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Regulating Market Activities by Public Sector

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Market Activities which was held by the competition Committee in June 2004.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled “Competition Policy Roundtables”.

PRÉFACE

Ce document rassemble la documentation dans la langue d'originale dans laquelle elle a été soumise, relative à une table ronde sur la régulation des activités marchandes exercées par le secteur public, qui s'est tenue en juin 2004 dans le cadre du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegate contributions and the background paper, a number of key points emerge:

- (1) *There are many different ways public sector businesses can distort competition in markets where they compete with private sector businesses.*

Across OECD countries many public sector businesses are providing services in competition with private sector businesses, or in areas where private sector businesses could potentially compete. The experience of OECD countries illustrates that in these competitive or potentially competitive markets, several possible sources of competitive distortions can arise because of advantages or disadvantages some public sector businesses have due to their government ownership.

First, there can be advantages and disadvantages that result from the governance and regulatory arrangements applied to public sector businesses. These include, for example, differences in: regulations imposed on public and private sector businesses; the cost of capital because government businesses are not required to earn a commercial rate of return or can borrow funds at rates lower than commercial interest rates; and the costs facing government businesses, such as no requirement to pay taxes.

Second, in some countries public sector businesses may be able to engage in anticompetitive practices because they are de facto or de jure exempt from competition law. While most countries do not exclude public sector businesses for coverage under competition law there may be partial exemptions that protect some types of public sector businesses or some aspects of their business activities. In addition, there are some actions by public sector businesses that could distort competition in a market but would fall outside the scope of traditional competition law.

Third, public sector businesses open to competition may receive subsidies from the government to fund public service obligations. If these subsidies are used to cross-subsidise commercial activities the public business will have an advantage over competing private sector businesses.

Forth, public sector businesses may derive advantages from lax public procurement rules. If the procurement rules favour public suppliers, by allowing them to set prices below full cost, then the public sector agency purchasing these goods and services will have a cost advantage over its private sector competitors. Similarly private sector businesses competing for the government procurement contract will be disadvantaged because their government competitors are not required to cover all of their costs.

Fifth, some public sector agencies have the power to collect data for public purposes. Private sector businesses rely on these public sector agencies to get access to that data. Public sector businesses will have an advantage if they can use this data on terms and conditions that are more favourable than the private sector.

Competitive neutrality problems can arise when competition is distorted by the advantages and disadvantages that some government businesses have due to their government ownership.

- (2) *The goals of policies designed to address competitive neutrality problems differ between countries.*

The objective of competitive neutrality policy is somewhat ambiguous. Some countries are seeking to promote fairness among public and private competitors as well as using competition to improve efficiency.

Efficiency: If the public provider has higher costs (is less efficient) than actual or potential private providers, but is nevertheless able to “crowd out” private providers, then the total cost to the economy of the service will increase. Part of that additional cost is ultimately met through a higher tax burden and allocative efficiency is reduced. Dynamic efficiency of the economy may also be lower if the government entity is less likely to innovate and entry is deterred. The government businesses will usually face fewer imperatives to improve their efficiency and, hence, technical efficiency is similarly reduced.

Fairness: Distortions of this sort will also reduce the profitability and rate of return on capital of private participants in competition with the government entity. At least for private participants, this is likely to be seen as fundamentally unfair, particularly if they regard part of any taxes they pay as indirectly subsidising their government competitor.

There is some debate about the extent to which the government should develop policies to constrain the activities of public sector businesses to promote competitive neutrality objectives, and the agencies that are best equipped to administer such policies.

- (3) *There are benefits from reducing competitive neutrality problems and achieving efficient and fair competition between public and private sector businesses.*

When competition is efficient and fair government businesses strive to reduce their costs and become more innovative because they know their ability to win customers rest solely on their business performance. Clear business objectives reduce conflicts of interest and increase the effectiveness of management. There is also greater transparency in the management of government businesses and more opportunities to benchmark government businesses against similar private sector activities.

Private sector businesses will be more active in markets when they know that public sector competitors do not have any artificial cost advantages, and customers will benefit from lower prices and better quality services, driven by more direct competition between the public and private sectors.

Resource allocation will improve because those businesses that are most efficient, and deliver the services customers want, will be the most successful. Governments will benefit from the economic growth and greater public sector efficiency that results from increased competition and improved resource allocation.

