasing the risk for abuse of dominance.

3. Current tools to address competitive neutrality distortions

According to the Competition Act, the NCA shall supervise competition in the various markets (Section 9), among other things by “calling attention” to the restrictive effects on competition of “public measures” and, where appropriate, submitting proposals aimed at furthering competition and facilitating market access by new competitors (Section 9 e).

A “public measure” can be many things. For example, it can relate to various forms of public support given to private and public entities, the manner in which public authorities organise their commercial entities and/or exercise their ownership, how public authorities operate, or it can refer to various laws and regulations at the state or local level.

As a typical example, the NCA has used this tool in a number of some cases in which concern was raised about the lack of competition neutrality stemming from the blurring of lines between monopoly activities and those exposed to competition in waste management.

A rather typical case is the following: In 2005, the NCA investigated the organisation of the waste management company of the municipality of Trondheim (the third largest city in Norway), i.e. Trondheim Renholdsverk AS (hereinafter referred to as TRV), and its implementation of tender processes in the waste sector. Renholdsverket har monopol på håndtering av husholdningsavfall i Trondheim. TRV has a monopoly in handling household waste in the city. Retura TRV ble opprettet av Trondheim Renholdsverk for å betjene kunder i næringslivet og leier ut containere. Retura TRV was created by TRV in order to serve customers in the management and rent containers market segments, thus competing with private firms in the industrial waste market. A competing private firm Veolia Miljø AS mente at konkurransen mellom Retura og private selskap ikke skjedde på like vilkår. claimed that the competition between Retura TRV and the private companies was not on equal terms.

In accordance with Section 9 e of the Competition Act, in a formal letter the NCA pointed out its concerns and the municipality, as the owner of TRV, was asked to make a number

of necessary changes to both the organisation of TRV and the tendering processes in the waste sector, with the aim of ensuring the existence of healthy and genuine competition on equal terms in the waste market in the Trondheim area. Changes were subsequently implemented that resulted in a clearer distinction between competitive activities and statutory activities, tDette ville medvirke til mer ryddige konkurranseforhold og å redusere faren for – og mistanken om – ulovlig konkurranseskadelig adferd i konkurranseutsatte markeder. hereby contributing to more orderly competition and a reduction of the risk - and suspicion - of illegal anti-competitive behaviour in the competitive markets.

The example illustrates that the NCA, through its power to ‘point out’ its concerns according to Section 9 e in the Competition Act, can in fact initiate change that contributes to the creation of a level playing field between public and private enterprises operating in the same market. The implementation of such changes is, however, voluntary.

4. State aid and taxes

The Norwegian Tax Act exempts the State, including government institutions, organisations and funds (hereinafter collectively referred to as “State institutions”), counties and municipalities (with some exceptions) as well as Regional Health Authorities and Public Health Enterprises from corporate income tax (hereinafter referred to as “public entities”). This also implies that economic activity within the state, counties and the municipalities as a legal entity, is exempt from tax.

In 2013, the Efta Surveillance Authority (ESA)⁶¹ initiated State aid procedures due to its concerns related to such public entities benefitting from tax exemptions - not only when they engaged in public, non-economic tasks, but also when they carried out economic activities on the market.

In 2015, the ESA reminded the need to ensure a proper, consistent and transparent separation of accounts, as well as the application of transparent and objectively justifiable cost accounting principles, when implementing the tax exemption modifications.

Also in 2015, the ESA informed the Norwegian authorities that it had expanded the scope of its ex officio investigation, in order to assess the compatibility of the (implicit or explicit) open-ended state guarantees enjoyed by the public entities mentioned above, as they are exempt from general bankruptcy and other insolvency procedures.

The ESA’s preliminary conclusion was presented in a letter at the end of 2015, in which it stated that the tax exemption and the unlimited guarantees benefitting public entities engaged in economic activity constituted incompatible State aid and should accordingly be abolished by way of appropriate measures.

The ESA proposed that the tax exemption and unlimited guarantees for public entities should be modified to ensure that the economic activities of State institutions, counties, municipalities, health enterprises and regional health enter-

⁶¹ The general prohibition on State aid that applies in Norway and the other Efta countries, namely Iceland and Liechtenstein, is enforced by the ESA. In its enforcement of the rules, the ESA has equivalent powers and similar functions to those of the EU Commission.

prises are subject to income tax and no longer benefit from unlimited guarantees.

Furthermore, in the ESA's view, public bodies had an obligation to set up separate legal entities to deal with their economic activities, which would thus be subject to income tax and ordinary bankruptcy and/or other insolvency rules.

5. Government committee – competition neutrality

Based on concerns related to competition neutrality between private and public enterprises and the concerns raised by the ESA as mentioned above, in 2016 the Norwegian government appointed a committee with a mandate to, *inter alia*, propose measures that are *necessary* to bring the current framework into line with the EEA agreement as well as measures that *preferably* should be implemented to ensure competition neutrality and the efficient use of resources, without undermining the possibility for public entities to fulfill their mission in a cost-effective manner.

The Committee presented its report and recommendations in early 2016. First and foremost, the majority of the Committee did not recommend a duty to corporatise economic activity within a public entity. The Committee argued that a public entity would consider this option itself, and be better placed to do so, based on an assessment of the cost and benefits of this alternative.

However, the majority of the Committee did recommend the introduction of a duty to separate accounts in an appropriate, consistent and transparent manner, as well as the application of transparent and objectively justifiable cost accounting principles. This is a prerequisite to ensure that a public owner adheres to the MEOP-principle mentioned above.

The majority also found that adherence to the MEOP-principle would ensure that unlimited guarantees for public entities engaged in economic activity would not constitute illegal aid, since the principle implies that the value of the guarantee would be priced in the same way as a private investor would put a price on providing a guarantee.

The majority of the Committee also recommended that economic activity should be subject to taxes in the same way as other private economic activity, and that a certain threshold relating to turnover was preferred to determine if the economic activity should be subject to tax.

A majority of the Committee also recommended that control measures should be introduced to ensure that public entities adhere to the MEOP-principle, even when the activity would not be subject to EEA-State aid regulations.

The same majority recommended that the Norwegian Competition Authority should be entrusted with this responsibility.

6. The NCA's hearing statement

In the NCA's hearing statement to the Committee's report, the importance of competitive neutrality in ensuring the efficient use of society's resources was emphasised.

However, the NCA also argued that the an efficiency goal also imply that public entities should not face restrictions regarding the utilisation of spare capacity in the provision of non-commercial activity or the exploitation of economies of scale and scope versus non-commercial activity – in the same way as an integrated private entity would seek efficiencies between its various business areas. Furthermore, the NCA emphasised the importance of not applying the MEOP-principle in the EU/EEA state aid context in a way that restricts socio-economic efficiency and, ultimately, competition.

As regards to the Committee's recommendation that there should be a requirement to maintain separate accounts for the commercial and non-commercial activities of a public entity, this was supported by the NCA with the aim of facilitating transparency and ensuring adherence to the MEOP-principle.

Regarding organisational separation, the NCA pointed out that the realisation of economies of scale and scope in many cases will require organisational integration. A legal requirement of organisational separation between the non-commercial and commercial parts of a public entity will imply that such benefits will be lost. Thus, the NCA supported the commission in its proposal that organisational separation and corporatisation must be based on a case by case assessment, which the public body is best placed to do itself based on the costs and benefits of corporatisation.

7. Next steps

The Norwegian government is currently in the process of assessing the recommendations and elaborating ways in which they should be implemented, for example via changes to the legal or regulatory framework.

In this regard, a socio-economic impact analysis exploring this aspect of the commission's report in more depth has been commissioned by the government. The aim of the analysis is, among other things, to map the magnitude of potential distortions and to analyse how the proposals may impact the potential exploitation of economies of scale and scope, as well as the utilisation of spare capacity in the short-term and long-term. A public hearing with concrete proposals is expected in 2020.

Advocacy Tools for Addressing Competitive Neutrality Issues

The Italian Experience



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The principle of competitive neutrality has inspired the Italian competition law framework since its establishment in 1990⁶². According to Art. 8 of the Italian Competition Act (Law No. 287 of October 10th, 1990), the provisions of this act “*apply to both private and public sector undertakings and to those in which the State is the majority shareholder*”: therefore, no specific exemption or exclusion has been envisaged. This is particularly relevant if one considers the weight of State-owned enterprises (SOEs) at national and local level in the Italian economy: in 2016 the State had a portfolio of 59,036 direct and indirect shareholdings in 9,184 companies, most of which were in the hands of local government.

It is therefore not surprising that the Italian Competition Authority (hereafter: the Authority or the AGCM) has been confronted with the issue of competitive neutrality over the course of its institutional life.⁶³

In more recent years, the Italian government has showed its willingness to intervene in the economy in order to rescue individual enterprises from bankruptcy often due to their inefficiency, mismanagement or inability to adapt to the prevailing economic climate. The economic shock brought about by the Covid-19 outbreak will likely bring a new wave of State interventions in the economy as the government has announced various economic measures to essentially bailout firms in distress as a part of its post-Covid-19 economic recovery plan.

This article describes the advocacy tools used by the AGCM to promote competitive neutrality and how they have been implemented in real cases; furthermore, it discusses the corporate governance measures introduced by the government to ensure a level playing field and the role of the AGCM in this important process and, finally, it addresses the potential impact of the economic shock brought about by the Covid-19 outbreak on the goal of competitive neutrality in the Italian context.

Competition advocacy to promote competitive neutrality

The set of advocacy powers available to the AGCM in order to enhance and support an environment of competitive neutrality is quite broad. Like most competition agencies, the Authority has been provided with the power to issue advisory opinions on existing and draft legislation (Art. 21 and 22 of law n.287/90) and to carry out sector enquiries which can be concluded with non-binding recommendations (Art. 12). In the aftermath of the financial and economic crisis of 2011-12, the liberalisation reforms of Monti’s government endowed the Authority with additional advocacy tools, including the new Art. 21-bis opinion which enables the AGCM to challenge, before the administrative courts, any acts of the public administration that are incompatible with the competition law and the competition principles embedded in the primary national and EU legislation.⁶⁴

This new power has been used by the AGCM to monitor the implementation of the liberalisation reforms approved at national level. The Authority has not only experienced resistance at the local level towards the opening up of markets to competition, but even a tendency for the reintroduction of restrictions that had previously been removed at the national level, as local authorities tend to favour incumbent firms because either these undertakings are directly or indirectly owned by them or they represent issues that are important to the local electorate.