- (4) *The extent of competitive neutrality problems differs between countries because of their history, structure and political culture.*

1. Countries that have limited the number of public sector businesses that provide goods or services in competition with the private sector have reduced the extent of competitive neutrality problems. Similarly, where competitive neutrality principles are enshrined in either the policies on corporate governance (such as in New Zealand) or competition law (such as the European Community), competitive neutrality problems are significantly reduced.

2. In other countries where there is a history of high levels of government provision of goods and services, particularly in markets where private sector competition is increasing, there is greater potential for competitive neutrality problems.

(5) *Countries have developed a range of options for dealing with competitive neutrality issues.*

As the extent of competitive neutrality problems has been influenced by the circumstances and policy priorities of different countries, so has their approach to dealing with these problems. This recognises that different approaches are effective under different circumstances. For example, market structure can make some policy approaches more effective. Competition law can be more effective when the government business is dominant in the market. It is, then, more likely that the competitive neutrality issues will come within the scope of competition law. The source of the competitive neutrality problem is also relevant. If the competitive distortions arise from a deliberate decision by government to favour its businesses then advocacy may be the most effective approach. Alternatively, if the competition distortions are the unintended consequences of other government policies, then transparency rules and specific competitive neutrality policies may be more effective.

Nearly all countries use advocacy, to some extent, to encourage efficient and fair competition between public and private sector businesses. The Korean contribution discusses its combined use of competition law and advocacy to address competitive neutrality issues at the local authority level of government.

Some countries are using remedies that deal with competitive neutrality problems *ex post*, for example using competition law to require public sector businesses to cease actions that have a detrimental impact on competition. For example Hungary has used competition law to redress problems where local government business activities were operating in ways that were inconsistent with competitive neutrality. The use of competition law can help address competitive neutrality problems where the government businesses fall within the scope of competition law because they are of sufficient size, have sufficient impact on the market and are not covered by any specific exclusions. Such competition law based approaches can encourage an environment for competitive neutrality but can only deal with specific problems after they have occurred.

Other countries are dealing with competitive neutrality issues *ex ante*, through policies that change the governance arrangements of public sector businesses to reduce the scope of the advantages and disadvantages these businesses have, changing and enforcing procurement policy in a way that equalises competition between the public and private sector, or reforming the approach to subsidising public services to ensure that these subsidies do not advantage public sector businesses over private sector businesses. The UK guidance for pricing is an example of such an approach. The effectiveness of these policies depends on whether they cover all government organisations providing commercial services in competitive, or potentially competitive, markets, whether the policies address all the sources of competitive advantages and disadvantages, and how the policies are implemented and enforced.

A third group of countries has reduced the scope of competitive neutrality problems by reducing the government involvement in commercial activities. The United States' contribution, for example, describes the level of federal, state and local government involvement in commercial activities as 'quite limited'. Israel is undertaking a process of privatisation that is reducing government involvement in commercial activities. This approach recognises that it is virtually impossible to eliminate all of the advantages and disadvantages public sector businesses receive due to government ownership. For example, governments are unlikely to allow their businesses to face the commercial disciplines of potential bankruptcy. There is often a temptation for governments to intervene in the operation of these businesses to achieve political objectives, customers may trust these businesses more because they are government owned, and there is at least a perception among private sector competitors that the close links between these businesses and the government provides the business with advantages.

The only way of guaranteeing that all of these advantages and disadvantages have been removed is to privatise the government businesses. Competitive neutrality reforms provide an alternative for dealing with

competitive advantages and disadvantages when the government does not wish to move to full privatisation. For governments that are adopting privatisation, competitive neutrality policy can form part of the interim strategy for preparing the market for competition.

- (6) *Some, but not all, countries have developed, or are developing, competitive neutrality policies, again their approaches vary considerably.*

The European Community, Australia, the Netherlands, Finland and Sweden have all placed a priority on dealing directly with competitive neutrality problems. Each has, or is in the process of, adopting policies based on competitive neutrality principles.

In the European Community competitive neutrality principles are embedded in the EC Treaty and are an integral part of the competition law. Article 86 provides that the services performed by government entities, or private entities on behalf of the government, should be subject to the competition provisions of the EC Treaty unless this would undermine the provision of 'services of general economic interest'. This is reinforced by the rules on State Aids that require member States to notify and seek approval from the Commission for subsidies (in any form) that would distort or threaten competition. To approve a subsidy the Commission must conclude that the member State has entrusted the service provider to provide a well defined service of general interest, and the aid is proportional to the objective and limited to the amount necessary to provide the service. The Transparency Directive requires public companies to transparently and separately report commercial and non-commercial activities.