One illustrative example is in **the publicly-funded health sector**: the multiple roles of regional health authorities (provider, planner and buyer of services) resulted in the favourable treatment of accredited providers: the Authority used its Art. 21-bis power to remove any obstacles or delays to the accreditation of new providers⁶⁵ and to discourage local health authorities from using historical expenditure as a criterion for the allocation of the public budget, given that the use of this

62 All views expressed are solely those of the authors: usual disclaimer applies.

63 For more information, please see the AGCM submission to the 2015 OECD Roundtable Competitive Neutrality In Competition Enforcement, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)41&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)41&docLanguage=En).

64 This new tool is characterised by a two-stage procedure. First, the Authority has to issue a reasoned opinion to the public administration concerned. Then, should the public administration fail to comply with the opinion within sixty days, the AGCM can challenge the administrative act before the Administrative Court within the following 30 days. This advocacy power may only be used against acts of an administrative nature (i.e., excluding primary legislation at both national and local level).

65 See for instance the AGCM opinion to the Basilicata Region (n. AS1522). The AGCM’s appeal is still pending.

criterion would inevitably give an advantage to incumbent providers at the expense of new and potentially more efficient accredited providers.⁶⁶

Art.21-bis opinions have also been issued to tackle several issues that were capable of hindering the ability of prospective bidders from competing on an equal footing in **public procurement procedures**. On several occasions, the AGCM has warned the local procurement authorities against:

- the limited recourse to competitive tender procedures, in favour of the direct awarding of in-house contracts to publicly-owned incumbents (which are still a frequent choice at local level);
- the extension of in-house contracts which have been granted too often and in many cases in contrary to the EU rules on in-house providing;
- the use of restrictive criteria in the service contract (definition of the object, technical requirements, allotment criteria) also in relation to the elements of the tender/auction design (e.g., participation/selection criteria), which have often been formulated in such a manner that only the incumbent SOE could actually meet all of them; and
- designing service contracts so that they closely mirror ones that have been formerly granted to municipality-owned providers, both in terms of the service obligations and the geographical areas concerned, without any economic justification for this (e.g., in terms of efficiencies, demand patterns).

Promoting competitive neutrality through corporate governance

The Italian legislator considered it important to introduce separation requirements when enacting the Competition Act in 1990: Art. 8 contains important provisions aimed at ensuring a level playing field between SOEs and their competitors. When the undertakings entrusted with services of general economic interest (which are mostly SOEs) also operate on other markets, they must comply with the obligations related to separation and non-discriminatory access envisaged by Art. 8 of the Competition Act. In particular:

- They must operate through separate companies (Art. 8.2-bis);
- They must submit prior notification to the AGCM if they intend to incorporate or acquire controlling interests in undertakings operating on other markets (Art. 8.2-ter) regardless of turnover thresholds (sanctions for failure to notify may be up to euro 50,000).
- When they supply their subsidiaries or controlled companies on different markets with goods or services, including information services, over which they have exclusive rights by virtue of their role, they shall make these same goods and services available to their direct competitors on equivalent terms and conditions, in order to guarantee a level playing field (Art. 8.2-quater).

Over the years, the Authority has applied Art. 8 provisions on several occasions. For instance, between 2010 and 2018 there were 18 infringements of Art. 8.2-ter, resulting in sanctions amounting to a total of euro 161,500; in one case the AGCM decided to impose the maximum amount of sanction (euro 50,000).

In 2015, for the first time the Authority closed a proceeding finding a breach of Art. 8.2-quater of the Act, i.e. establishing a violation of the obligation to provide third parties with goods/services under the same conditions as those applied to controlled firms. The case concerned the mobile operator HG3 which was denied access to the exclusive postal network of Poste Italiane (PI), the incumbent in the postal services sector, on equivalent terms to those offered to Poste Mobile, a subsidiary of PI operating in the retail telephone mobile market. The Authority ordered PI to refrain from similar behaviour in the future.⁶⁷

Outside the application of Art. 8, the Authority has expressed its preference for a structural/ownership unbundling, or at a least legal unbundling (compared to the softer “accounting/functional” separation), in several advocacy opinions in the past. Separation recommendations have also been formulated as a result of market studies: dated examples are in the electricity and gas markets, while more recently there have been calls for separation requirements in the local public transport, postal services and waste management sectors.

The Authority has advocated for the adoption by SOEs of corporate governance best practices that mirror those of the private sector, especially in terms of transparency and accountability, and other governance principles, with the aim of harmonising the very fragmented and complicated framework governing SOEs, especially at local level. In 2016, the government eventually introduced a single regulatory framework for publicly-owned enterprises (Legislative Decree no. 175/2016) to increase the efficiency and quality of local public services and also to promote competition. The main objective of the reform was to ensure that public administrations controlled or participated only in companies whose main business is strictly related to their institutional missions.

To this end, stringent limits on the ability of SOEs to create new companies or to acquire new shareholdings have been introduced, together with the obligation to review and dismiss non-core shares in periodic rationalisation plans (on a yearly basis). In case of failure to dismiss, the public shareholder would lose its voting rights and/or its shareholding would be liquidated/dismissed.

The AGCM has played an important role under the framework. On the one hand, the AGCM was called to review the first periodic plans of the major regional capital cities and analyse their decisions to keep shareholdings. On the other hand, under the framework the AGCM is entitled to “monitor” the implementation of this reform by intervening when the plans of a local authority in relation to the creation of a new entity or the acquisition of a shareholding in an existing entity

66 See the AGCM opinion to the Calabria Region in 2014 (opinion n. AS1181): the AGCM’s appeal to the Court was successful and therefore the act was annulled.

67 See AGCM decision n. 25795, of case n. SP157 - H3G/CONDOTTE POSTE ITALIANE E POSTEMOBILE, published in the AGCM Bulletin 48/2015, and available at: [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/A8795D4174B3E9A1C1257F30004EA06A/\\$File/p25795.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/A8795D4174B3E9A1C1257F30004EA06A/$File/p25795.pdf). The AGCM infringement decision was upheld by the first instance Court in 2016 (there was no appeal to the Supreme Admin Court).

may be contrary to the criteria and principles, among which the promotion of competition is explicitly mentioned, of the new framework. In such cases, the AGCM may issue an opinion to the local authority, pursuant to Art. 21 bis, and in case of non-compliance, it may decide to challenge the decision of the local authority before the administrative court. The AGCM has not hesitated to use this power, issuing 17 opinions in 2017, 1 in 2018 and 3 in 2019 (resulting in compliance with the decision of the AGCM in the majority of the cases).

Despite the slow pace of the initial implementation,⁶⁸ this reform looked promising in terms of expected outcomes. However, in recent years the reform has been watered down by the government with the introduction of derogations and exemptions, which risk undermining the objectives of the reform. The Authority has promptly invited the government to reconsider this policy shift in recent advocacy interventions.

Some remarks on the impact of the Covid-19 outbreak on competitive neutrality

One of the consequences of the economic crisis triggered by the Covid-19 pandemic in Italy and in other countries around the world is likely to be the increased presence of the State in the economy: this may mean significant and immediate interventions in several markets, from the most directly affected by the crisis to other markets that may be affected later.

The European Commission promptly intervened to provide Member States with the possibility of designing ample aid measures to support specific companies or sectors suffering from the consequences of the coronavirus outbreak. It adopted a Temporary Framework⁶⁹ setting out, in line the existing EU State aid framework, several measures such as direct grants, selective tax advantages and advance payments, State guarantees for loans taken by companies from banks and subsidised public loans to companies. Outside the state aid control, the Commission put in place a framework for

swifter government actions, such as national funds granted to health services or other public services to tackle the Covid-19 pandemic.⁷⁰ At national level, the Italian government has recently approved new economic measures to support several sectors,⁷¹ including transport (e.g., airlines) and tourism.

After years of ideological opposition between free markets and state intervention, the shock produced by Covid-19 confirms the important role played by competition policy at times of economic crisis, which while a valuable tool in itself, must be increasingly integrated with other public policies in order to help accelerate the economic recovery.

With entire sectors and supply chains in dire straits due to Covid-19, with efficient as well as inefficient businesses asking for economic support, the main challenge for competition policy is to facilitate the reconstruction of the economy and its competitiveness at a global level, and to reinforce the complementarity with other policies, in particular the industrial policy. At the same time, it will be important for competition authorities to continue to advocate for a level playing field and to ensure that competitive neutrality is maintained whenever possible and appropriate.

The coordination and integration of competition policy with other government policies is particularly urgent in the Italian context where State interventions in the economy have acted in recent years as an improper measure to mitigate the social welfare costs of economic distress. As outlined by the AGCM in several advocacy opinions, the implementation of social welfare measures to counteract the negative effects of a crisis would ensure that the exit of inefficient firms is socially accepted and the allocation of resources is oriented towards long-term objectives rather than the short-term view of the markets. This is an important issue in a country in which a distinctive feature of the economy is indeed the presence of high barriers to exit which hinders the ability of market mechanisms to allocate resources to their most efficient use and reward the most cost-effective and innovative companies.⁷²

68 According to the Economic and Financial Document – Italy's Stability Programme, approved by the Council of Ministers (Documento di economia e finanza - DEF) in April 2019, as a result of the first rationalisation plans (submitted by 90% of the public bodies involved), it emerged that: around 8,200 bodies hold more than 32,000 shares in 5,700 companies; public bodies identified 3,100 non-core shareholdings to be dismissed (originally envisaged by 30 September 2018); only 572 (18% of the total) have been alienated with an income of 419 million euros for the government.

69 Adopted on 19 March 2020, and subsequently amended on 3 April and 8 May. See press release: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_496.

70 See the European Commission's Communication on a Coordinated economic response to the Covid-19 outbreak of 13 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_459.

71 Law Decree no. 34 of 19 May 2020 (so-called "Rilancio Decree").

72 See AGCM submission to the 2019 OECD Roundtable on Barriers to Exit, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2019\)99/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)99/en/pdf).

A Level Playing Field Requires Active Enforcement and Advocacy

Insights from the “SME Policy Index: Eastern Partner Countries 2020”



Sabine Zigelski
Senior Competition Expert
OECD Competition Division

The OECD has recently released the “SME Policy Index: Eastern Partner Countries⁷³ 2020 – Assessing the Implementation of the Small Business Act for Europe”.⁷⁴ It is a unique benchmarking tool, and is structured around the ten principles of the Small Business Act for Europe (SBA).⁷⁵ This report marks the third edition in this series, following assessments in 2012 and 2016. For the first time, the 2020 edition features an assessment of three new dimensions – **competition**, contract enforcement and business integrity. These dimensions look at key structural reform priorities that are critical to establishing a level playing field for enterprises of all sizes. This article focuses on the competition part of the publication, but readers are of course invited to consider the other dimensions as well.

While competition law and policy do not specifically target SMEs, a broad and effective competition law enforcement is essential to ensuring a level playing field that will in turn benefit them. “**Competitive neutrality**” is critical here – the principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government’s contact, ownership or involvement in the marketplace, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant.⁷⁶ From this flows naturally the need for an independent referee that applies “the rules of the game” in a fair and impartial manner, to instil trust in all market players that their efforts to compete on the merits will pay off, and will not be obstructed by private or public restrictions to competition.

The report reflects the findings on the competition policy regimes in the six countries of the EU’s Eastern Partnership (EaP).⁷⁷ The analysis and recommendations, which stem from



these findings, focus on the aspects of a competition law regime that provide for a neutral and effective legal framework while ensuring that the enforcement body is competent, objective and independent in its application.

Fostering competition in EaP countries, as in many other post-communist economies, has presented a particularly daunting challenge – not only because the suppression of competition was integral to the socialist system, but also because the industrial structures bequeathed to the transition countries by central planners were often highly concentrated. Yet successful, competition-oriented reform has been rewarded: where reformers have been more successful in fostering competition, performance has tended to improve.⁷⁸ Competition can also help promote a cleaner, fairer business environment in which success comes to those firms best able to meet their customers’ needs, rather than to those with the best connections or the deepest pockets.⁷⁹

73 This article presents excerpts from the “SME Policy Index: Eastern Partner Countries 2020”, pp 95-106. The competition chapters were drafted mainly by the present author. The Eastern Partner Countries assessed in the report are: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

74 The publication can be accessed and downloaded here: oe.cd/smepeaP. The report is available in English and Russian. In addition, all six country profiles are available in the local languages.

75 https://ec.europa.eu/growth/smes/business-friendly-environment/small-business-act_en

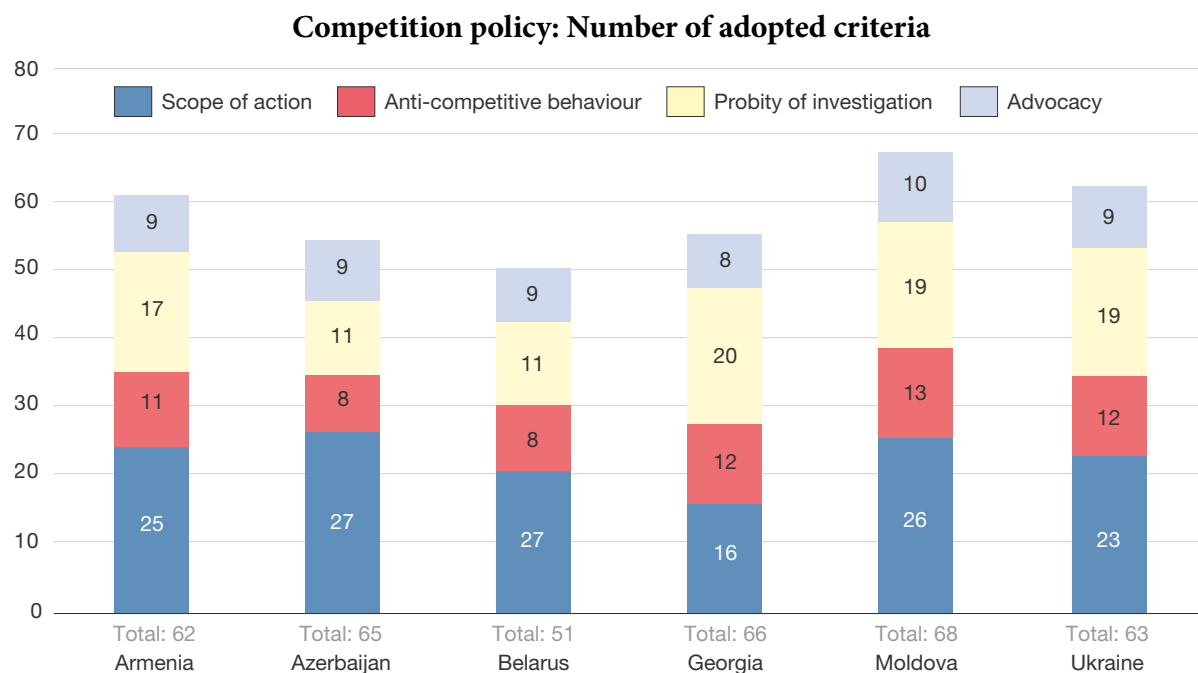
76 See all related OECD work here <http://www.oecd.org/competition/competitive-neutrality.htm>.

77 See FN 2.

78 See for example, EBRD (2002), “Transition Report: agriculture and rural transition”, Economic transition in central and eastern Europe and the CIS, <https://www.ebrd.com/downloads/research/transition/TR02.pdf>, Carlin W., E. (2001), “Competition and Enterprise Performance in Transition Economies: Evidence from a Cross-Country Survey”, William Davidson Institute Working Paper 376, <http://dx.doi.org/10.2139/ssrn.270320>; and Vagliasindi, M. (2001), “Politique de la concurrence dans les économies en transition”, Revue d’économie financière, Vol. H-S/6, pp 233-272, <http://dx.doi.org/10.3406/ecofi.2001.4560>.

79 OECD (2014), Factsheet on how competition policy affects macro-economic outcomes, <https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf>.

The figure shows that most of the basic building blocks necessary to create functional competition regimes are present in all six EaP countries.⁸⁰



Note: The maximum number of adopted criteria is 73. The data refer to the number of competition policy criteria *formally adopted in the legal framework* rather than actual enforcement activity in terms of relevance or quantity. Much also depends on the relevance of the criteria lacking or met, which is not reflected here.

Source: SME Policy Review 2020, p 99.

Apart from Belarus and Azerbaijan, where competition authorities operate under local ministries, the competition authorities in EaP jurisdictions are formally independent institutions. The competition authorities in all EaP jurisdictions conduct a competition assessment of laws and regulations and all six economies consider barriers to entry for SMEs when conducting competition assessments. As for other advocacy activities, such as training for public procurement officials in the prevention and detection of bid rigging in public procurement procedures, training is currently organised in three of the six evaluated countries: Azerbaijan, Georgia and Moldova. However, actual implementation of the competition laws remains the biggest challenge. With the exception of Moldova and Ukraine, which show significant cartel prosecution and/or merger control activities, implementation of the competition laws can only be described as insufficient. This may be due to a lack of necessary tools, a reluctance to use the available powers, inadequate funding and staffing of the competition authorities, or political factors.

Thus the main competition related message of the report is that in order to ensure fair competition for all firms in the EaP region, and in particular for SMEs, **countries need to boost their competition enforcement efforts**, especially in the areas of cartels and merger control.

The **recommendations** issued reflect this:

- **Cartels** are the most clear-cut and undisputedly harmful competition law violation, and they affect every country. In particular, small economies with limited openness to trade and small numbers of major economic actors seem to face an even higher risk of becoming victims of cartels than large, open economies (i.e. Armenia, Azerbaijan, Belarus, and Georgia). This comes at a high cost to consumers and taxpayers (10 – 20% higher prices for goods and services). As cartels often target public procurement, public services come at a much higher cost to taxpayers as well. While leniency programmes can help, they are not a silver bullet and require determined enforcement in the first place in order to be attractive at all.
- In order to improve **merger control**, the competition authorities need to ensure that all mergers that meet the legal thresholds are duly notified (i.e. Azerbaijan, Georgia and Moldova). These mergers should then be analysed using sound economic methods where necessary. Authorities should consider a prohibition decision as a realistic option in problematic cases, when competition concerns cannot be appropriately addressed with remedies. If remedies are considered, structural merger remedies should be the preferred option.⁸¹
- All competition authorities need to have sufficient **investigation and sanctioning tools** in order to enable strong enforcement. Four economies – Armenia, Azerbaijan,

⁸⁰ The competition assessment criteria are explained in the report, pp 96.

⁸¹ OECD (2011), <https://www.oecd.org/daf/competition/market-studies-and-competition.htm>, <http://www.oecd.org/daf/competition/RemediesinMerger-Cases2011.pdf>.

Belarus and Georgia – do not have effective dawn raid powers, which are a universally agreed-upon indispensable tool for uncovering illegal cartels and bid rigging.⁸² In addition, sufficient powers to investigate and sanction non-compliance with orders and requests in all enforcement areas are a necessary tool for all authorities. This will enable them to base their decisions on a sound factual and economic basis. Competition and procedural laws of advanced jurisdictions can serve as an inspiration and blueprint for necessary changes.

- Effective and impartial enforcement requires highly qualified enforcers who act in an institutional environment that assures **independence** from public or private stakeholder interventions and guarantees an absence of corruption. Azerbaijan and Belarus should consider converting their competition enforcement bodies into government-independent institutions. Independence also hinges on competition authorities having **sufficient resources**, and on the existence of a functional decision-making body at all times, with members being appointed on merit. In order to attract and retain highly qualified lawyers and economists, the salaries of all agencies would need to increase significantly. While effective competition enforcement comes at a cost, the authorities that have conducted impact assessments of their actions can usually demonstrate that their expenditure has been recovered several times over in the form of direct benefits to consumers. Consequently, every euro invested in an authority can be expected to generate many euros of consumer savings every year.
- Governments should ensure that their competition authorities are always involved in drafting or reviewing laws and regulations that have the potential to affect

competition in a sector. The authorities should be given sufficient time to comment. Their recommendations should be taken seriously, and governments should commit to publicly explaining themselves when they do not follow them (i.e. Armenia, Azerbaijan, Belarus). The OECD's **Competition Assessment** Toolkit⁸³ provides competition authorities and other decision makers with a practical methodology for identifying and evaluating existing and proposed policies to see whether they unduly restrict competition. Where a detrimental impact is discovered, the toolkit helps to develop alternative ways to achieve the same objectives while ensuring that any harm to competition is minimised..

- As part of their **advocacy** activity, and in particular in order to fight bid rigging in public procurement, EaP economies should enhance (i.e. Azerbaijan, Georgia, Moldova) or initiate (i.e. Armenia, Belarus, Ukraine) activities to train and educate public procurement officials to draft tenders in a way that prevents bid rigging, and to detect suspicious signs of bid rigging. OECD materials on fighting bid rigging in public procurement⁸⁴ can offer valuable guidance, and are a standard tool used by many jurisdictions around the world.