Australia has a specific competitive neutrality policy based on the principle that government businesses operating in actually or potentially competitive markets should not enjoy net competitive advantages over the private sector because of public ownership. This policy involves applying principles that require, tax neutrality, debt neutrality, regulatory neutrality, agencies to earn a rate of return, and agencies that undertake significant business activities as part of a broader range of functions to price those business activities to ensure full cost attribution and avoid cross-subsidies. A complaints handling process has been set up to consider complaints by private sector businesses that public sector businesses are not complying with their competitive neutrality obligations. The Australian Government also makes incentive payments to State Governments that continue to comply with competitive neutrality requirements.

The Netherlands is considering a Market and Government Bill that will govern the behaviour of public sector businesses in competition with the private sector. It is intended that this Bill will incorporate rules of conduct for public bodies into the Dutch Competition Act. The Dutch contribution discusses four rules. First, a ban on cross-subsidies (except where removing subsidies would hinder the performance of the organisation's public mandate). Generally prices should fully recover costs and economic activities should not be subsidised from other activities. Second, a ban on the exclusive use of data that the organisation has gathered in order to exercise its public mandate. Confidential data cannot be used for economic activities. Other data can only be used if it is available to third parties under similar conditions. Third, a ban on combining segregated tasks, so that commercial activities and public responsibilities are carried out by different parts of the organisation. Forth, a ban on preferential treatment for public enterprises, which prohibits public bodies from favouring public enterprises.

In Finland competitive neutrality and transparency of public sector businesses have been improved, by the State Enterprise Act (2003) and a new government decision on the state's ownership policy (2004). The State's ownership policy further defines the roles of government businesses operating on market terms. Finland's contribution describes the operating framework for these companies. Companies operating on market terms, and associated companies, must comply with the same rules and conditions as their competitors. This policy, however, does not apply to all government businesses.

Sweden is currently considering a proposal to supplement the Competition Act to allow the Market Court to prohibit public agencies from obstructing efficient market competition. The competition authority has been asked to monitor the issue and to suggest remedies that might improve competition between public and private sector firms.

- (7) *The role of competition authorities in actively addressing competitive neutrality issues depends on the policy instruments used, and the tools available to the competition authority.*

Where competitive neutrality problems are being addressed through competition law, such as described in the European Community contribution, the competition authority usually has a direct role in redressing competitive neutrality problems. Where competitive neutrality problems are being addressed through administrative and governance reform, such as described in the Australian contribution, bodies, other than the competition authority, may be responsible for the implementation of competitive neutrality principles. The role of the competition authority in dealing with competitive neutrality problems is also affected by its access to resources and expertise.

SYNTHÈSE

par le Secrétariat

Il ressort des débats qui se sont déroulés lors de la table ronde, des contributions des délégués et de la note de synthèse un certain nombre de points clés :

- (1) *Les entreprises du secteur public peuvent fausser le jeu de la concurrence de diverses manières sur les marchés où elles sont en concurrence avec des entreprises du secteur privé.*

Dans l'ensemble des pays de l'OCDE, de nombreuses entreprises de services du secteur public sont en concurrence avec des entreprises du secteur privé, ou exercent leurs activités dans des domaines où elles pourraient éventuellement être concurrencées par des entreprises privées. L'expérience des pays de l'OCDE montre que sur ces marchés effectivement ou potentiellement concurrentiels, plusieurs sources possibles de distorsions de concurrence peuvent résider dans les avantages ou les désavantages qui caractérisent certaines entreprises du secteur public en raison de leur appartenance à l'État.

Premièrement, ces avantages et désavantages peuvent résulter du système de gouvernement d'entreprise et de réglementation qui s'applique au secteur public. On peut notamment citer à cet égard les différences concernant les règles imposées aux entreprises des secteurs public et privé, le coût du capital (les entreprises publiques n'étant pas tenues d'offrir un taux de rendement du capital correspondant aux conditions du marché, ou pouvant emprunter des fonds à des taux d'intérêt inférieurs à ceux pratiqués sur le marché), ainsi que les coûts assumés par les entreprises publiques (qui peuvent être notamment allégés par des exemptions fiscales).

Deuxièmement, dans certains pays, les entreprises du secteur public peuvent être en mesure de se livrer à des pratiques anticoncurrentielles parce qu'elles jouissent *de facto* ou *de jure* d'un régime dérogatoire au droit de la concurrence. Si la plupart des pays n'excluent pas les entreprises du secteur public du champ d'application du droit de la concurrence, il peut exister des exemptions partielles qui protègent certains types d'entreprises du secteur public ou certains pans de leurs activités commerciales. En outre, les entreprises publiques peuvent se livrer à des pratiques susceptibles de fausser le jeu de la concurrence sur un marché donné, sans relever pour autant du droit de la concurrence classique.