While the report focuses on six economies only, other economies with a socialist heritage may find some resemblances with their current situation and may want to consider the recommendations. The six scrutinised economies, Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, made a big effort when they participated in the exercise, and the OECD is very thankful for their commitment. If competition rules are applied, and if they are applied evenly, this will go a long way towards achieving a level playing field for small and large, public and private businesses alike.

⁸² See also [OECD Recommendations on effective action against hard core cartels](#), with an explicit recommendation to confer dawn raid powers on competition authorities, and on [fighting bid rigging in public procurement](#).

⁸³ See <http://www.oecd.org/daf/competition/assessment-toolkit.htm>.

⁸⁴ See <https://www.oecd.org/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>.

OECD Best Practice Roundtables on Competition Policy

Summary of the June 2020 meeting of the OECD Competition Committee



OECD
Competition
Division

Three main topics addressed at the latest OECD Competition Committee may be of particular interest for competition authorities in Eastern Europe and Central Asia: the criminalisation of cartels and bid rigging conspiracies, the acquisition of start-ups by dominant incumbents and the conglomerate effects of mergers.

A recurring competition policy question is whether monetary fines against firms and other legal persons are sufficient to ensure deterrence. In the last years, an increased adoption of (different) **criminal sanctions** was observed across jurisdictions, in particular against hard-core cartels. Notwithstanding this increased adoption, custodial sentences (and cases resulting in actual imprisonment) remain quite limited in most jurisdictions.

Integrating criminal enforcement in civil or administrative regimes often requires adjustments. Institutional settings differ among jurisdictions and the degree of involvement of competition agencies in criminal investigations varies. Moreover, in some jurisdictions, criminal enforcement raises the standard of proof that authorities must meet. Corporate compliance programmes and leniency programmes can contribute to detect and deter cartel offences, but they also need to integrate with generally applicable criminal laws. Criminal enforcement has also implications for international co-operation, in particular on the exchange of information between competition agencies.

Building on an inspiring background note prepared by the OECD Secretariat and presentations by international experts, the roundtable at the OECD Competition Committee focused on criminal enforcement of cartels, including in the area of public procurement (in case of bid rigging). It examined different types of criminal sanctions imposed, in particular against individuals. It also explored the different approaches to investigation and prosecution of criminal offences, as well as the role of leniency programmes, whistle-blower legislation and corporate compliance programmes. Finally, it looked at how competition agencies co-operate with prosecution authorities in their own jurisdictions.

Questions over the competitive effects of the **acquisition of start-ups** or ‘nascent’ firms by dominant incumbents have become a key part of the debate as to how effective merger control regimes have been in protecting competition during a period of increasing profits. For some it represents a specific example of excessively permissive antitrust enforcement, while for others it demonstrates that agencies lack the tools they need to protect competition, particularly in the digital realm. Others suggest the concerns are overstated and any scope for such mergers to damage competition is outweighed by the additional incentive to innovate that comes from the prospect of being acquired by a big firm.

A number of challenging issues were discussed during this session, including: the right merger thresholds, the theories of harm that may arise, the analytical tools that should be used to test them, the relevant counterfactual that should be identified and the types of efficiency that might result.

Conglomerate effects arise when a merger has an effect on competition, but the merging firms’ products are not in the same product market, nor are they inputs or outputs of one another.

Mergers exhibiting conglomerate effects have taken on a new prominence in the digital era, as the largest technology companies use acquisitions as a key part of their product development, expansion and recruitment strategies. These transactions are generally considered to be procompetitive: they can allow the combination of complementary skills and assets, improve interoperability, and facilitate innovation. However, there can also be some potential competition concerns associated with these mergers. They include the potential for bundling and tying, reduced innovation incentives, and co-ordinated effects.

Investigating conglomerate effects can be particularly difficult, as it is not straightforward to identify when they are likely to arise. Information gathering, addressing uncertainty in the development of the market, and assessing remedies for conglomerate effects are some of the key challenges faced by competition authorities in these cases. This session addressed questions such as: When are conglomerate effects harmful to competition? How should conglomerate effects be assessed? Are new theories of harm specific to digital companies needed? How can authorities overcome the practical challenges associated with investigating conglomerate theories of harm?

Other interesting themes discussed by the OECD Competition Committee were Consumer Data Rights and Line of Business Restrictions.

Consumer Data Rights include fundamental rights to privacy; requirements around consumer consent to have their data collected, stored and used by businesses and governments; and regulations around how consumers can access, share and delete their data. One key component of consumer data rights is data portability, which facilitates the transfer and release of consumer information held by businesses to consumers, or to other businesses or organisations on behalf of consumers.

A session of the OECD Competition Committee addressed three primary questions: How do businesses use consumer data and are there market failures with respect to consumer data? What is the role for competition law enforcement both with respect to privacy as a competitive quality factor and to the relationship between consumer data and market power? What is the role for competition advocacy?

Line of Business Restrictions are antitrust remedies or regulatory restrictions that can be used to limit the range of activities that a firm can undertake. They can be structural in the sense that they prohibit a firm from engaging in a line of business, as set out in the OECD Recommendation on Structural Separation. Alternatively, they can be behavioural, for

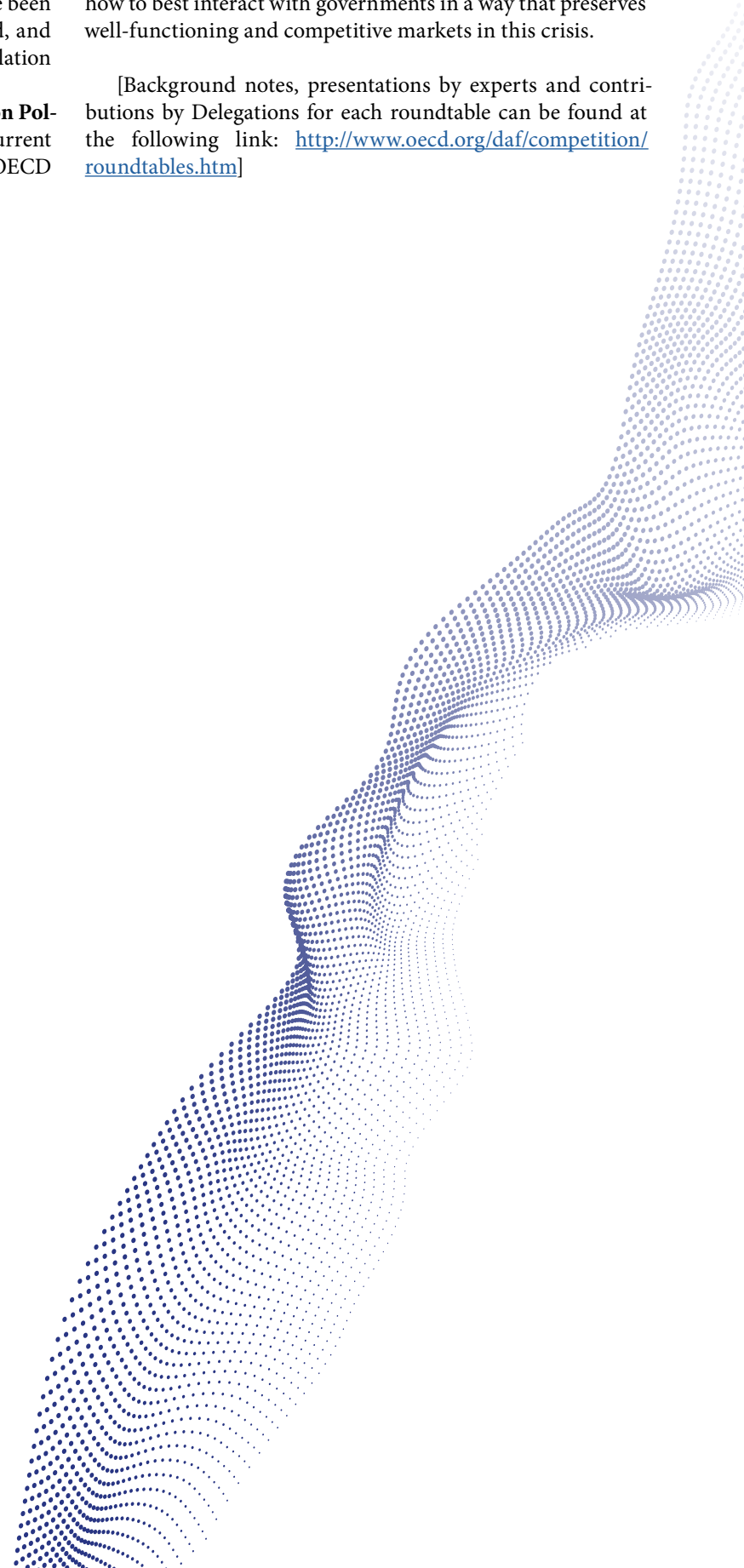
example restricting a firm's scope to discriminate between those that one of its lines of business sells to, or restricting the firm's ability to organise its lines of business, for instance by mandatory functional or legal (accounting) separation.

In a dedicated hearing, OECD CC Working Party No. 2 explored how effective different types of restriction have been in the utility industries in which they had been applied, and sought to understand whether similar issues arise in relation to self-preferencing by digital platforms.

Finally, a specific session was devoted to **Competition Policy in Times of COVID-19**. Given the impact of the current pandemic on markets and on national economies, the OECD

Competition Committee encouraged competition authorities to share experiences on the strategies put in place to face the extraordinary challenges posed by the COVID-19 emergency, in terms of enforcement and advocacy activities. Delegates discussed how to best provide guidance to businesses and on how to best interact with governments in a way that preserves well-functioning and competitive markets in this crisis.

[Background notes, presentations by experts and contributions by Delegations for each roundtable can be found at the following link: <http://www.oecd.org/daf/competition/roundtables.htm>]



INSIDE A COMPETITION AUTHORITY

The Competition Council of the Republic of Moldova

The Institution

The Chairperson

Marcel RĂDUCAN, *President of the Competition Council, President of the Plenum of the Competition Council*. Start of mandate: December 2018. End of mandate December 2023.

The members of the Board

Mihail CIBOTARU, *Vice President of the Competition Council, Vice President of the Plenum of the Competition Council*. Start of mandate: December 2018. End of mandate December 2023.

Ion MAXIM, *Vice President of the Competition Council, Vice President of the Plenum of the Competition Council*. Start of mandate: December 2018. End of mandate December 2023.

Mrs. Ala POPESCU, *Member of the Competition Council Plenum*. Start of mandate: December 2018. End of mandate December 2023.

Viorel MOȘNEAGA, *Member of the Competition Council Plenum*. Start of mandate: December 2018. End of mandate December 2023.

The head of the staff

Anatol BOTNARU, *Executive Head*. Start of mandate: October 2019 – indefinite period.

Appointment system for the Chairperson and other key roles

According to the provisions of the Competition Law no. 183/2012, the Competition Council Plenum is a collegial body and consists of 5 members, including the President, two Vice Presidents and two members, who are at the same time the President, Vice Presidents and members of the Competition Council. The members of the Competition Council Plenum fulfil public dignity functions and are appointed by the Parliament, on the proposal of the Speaker of the Parliament and with the endorsement of the relevant parliamentary commission for a five-year term. The Speaker of the Parliament also proposes the candidate for the President of the Competition Council. Each member of the Competition Council may be appointed for two consecutive terms.

The Executive Head it is a top-level public management function. According to the provisions of the Law no. 158 as of 4.07.2008 on Public Functions and the Status of Public Servants, the recruitment for this position shall take place via open competition.

Decision-making on competition cases

The administrative acts of the Competition Council shall be adopted during the Competition Council Plenum meetings, which may be ordinary or extraordinary. The meetings' minutes shall be signed by the President of the Competition Council, present members and the secretary of the meeting.

The meetings of the Competition Council shall be deliberative where at least 3 members are present, out of which one shall be the President or the Vice President, and shall be chaired by the President of the Competition Council, or in his/her absence by the appointed Vice President.

The administrative acts of the Competition Council shall be adopted in the Plenum by the vote of the majority of the members present at the meeting. Each member has one vote. In case of equal votes, the vote of the President, or in his/her absence, of the Vice President who chairs the Plenum meeting shall be decisive.

The members of the Competition Council Plenum do not have the right to abstain from voting. Those members voting against an act may choose to have their separate decision recorded in the minutes of the meeting concerned.

The decisions, dispositions and prescriptions of the Competition Council shall enter into force at the date of their adoption, if the decision, disposition or prescription does not provide for a later date.

Agency's competences in competition

- Antitrust (agreements and abuses of dominance)
- Mergers and acquisitions
- Advocacy to other public bodies
- Market studies
- State aid

In addition, the Competition Council has powers to investigate the following infringements:

- Actions or inactions of authorities and central or local public administration institutions resulting in the restriction, prevention or distortion of competition
- Unfair competition

Relevant competition legislation

The Competition Law provides the legal framework for the protection of competition, and sets out the rules concerning the prevention and elimination of anticompetitive practices and unfair competition, and the authorisation of economic concentrations; furthermore, its provisions detail the scope of activity and competence of the Competition Council and the applicable sanctions for competition law infringements.

This law transposes the provisions of Articles 101-106 of the Treaty on the Functioning of the European Union, EC Regulation no.1/2003, and partially (EC) Regulation no.

139/2004 on the control of concentrations between undertakings.

The State Aid Law no.139/2012 establishes the legal framework for the authorisation, monitoring and reporting of the state aid granted to beneficiaries from all sectors of the national economy, except for the agriculture sector, to prevent competitive distortion.

Other competences

According to the Advertising Law no. 1227/1997, the Competition Council is endowed with the following powers:

- ensuring that advertising activities are conducted in a manner that complies with the legislative provisions relating to advertising;
- requiring advertisers to terminate any behaviour that infringes advertising law;
- providing recommendations and proposals to prosecution bodies and other law enforcement bodies, within the limits of its competence, about how to address identified problems related to advertising.

In addition, the Competition Council is entitled to bring actions in court, including in the interests of an undetermined circle of advertising consumers, in connection with the violation of the legislation on advertising committed by advertising agencies, as well as on the cancellation of transactions related to inappropriate advertising.

Number of staff of the authority

As of February 2019, the Parliament of the Republic of Moldova approved the new organisational structure and the staff-limit of the Competition Council.

According to the new structure, the Competition Council has an administrative and executive body consisting of 11 specialised and seven operational subdivisions, and three territorial branches (operating in the North, South, Gagauzia regions). The limit number of the staff is 130.

Staff structure by functional unit (% of total), 2019		
Functional units	Actual number of positions filled as of 31.12.2019	Number of positions as provided for by the organisational structure
Management		
Competition Council Plenum	5	5
Executive Head	1	1
Specialised divisions, of which:	57	90
Competition Divisions	26	45
State Aid Divisions	17	25
Territorial Offices Division	9	12
Legal Division	5	8
Operational divisions	27	34

Number of staff working on competition		
Competence	Number of case handler/manager positions filled as of 31.12.2019	Number of case handlers/managers as provided for by the organisational structure
Antitrust	10	16
Anti-cartel	5	8
Abuse of dominant position	5	8
Mergers and acquisitions	6	8
Market studies	3	9
Advocacy to other public bodies*	9	14
State aid	17	25
Other	16	24
<i>Actions or inactions of authorities and central or local public administration institutions resulting in the restriction, prevention or distortion of competition</i>	4	6
Unfair competition	3	6
Territorial Offices Division	9	12
TOTAL	61	96

* In the implementation of Advocacy, all employees of the specialized competition and state aid divisions are involved together with the Legal Division and Policy, Protocol and External Relations Division.

Accountability

According to the provisions of the Competition Law no. 183/2012 the Competition Council is an autonomous public authority accountable to Parliament, which ensures the observance and enforcement of the legislation regarding competition, state aid and advertising within the limits of its competence.

On an annual basis, the Competition Council prepares a report on its activity. The report of the Competition Council is adopted by the Plenum of the Competition and is annually presented to the Parliament of the Republic of Moldova in plenary by 1 June, and is then published on the official website of the authority.

The activity report shall contain:

- the annual financial report and the audit report;
- the Competition Council's activities in the accomplishment of the objectives provided for by the present law and in the legislation on state aid and advertising;
- the most important priorities for the following year;
- other information deemed important by the Competition Council.

In addition, according to the provisions of the State Aid Law no. 139/2012 the Competition Council shall prepare an annual report on the granted state aid, which shall be submitted annually to the Parliament in plenary and the Government by 1 June and then published in the Official Gazette of the Republic of Moldova.

1. ANTITRUST ENFORCEMENT OVER THE LAST 24 MONTHS

Cartels

Number of cases			
	2018	2019	TOTAL
Infringement decisions	8	2	10
<i>With fines</i>	8	2	10
<i>Without fines</i>	0	0	0
Non-infringement decisions	0	0	0
Other (specify)	12	7	19
<i>imposition of fines</i>	0	4	4
<i>acceptance of commitments</i>	5	0	5
<i>carrying out dawn raids and executing penalties</i>	5	2	7
<i>termination of investigations</i>	2	1	3
TOTAL	20	9	29

Fines

Total sum of cartel fines in 2018 and 2019 was around **MLD 10.5 million** (over **€0.542 million** according to the exchange rate of the National Bank on 31.12.2019).

- In 2018, 23 undertakings involved in anti-competitive cartel agreements were sanctioned and fines totalling over **MLD 10 million** (over **€0.519 million** at the exchange rate of the National Bank on 31.12.2019) were imposed for infringements of the provisions contained in the Competition Law.
- In 2019, 6 undertakings involved in anti-competitive cartel agreements were sanctioned and fines totalling approximately **MLD 0.432 million** (over **€0.022 million** at the exchange rate of the National Bank on 31.12.2019) were imposed for infringements of the provisions contained in the Competition Law.

Leniency applications

In 2018-2019, only one leniency application was submitted to the Competition Council (in 2018). This application related to an investigation that had been initiated by the Competition Council into alleged anti-competitive collusion in the form of bid rigging by undertakings involved in public procurement procedures.

It is important to point out that it was only in 2018 that the Law for amending and supplementing the Criminal Code was approved which enables the representatives of undertakings that are cooperating with the Competition Council under the framework of the leniency policy, as provided by the Competition Law, to be exempt from the application of the criminal law.

Following the entry into force of these amendments to the Criminal Code, which provided for criminal liability in the event of an infringement restricting competition, natural persons may be exempt from criminal liability if they are representatives of undertakings that are cooperating with the Competition Council within the framework of the leniency policy.

Dawn raids

The Competition Council has carried out **47 dawn raids** (32 in 2018 and 15 in 2019) in cartel cases.

Main cases

The Competition Council Plenum adopted, in 2018-2019, 10 decisions concerning the conclusion of anti-competitive agreements that aimed to distort or restrict competition in procurement procedures through bid rigging behaviour.

One of the main completed investigations:

Decision of the Competition Council Plenum no. DA-42/17-48 as of 28.06.2018

Defendants: “BTS PRO” LLC, “MSA GRUP” LLC and “ESEMPLA SYSTEMS” LLC

Brief description:

The Competition Council Plenum established that “BTS PRO” LLC and “MSA GRUP” LLC had concluded an anti-competitive agreement through their participation in bid rigging in the public procurement procedure no 239/17 on 19.06.2017, which was organised and conducted by the National Integrity Authority, and also that “BTS PRO” LLC, “MSA GRUP” LLC and “ESEMPLA SYSTEMS” LLC had concluded an anti-competitive agreement through their participation in bid rigging in the public procurement procedures no.17/01728 22.06.2017 and no. 17/01732 as of 22.06.2017, which were organised and conducted by the General Prosecutor’s Office.

Committed violation:

The bid rigging was carried out by exchanging sensitive commercial information, as well as by presenting cover bids at the mentioned tenders to simulate competition, thereby violating the provisions of Art. 5 para. (1) of the Competition Law.

Total fine imposed:

The total amount of the fines imposed on “BTS PRO” LLC, “MSA GRUP” LLC and “ESEMPLA SYSTEMS” LLC was over **MLD 5.175 million** (over **€0.264 million** at the exchange rate of the National Bank on 31.12.2019).

Non-cartel agreements

In 2018-2019 the Competition Council only investigated cartel agreements.

Abuses of dominance

Number of cases			
	2018	2019	TOTAL
Infringement decisions	3	2	5
With fines	3	2	5
Without fines	0	0	0
Commitment decision	1	0	1
Non-infringement decisions	2	3	5
Other (specify)	2	2	4
imposition of fines	0	1	1
termination of investigations	2	1	3
TOTAL	8	7	15

Fines

Total sum of abuse of dominance fines in 2018 and 2019 was around **MLD 7.8 million** (over **€0.407 million** at the exchange rate of the National Bank on 31.12.2019).