Troisièmement, les entreprises du secteur public exposées à la concurrence peuvent bénéficier d'aides financières versées par l'État découlant de leurs obligations de service public. Si ces aides sont utilisées pour soutenir des activités marchandes au moyen de subventions croisées, l'entreprise publique considérée jouit d'un avantage sur ses concurrents du secteur privé.

Quatrièmement, les entreprises du secteur public peuvent tirer avantage de la souplesse des règles relatives aux marchés publics. Si ces règles favorisent les fournisseurs publics, en leur permettant de fixer leurs prix en dessous du coût de revient total des biens et services considérés, l'organisme public qui acquiert ces biens et services bénéficie d'un avantage de coût par rapport à ses concurrents du secteur privé. Par ailleurs, les entreprises privées qui tentent d'obtenir un marché public sont désavantagées, car leurs concurrents publics ne sont pas tenus de couvrir intégralement leurs coûts de revient.

Cinquièmement, certains organismes du secteur public sont habilités à réunir des données à des fins d'intérêt public. Les entreprises du secteur privé sont tributaires de ces organismes pour accéder à ces informations. Par conséquent, les entreprises du secteur public bénéficient d'un avantage si elles peuvent utiliser ces données à des conditions plus favorables que le secteur privé.

Des problèmes de neutralité concurrentielle peuvent donc se poser lorsque le jeu de la concurrence est faussé par les avantages et désavantages qui caractérisent certaines entreprises publiques en raison de leur appartenance à l'État.

- (2) *Les objectifs des politiques destinées à remédier aux problèmes de neutralité concurrentielle diffèrent suivant les pays.*

L'objectif d'une politique axée sur la neutralité concurrentielle est quelque peu ambigu. Certains pays s'efforcent d'instaurer des conditions de concurrence loyale entre les secteurs public et privé, ainsi que d'utiliser la concurrence comme vecteur de gains d'efficacité.

Efficacité : Si le prestataire public a des coûts plus élevés (est moins efficace) que les prestataires privés existants ou potentiels, tout en étant capable d'« évincer » des prestataires privés, le coût total pour l'économie du service considéré augmente. En dernière analyse, une partie de ce coût additionnel est financée par un surcroît de pression fiscale, si bien que l'efficacité allocative s'en trouve réduite. L'efficacité dynamique de l'économie peut également être amoindrie si l'entité publique est moins susceptible d'innover, et si ses concurrents potentiels sont dissuadés d'entrer sur le marché. Par ailleurs, les impératifs qui pèsent sur les entreprises publiques en termes de gains d'efficacité sont généralement plus réduits, de sorte que l'efficacité technique s'en trouve également réduite.

Concurrence loyale : Les distorsions de ce type réduisent également la rentabilité et le taux de rendement des capitaux des participants privés en concurrence avec l'entité publique. Cette situation risque fort d'être jugée fondamentalement déloyale, à tout le moins par les participants privés, notamment s'ils considèrent qu'une partie des impôts qu'ils paient sert indirectement à subventionner leur concurrent public.

La question de savoir dans quelle mesure l'État doit élaborer des politiques destinées à limiter les activités des entreprises publiques à des fins de neutralité concurrentielle, et quels sont les organismes les mieux placés pour appliquer ces politiques, fait débat.

- (3) *La réduction des problèmes de neutralité concurrentielle et l'instauration d'une concurrence loyale et efficace entre les entreprises des secteurs public et privé présentent des avantages.*

Lorsque la concurrence est efficace et loyale, les entreprises publiques s'efforcent de réduire leurs coûts et deviennent plus innovantes, car elles savent que leur capacité à attirer des clients repose uniquement sur leurs performances commerciales. Des objectifs commerciaux clairs réduisent les conflits d'intérêts et accroissent l'efficacité de la gestion des entreprises publiques. En outre, celle-ci se caractérise par une plus grande transparence, et il est davantage possible de comparer les résultats des entreprises publiques à ceux obtenus par le secteur privé dans des activités similaires.

Les entreprises du secteur privé sont plus actives sur des marchés où elles savent que leurs concurrents du secteur public ne bénéficient pas d'avantages artificiels en termes de coûts, et les clients bénéficient de prix inférieurs et de services de meilleure qualité, grâce à une concurrence plus directe entre les secteurs public et privé.