- In 2018, 3 undertakings were sanctioned for an abuse of a dominant position, and fines totalling over **MLD 0.573 million** (over **€0.029 million** at the exchange rate of the National Bank on 31.12.2019) were imposed on the undertakings for infringements of the provisions contained in the Competition Law.
- In 2019, 2 undertakings were sanctioned for abuse of a dominant position and fines totalling over **MLD 7.261 million** (over **€0.377 million** at the exchange rate of the National Bank on 31.12.2019) were imposed on the concerned undertakings for the infringements.

Dawn raids

The Competition Council has only carried out **one dawn raid** in an abuse of dominance case, which took place in 2019.

Main cases

The Competition Council Plenum adopted, in 2018-2019, 5 decisions establishing an abuse of a dominant position. One of the main cases was “**Apă-Canal Chişinău**” JSC (concerning the provision of public services for the sewage treatment of wastewater in Chişinău and Ialoveni).

Decision of the Competition Council Plenum no. APD-35/17-64 as of 13.09.2019

Defendants: “Apă-Canal Chişinău” JSC

Brief description:

Following an investigation, which lasted 1 year and 10 months, the Competition Council qualified the action of the municipal enterprise as an abuse of a dominant position and found that “**Apă-Canal Chişinău**” JSC had acted illegally. This is because “Apă-Canal Chisinau” JSC had applied differentiated and arbitrary coefficients to establish differentiated tariffs or additional payments. At the same time, “Apă-Canal Chisinau” JSC did not charge a large majority of the economic agents from the Chişinău municipality - 95.47% of about 23 000 - differentiated tariffs or additional payments for overloaded wastewater spillage.

Committed violation:

The Competition Council Plenum established that “Apă-Canal Chişinău” JSC had violated the provisions of Art. 11 para.(1) and (2) letter c) of the Competition Law 183/2012 by applying arbitrarily differentiated coefficients when fixing differentiated rates/additional payments for exceeding the maximum allowable concentration in waste water, as well by not levying additional payments on a number of the undertakings active in Chişinău and Ialoveni.

Total fines imposed:

A fine of **MLD 7.19 million** (over €0.373 million at the exchange rate of the National Bank on 31.12.2019) was imposed on “Apă-Canal Chişinău” JSC for the infringement. Additionally, the Competition Council obliged “Apă - Canal Chisinau” JSC to ensure non-discriminatory and equitable access to the public service of treatment of wastewater.

2. JUDICIAL REVIEW OVER THE LAST 24 MONTHS

Outcome of the judicial review by the Supreme Administrative Court

	2018	2019	TOTAL
Entirely favourable judgments (decision entirely upheld)	10	5	15
Favourable judgments but for the fines	-	-	-
Partially favourable judgments	-	2	2
Negative judgments (decision overturned)	6	1	7
TOTAL	16	8	24

Outcome of the judicial review by the first instance Courts

	2018	2019	TOTAL
Entirely favourable judgments (decision entirely upheld)	22	6	28
Favourable judgments but for the fines	-	-	-
Partially favourable judgments	-	2	2
Negative judgments (decision overturned)	5	3	8
TOTAL	27	11	38

Main judgements

As a result of the examination by the courts of the cases of the Competition Council, the percentage of decisions favourable to the Competition Council pronounced by the courts was 81% out of the 21 cases completed in 2019 and 78% out of the 27 cases completed in 2018.

A good example of how the courts deal with competition issues can be seen in the “Litarcom” case, which concerned participation in bid rigging in public procurement procedures for the purchase of road repair works.

In this case the Competition Council Plenum established that three undertakings had violated the provisions of Art. 5 of the Competition Law by concluding an anti-competitive agreement that qualified as a hardcore cartel.

The Competition Council found that, on the initiation of “Litarcom” LLC, the concerned companies had participated in

a hardcore cartel through their participation in bid rigging in the public procurement procedure organised by SE “State Road Administration”. Their coordinated actions led to false competition during the procurement procedure and resulted in the artificial increase of prices by around 27%.

Fines totalling **MLD 2.02 million (over €0.103 million at the exchange rate of the National Bank on 31.12.2019)** were imposed on the undertakings for this infringement.”Litarcom” LLC disagreed with the decision of the Competition Council Plenum and filed an action to have it overturned.

The first instance Court overturned the contested decision. The Court of Appeal in Chisinau quashed the decision of the first instance and upheld the decision, both in terms of the existence of the anti-competitive act and the individualisation of the sanction applied.

“Litarcom” LLC appealed against the decision of the Court of Appeal in Chisinau. The Supreme Court of Justice rejected the undertaking’s appeal, thus maintaining the validity and legality of the decision of the Competition Council Plenum, which had established and sanctioned the hardcore anti-competitive agreement.

3. MERGER REVIEW OVER THE LAST 24 MONTHS

Number of cases			
	2018	2019	TOTAL
Blocked merger filings	-	-	-
Mergers resolved with remedies	1	0	1
Mergers abandoned by the parties	-	2	2
Unconditionally cleared mergers	9	16	25
Other (specify)	5	3	8
TOTAL CHALLENGED MERGERS	-	-	-

Main cases

Notifications of economic concentrations carried out by “ABI”

The notified merger transaction concerned the intention of “ABI” to restore certain special voting rights for minority shareholders held by “SAB Miller” PLC (hereinafter “SAB”) in “Anadolu Efes Biracılık ve malt Sanayii” AŞ (hereinafter “AE”), lost as a result of the “ABI”/“SAB” transaction. After the completion of the notified transaction, “AG Anadolu Grubbu holding” and “ABI” were to jointly control “AE”.

The transaction notified by “ABI” was extremely complex and it was the first time that the Competition Council had applied, in relation to an economic concentration, the Regulation on commitments proposed by undertakings and approved by the Competition Council Plenum Decision no. 2 of 22.01.2015. The relevant market concerned by the transaction was determined as the wholesale beer market throughout the territory of the Republic of Moldova.

The Competition Council Plenum cleared the merger subject to commitments offered by “ABI”.

4. ADVOCACY OVER THE LAST 24 MONTHS

Main initiatives

In 2018 and 2019, the Competition Council disseminated information on competition law and state aid to the central and local public administration authorities and the business environment via 207 events (seminars, conferences, round tables, meetings, etc.), which were attended by over 2,500 persons.

2018 was also a year in which the cooperative relationship between the Competition Council and the National Anticorruption Centre was strengthened via the signing of a collaboration agreement, under the framework of which the institutions aim to prevent and fight corruption and thereby strengthen public integrity in the field of competition. In order to mark the beginning of this initiative a conference entitled “Platform for anti-corruption cooperation with the private sector” was organised and attended by over 100 participants.

Furthermore, in 2019 several important events were organised: a round table dedicated to the implementation of competition law and public procurement with the National Agency for the Resolution of Complaints, a competition training seminar for judges and employees of the Competition Council of the Republic of Moldova and the TAIEX Workshop of the European Commission on “Monitoring and evaluation of State aid”.

The Competition Council also conducted an information campaign consisting of 16 seminars with representatives of local public administration authorities in order to inform them about the provisions of the State Aid Law. Additionally, it broadcast a public service announcement on 22 local and national TV channels about the deadline for reporting the granted state aid.

In order to assess the regulatory impact on the competitive environment, the Competition Council prepared 226 opinions during 2018-2019. 134 of these opinions contained proposals and recommendations about how the regulatory framework could be complied with in the field of competition, state aid and advertising, with a view to ensuring competition. The main areas covered were: public procurement, insurance, public-private partnership, electricity and natural gas market, advertising of alcoholic beverages, financial and banking services, tourist services, security services, public water supply and sewerage services, etc.

Results

The recommendations of the Competition Council have led to substantial improvements in the enforcement of the Competition legislation with the aim of preventing undertakings and local public authorities from engaging in anti-competitive practices.

As a result the proposals submitted on the *Methodology of formation and application of prices for petroleum products*, the protection of competition has been ensured through the adoption of legislation concerning the formation and application of prices to petroleum products. Furthermore, the unfounded restrictions placed on the right to market insur-

ance policies by insurers (reinsurers) as a consequence of non-compliance with the solvency ratio requirements, have been excluded after the National Financial Market Commission (hereinafter NFMC) took into account all the objections and proposals submitted by the Competition Council regarding the *draft decision of the NFMC on the presentation and approval of actuarial calculations of compulsory motor third party liability insurance premiums*.

As a result of the advocacy actions carried out by the Competition Council, the knowledge of public authorities' representatives has been improved in the field of state aid monitoring in accordance with EU rules. Additionally, new practices have been identified for the efficient use of public resources under the State aid mechanism, which will help reduce the share of state aid in GDP to 1%, according to the European Union average.

Furthermore, we would like to point out that in 2020, following the information campaigns, seminars and conferences carried out by the authority, the number of providers who reported state support measures offered to undertakings increased by three times in comparison to 2015 (the first year of reporting state aid, granted after the entry into force of State Aid Law no. 139/2012).

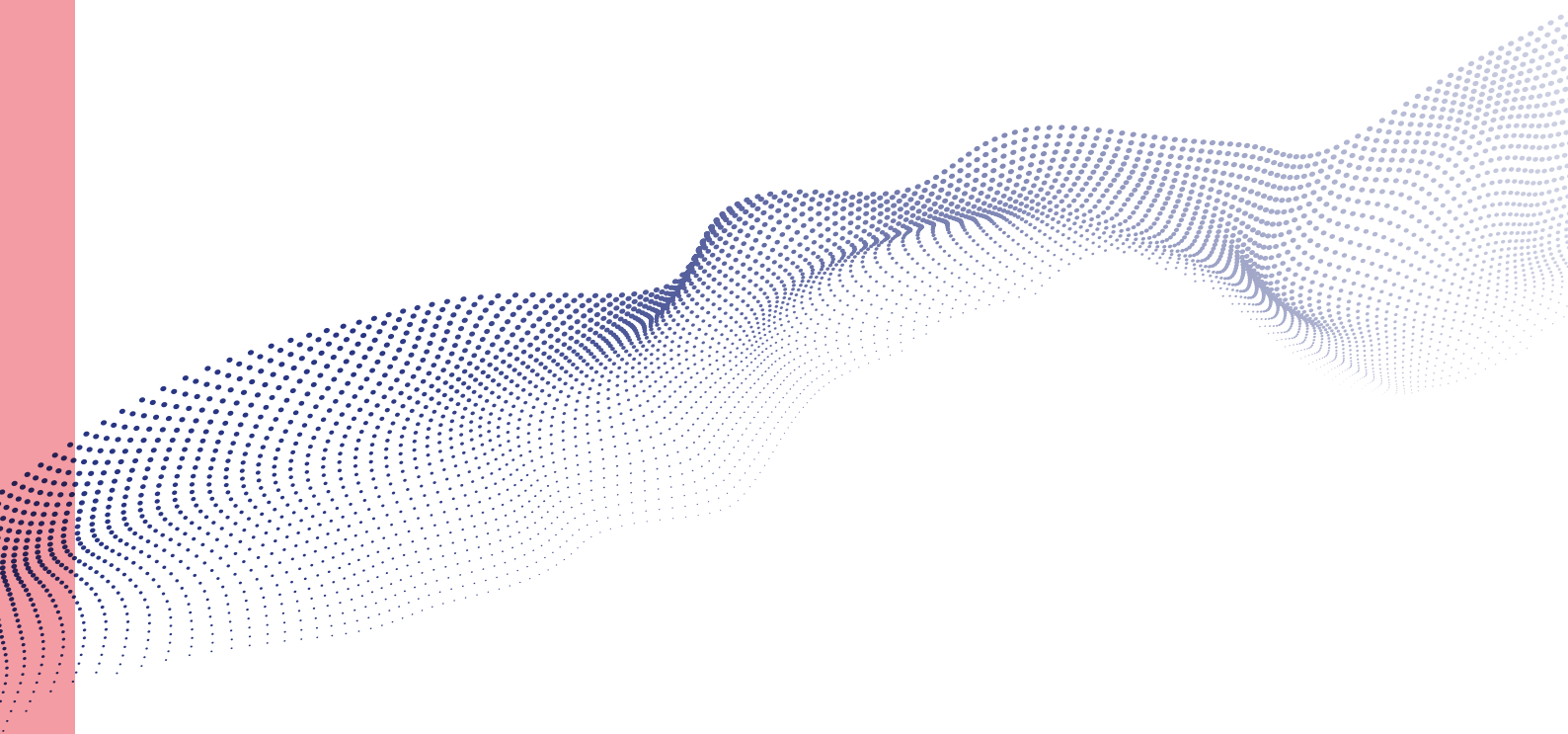
5. MARKET STUDIES OVER THE LAST 24 MONTHS

Main initiatives

The on-going assessment of the competitive environment through market studies was one of the priorities of the Competition Council in 2019. Consequently, the Competition Council initiated the following 19 market studies aimed at removing anti-competitive barriers from the regulatory framework, in order to ensure compliance with Competition Law:

- medical devices market
- the sale of vehicles, spare parts and related services market
- processing and sale of fish, crustaceans, molluscs and fish products market
- processing and sale of cereal and oil crops
- transport services and related activities market
- the chemical market
- identification of the entities vested with exclusive rights and monitoring their activity
- advertising market
- wholesale drug market
- wholesale and retail market of the main oil products and liquefied gas in the Republic of Moldova
- banking services market (lending services, gathering of deposits, current accounts service)
- import, production and sale of meat and meat products market
- sale of socially important products
- identification of the entities vested with exclusive rights and the monitoring of their activity; (SGEI)
- sale of agricultural machinery, equipment and related services
- construction market
- market of research and development activity
- electricity production and sale market
- processing of agri-food products market.

At the end of 2019, the systematisation of the information received from the surveyed companies was in progress in relation to eight market studies, informative investigation progress reports had been drawn up for nine market studies, and useful investigation reports for two market studies had been presented and discussed at Competition Council meetings.



Interview with the Chairperson of the Competition Council of the Republic of Moldova



Marcel Răducan
Chairperson of the
Competition Council

What are the main challenges that your authority is facing? What are your priorities for the near future?

2020 has been marked by a new challenge - the COVID-19 pandemic that has affected economies and competitive policies around the world. This crisis has led to increased accountability on the part of competition authorities, in particular as regards price monitoring, but also the application of competition rules so as to ensure the well-being of consumers and that prices do not become excessively expensive. This experience has brought to light a number of legislative gaps and has clarified the need to revise existing regulations and policies in the field of competition and state aid.

Another challenge is the Competition Law amendment. According to Directive No. 1/2019 of the European Parliament and the Council of the European Union, it has been entrusted to EU Member States and associated countries to amend competition law. We have a joint project with the World Bank, which has already started. The team of international experts with whom we will work has been contracted and work has already begun. One thing is for certain: 2020 will be a crucial year for us, in one way or another.

As far as our daily work is concerned, our priority remains ensuring that our work continues to benefit consumers and businesses, with whom we work or who are part of our work.

Our main goals for 2020 are to successfully strengthen the Council's team, to attract high quality candidates to work at the authority, to effectively address the challenges we face and, at the same time, to be equidistant in terms of political influence.

At the same time, 2020 is the last year of implementation of the National Competition and State Aid Program, approved by Law 169/2017. We have high expectations in relation to this program, which in order to be effective requires the involved authorities to embrace their responsibilities and fulfill their commitments. From an economic point of view, the elaboration and implementation of this document derive from the need to open economic sectors to competition and increase the level of transparency and accessibility of markets, with the aim of ensuring the efficient use of public resources to increase consumer welfare - the basic objective of our authority.

We are currently working on the development of two important strategies. While a lot depends on how things progress in relation to the legislation amendment under the Directive, of greatest importance is the development and maintenance of medium and long-term active dialogue with development partners and international organisations.

In addition to the above, this year we were especially honoured to be selected, for the first time, as the host institution of the international regional seminar, under the auspices of the Regional Competition Centre in Budapest, Hungary (RCC OECD-GVH), which is foreseen to take place in Chisinau, on the topic: Evaluation of abusive behaviour by dominant players.

We are convinced that this regional seminar will play a vital role in the strengthening of existing relations and in the sharing of experiences, both of which are especially important in times of the COVID-19 pandemic.

What are the points of strength and of weakness of your authority?

Although the Competition Council is a relatively young authority, having only been established in 2007, it has been able to achieve tangible results through its work. We are proud to have legislation in the domain of competition and state aid that fully transposes the provisions of the EU Acquis in the domain.

Furthermore, we were able to implement, with the support of the World Bank, in 2014 - the information system "Register of State Aid in Moldova" (SIRASM). This pilot project, which was unique in the region for that period, is presently, taking into account relevant evolutions and technological developments, in the final stages of being modernised and developed.

This State Aid Register contributes to the establishment of a state aid monitoring system, as well as to the creation of the necessary conditions for the implementation of a monitoring mechanism of the state aid impact on the competitive environment.

In the same vein, we have managed to form and strengthen our reputation as European experience donor in the competition and state aid domain, by organizing regional seminars for Eastern Partnership countries, by participating in various international events with various presentations and speeches, by advising competition authorities.

On the other hand, we face a lack of financial independence, in the sense that the Competition Council is financed from the state budget and is therefore subject to the limitations set out in the annual budget law when it comes to approved budgetary allocations.

Another challenge we face is our staff turnover rate, which leads to a shortage of qualified staff in the field. This is largely a result of insufficient financial means, which in turn makes it impossible to adequately remunerate qualified specialists.

What is the level of competition awareness in your country? Do policy-makers consider competition issues? Is competition compliance a significant concern for businesses?

One of the main responsibilities of the Competition Council is to promote a competitive culture. In this regard, over the years we have carried out a comprehensive campaign to raise awareness of competition and state aid, involving discussions and debates with various target groups about the competitive issues they may face in the economic sectors in which they operate. We have experienced tangible results due to these efforts. For example, in 2020 the number of suppliers who reported the support measures offered to undertakings increased by approximately 3 times the amount reported in 2015 (the first year in which state aid could be reported after the entry into force of Law no. 139/2012 on state aid), and by 4.43 times the amount reported in 2018.

In 2017, the Parliament of the Republic of Moldova approved the National Competition and State Aid Program. The general objective of the Program is the development of a fair competitive environment by opening the economic sectors to competition and ensuring the efficient monitoring of state aid. All specialised central public authorities, local public administration authorities and authorities with regulatory and control functions, are responsible, within the limits of their competence, for the implementation of the provisions contained within the Program. While we work closely with these authorities to raise awareness, there remains a low level of competition awareness.

However, the greatest problem that the Authority continues to face is convincing the general public and, in particular, politicians that the institution is independent. As far as this issue is concerned, I am confident that serious progress has been made. In particular, we have established excellent cooperation with the Parliamentary Commission on Economy, Budget and Finance, being the commission to which we report and one of the most important parliamentary commissions, which has supported us on numerous difficult occasions. We have managed to work together in order to provide the necessary information, according to the legislation; furthermore, we have collaborated on the legal framework and we will continue to do so in relation to the development of the legislative framework.

If you could make one major change to your national competition law tomorrow, what would it be?

Task number one for us this year is to amend the Competition Law in accordance with the provisions of Directive no.1 / 2019. This will result in greater autonomy for the Competition Council, the extension of the rights of the Council, and the introduction of broader rights, which will enable the authority to investigate complex cases. When I speak of broader rights, I am referring to the possibility of accumulating evidence in a special regime, of having full competence and various tools to investigate and prove any competition infringement. As far as full competence is concerned, this needs to be appropriate to meet the challenges of law enforcement in the digital environment.

Do you find that international and regional cooperation is helpful? Is it working well?

In an era of rapidly progressing globalisation, cooperation between the Competition Council and international authorities is of utmost importance. Illegal practices and competition issues exist in all states, which is why the exchange of experience, communication, joint participation in projects, development and diversification of international relations are essential in achieving the objectives of increasing market attractiveness, investment, innovation and strengthening economic competitiveness.

The importance and usefulness of international cooperation between authorities is especially evident when it comes to the digital economy, which has resulted in the creation of new business models, new rules and novel behaviours of economic agents. Competition is one of the indispensable aspects of the digital economy, as long as firms often operates outside national jurisdictions, and the relevant market may be the entire globe. Thus, the investigations carried out by competition authorities also become transnational and their proper execution can only be ensured through close cooperation and collaboration.

What is your opinion about the OECD-GVH Regional Centre for Competition? Do you have suggestions for improvement?

The Regional Competition Centre in Budapest plays a crucial role in shaping competition policies, but also in strengthening the institutional capacities of the beneficiary authorities. Throughout its existence, the OECD-GVH RCC has managed to strengthen its role as a disseminator of the latest trends and techniques in the domain and as a sustainable platform for the exchange of experiences and the establishment of cooperative relations between the participating competition authorities.

Thanks to the support provided by the Centre, the beneficiary authorities have not only been able to benefit from the unique experience of experts and international best practices in the field of competition policy and advocacy, but have also been able to successfully apply them in their work.

We would particularly like to mention the very effective way in which workshops are organised and structured, employing a combination of theoretical and practical panels and the presentation of the beneficiary authorities' case studies.

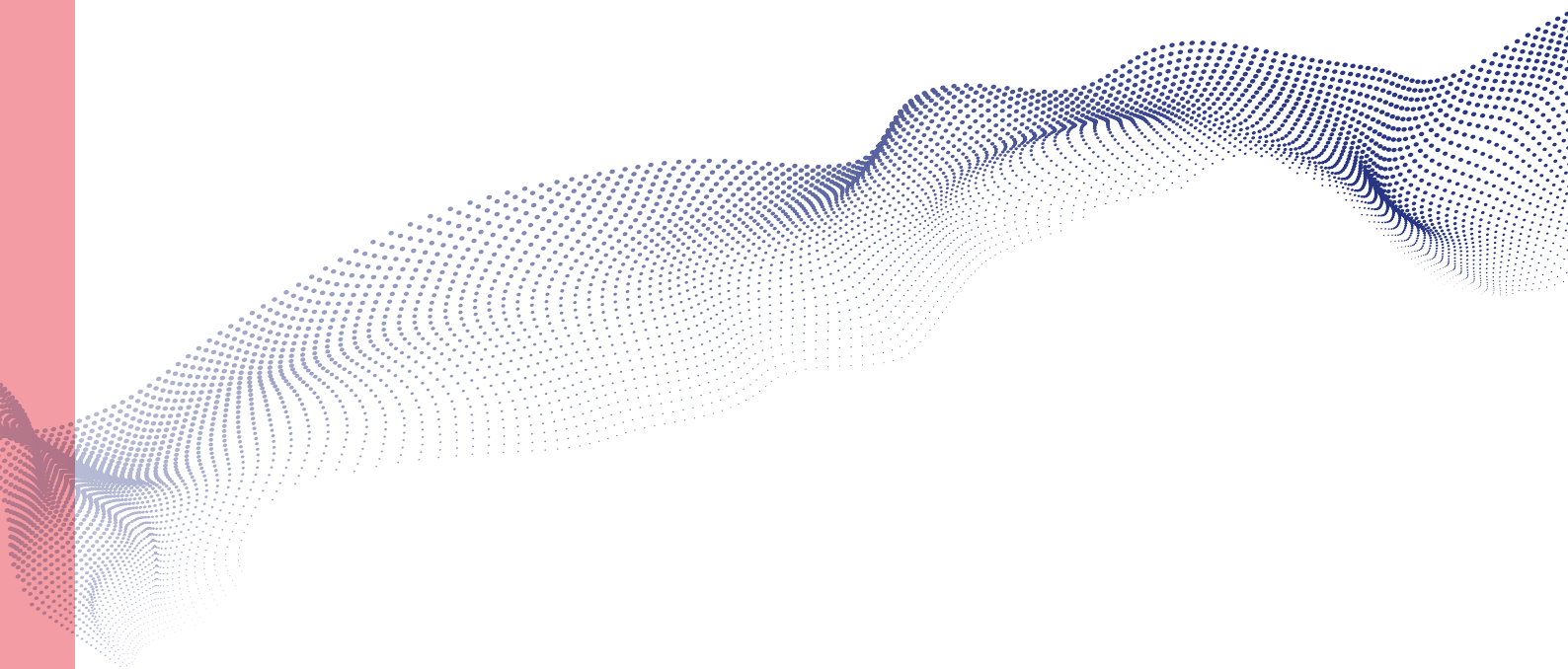
Furthermore, the Centre plays an important role in ensuring the continuity of professional development through the provision of informational materials on its website, which constitutes one of the main sources of information and training for the employees of the Competition Council.

In order to further enhance the dissemination of the quality training provided by the Centre we would propose the video recording of the seminars and/or their on-line transmission. This would provide an opportunity to significantly expand the number of individuals able to benefit from the Centre's training. The proposal comes in the context of the staff turnover issue faced by most competition authorities. In this sense, increased access to the discourses and explanations of experts on various

competitive topics will ensure the continuity of the professional training of employees and will vitally contribute to the achievement of tangible results, in terms of better quality and more efficient investigations.

I would like to conclude by acknowledging the challenges faced by all competition authorities as a result of the COVID-19 pandemic. Authorities have not only been forced to reevaluate their activities and the way in which they manage

their investigations, but have also been required to engage in bilateral and multilateral cooperation at the international level. At the same time, this pandemic has strengthened our co-operative efforts with the aim of effectively dealing with the extraordinary problems and circumstances arising from the pandemic. In this sense, we are convinced that this unique, joint experience will serve to further strengthen and enhance existing relations between our institutions.



Literature Digest



Pedro Caro de Sousa
OECD Competition Expert

This Literature Digest for the May 2020 issue of the RCC Newsletter reviews papers on the role of competition law in addressing the Covid-19 crisis. These papers discuss, among other things, how to ensure that the reaction to the crisis preserves competitive neutrality, which is our focus today.

More detailed reviews of the papers discussed below – together with those of other academic papers – can be found at www.antitrustdigest.net.

Frederic Jenny ‘Economic Resilience, Globalisation and Market Governance: Facing the Covid-19 Test’

This paper by the chair of the OECD Competition Committee considers the implications of this pandemic for the economic architecture underpinning globalisation.

From a competition perspective, the main issue to be confronted in the short term is the brutal disruption that the crisis has caused to value chains, leading to insufficient production or difficulties in product distribution. In such circumstances, cooperation between suppliers (and/or government intervention) may be necessary to ensure an adequate supply of essential goods and services. Second, consumers need to be protected against abuses resulting in price gouging of products in short supply or high demand. This requires competition authorities to take a more nuanced approach with respect to cooperation among competitors and to focus on exploitative abuses of market power.

In the medium run, our economies will be depressed, with a large number of firms facing bankruptcy either due to directly being hit hard by the Covid-19 epidemic or as a result of the disruption caused to their supply chains, rising unemployment and dwindling demand. Massive amounts of state aid, tax deductions or deferments and subsidies of various kinds, or even the nationalisation of entire economic sectors, will become necessary. This policy response will create tension between the need to prevent a large number of firms going bankrupt in the short run, and the role of competition law in ensuring that the competitive process guides the allocation of resources to maximise consumer welfare in competitive markets in the short run.

The author concludes that, in this environment, the promotion of competition may not be as central an economic pre-occupation as it was during the first two decades of the century. At the very least, it is likely that competition authorities will have to take a longer and more dynamic view of the process of competition than they have up until now and adapt their reasoning with respect to state aid, crisis cartels or mergers in circumstances of economic disequilibrium caused by an exogenous shock to the economic system.

Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti and Alexandre Ruiz Feases ‘EU Competition Law and Covid-19’

This paper by members of the competition department of Tilburg University explores how EU competition law enforcement might be affected by the COVID-19 pandemic.

The authors recommend that competition authorities should be watchful of excessive prices and price discrimination and use interim measures if necessary. While collusion should remain an enforcement priority, the authors propose the adoption of a procedural pathway for the review of agreements that may be in the public interest. As regards to merger control, the Commission’s strict interpretation of the failing firm defence is appropriate, although a more sceptical attitude towards mergers may be warranted during this period. Advocacy will play a key role: competition authorities can both point to existing regulations that limit competition, and monitor proposed emergency legislation that would harm competition for no good reason.

Particularly as regards to state aid, the authors recognise that these are not normal times but still argue in favour of applying existing instruments and principles as far as possible, coupled with a sceptical approach to claims that mergers are necessary to keep struggling companies afloat. While such a statement of principle must be endorsed, the magnitude of the crisis and political imperatives to protect employment may make it hard to uphold in practice.

Jorge Padilla and Nicolas Petit on ‘Competition policy and the Covid-19 opportunity’ (2020) Concurrences 2 1

In countries around the world, massive amounts of state aid have been injected into the economy with the goal of saving companies and jobs. While such policies deserve praise in their concern for the protection of jobs, the pro-competitive “cleansing effect” of recessions may be reduced by such interventions. Recessions facilitate the exit of zombie firms that crowd out growth opportunities for more efficient competitors, and delay the diffusion of technological innovations.

The authors argue that the current recession might provide an opportunity for the growth and regeneration of the EU economy, which has long been trapped in a cycle of weak productivity, low economic dynamism, and a conspicuous absence of superstar firm creation. Competition law and the state can play a role in this by assisting inefficient firms to leave the market, by allowing them to merge with more efficient firms, and by denying inefficient firms the benefit of state aid when it prevents efficient industry reorganisation or liquidation.

From this perspective, economy-wide state aid measures may be too lenient and rescue zombie companies with problems that predate the Covid-19 crisis. At the same time, the increasing scepticism of competition authorities about the pro-competitive effects of mergers may deter the restructuring of sectors of the economy. Concerns about lax merger pol-

icies could be alleviated by the adoption of a competitive assessment that discriminates between acquisitions by frontier firms and by technology laggards. The receipt of past or ongoing subsidies, as well as state-ownership, should be adversely accounted for in the competitive assessments of mergers.

This important paper puts forward a number of controversial ideas. While it is important for zombie firms to leave the market during recessions and for state aid and merger control to be applied accordingly, Covid-19 is a brutal exogenous shock that will lead to the market exit of any company that does not have the cash reserves to survive an unexpected shutdown of the economy. Given this, the risk of economic shock, mass insolvencies and unemployment, and long-term economic hysteresis may in practice overwhelm all other considerations, including those connected to the promotion of long-term productivity and the protection of competitive neutrality.



It's a kind of magic

A letter to Andrea Dalmay

Dear Andrea,

When you work with passion for the OECD-GVH RCC for more than eight years, you end up feeling like someone *who wants to live forever*. Indeed, we were so used to seeing you smiling and perfectly managing the RCC seminars like a *killer queen*! At the end of each Seminar, we often felt that *we are the champions* and had in you *somebody to love*. And yet, all of a sudden you must have said: "*I want to break free*" and left the GVH.

We are really sad, dear Andrea. Yes, *show must go on* and will have to continue without you. You know: each of us reacts in a different way. One gets it over quickly, *another one bites the dust* for long. Not only we will feel *under pressure* without your impeccable support, but above all we will miss someone with whom we shared one vision.

Anyway, we do not want to be sad. You know that *friends will be friends right till the end* and you will always be very welcome to our Seminar and the OECD.

Dear Andrea, *we will rock you*, (ohps), miss you!!!

Hugs,

Gabriella, Orsolya, Taras, Sabine and Renato



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