L'allocation des ressources s'améliore, car les entreprises qui sont les plus efficaces, et fournissent les services souhaités par les clients, obtiennent les meilleurs résultats. Les États bénéficient, quant à eux,

de la croissance économique et de la plus grande efficacité du secteur public qui résulte du renforcement de la concurrence et de l'amélioration de la répartition des ressources.

- (4) *L'ampleur des problèmes de neutralité concurrentielle varie d'un pays à l'autre suivant leur histoire, leur structure et leur culture politique.*

Les pays ayant limité le nombre d'entreprises du secteur public qui fournissent des biens ou des services en concurrence avec le secteur privé ont réduit l'ampleur des problèmes de neutralité concurrentielle. De même, lorsque des principes de neutralité concurrentielle sont consacrés par des règles de gouvernement d'entreprise (comme en Nouvelle-Zélande) ou par le droit de la concurrence (comme dans l'Union européenne), les problèmes de neutralité concurrentielle sont sensiblement réduits.

Dans d'autres pays, où il est de tradition que l'État intervienne fortement en tant que fournisseur de biens et services, notamment sur des marchés où la concurrence du secteur privé augmente, des problèmes de neutralité concurrentielle risquent davantage de se poser.

- (5) *Certains pays se sont dotés de divers mécanismes pour faire face aux problèmes de neutralité concurrentielle.*

Si les conditions qui prévalent dans les différents pays et leurs priorités en termes d'action publique influent sur l'ampleur des problèmes de neutralité concurrentielle, elles conditionnent également la manière dont ils traitent ces problèmes. Autrement dit, les méthodes employées doivent être adaptées aux circonstances pour être efficaces. Ainsi, la structure du marché peut conférer une plus grande efficacité à certaines approches. Le droit de la concurrence peut notamment donner de meilleurs résultats lorsque l'entreprise publique considérée occupe une position dominante sur son marché. Il est alors plus probable que les problèmes de neutralité concurrentielle entrent dans le champ d'application du droit de la concurrence. La source du problème de neutralité concurrentielle constitue également un facteur déterminant. Si les distorsions de concurrence découlent d'une décision délibérée de l'État de favoriser ses entreprises, des mesures de sensibilisation peuvent constituer l'approche la plus adaptée. Par contre, si les distorsions de concurrence sont les conséquences imprévues d'autres interventions de l'État, des règles de transparence et des dispositions spécifiques en matière de neutralité concurrentielle peuvent s'avérer plus efficaces.

La quasi-totalité des pays ont recours, dans une certaine mesure, à des actions de sensibilisation pour favoriser une concurrence efficiente et loyale entre les entreprises des secteurs public et privé. Dans sa contribution, la Corée indique qu'elle utilise à la fois le droit de la concurrence et des mesures de sensibilisation pour remédier aux problèmes de neutralité concurrentielle au niveau des collectivités locales.

Certains pays recourent à des méthodes qui consistent à traiter les problèmes de neutralité concurrentielle *a posteriori*, notamment en appliquant le droit de la concurrence pour exiger des entreprises du secteur public qu'elles mettent un terme à des pratiques préjudiciables à la concurrence. Ainsi, la Hongrie a utilisé son droit de la concurrence pour remédier à des situations dans lesquelles des activités commerciales relevant de collectivités locales se déroulaient de manière incompatible avec le principe de neutralité concurrentielle. Le recours au droit de la concurrence peut contribuer à la résolution de problèmes de neutralité concurrentielle lorsque les entreprises publiques visées entrent dans le champ d'application du droit de la concurrence, parce qu'elles sont d'une taille suffisante, ont un impact suffisant sur le marché et ne bénéficient d'aucune exemption particulière. Ce type d'approche fondé sur le droit de la concurrence peut favoriser l'instauration de conditions de neutralité concurrentielle, mais il permet uniquement de traiter des cas particuliers *a posteriori*.

D'autres pays traitent les questions de neutralité concurrentielle *ex ante*, en prenant des dispositions qui modifient le cadre de gouvernement des entreprises du secteur public, afin de réduire l'ampleur des avantages et désavantages qui les caractérisent ; en modifiant et en appliquant les règles relatives aux marchés publics de manière à égaliser les conditions de concurrence entre les secteurs public et privé ; ou en réformant le système des aides financières accordées aux services publics de telle sorte que ces aides n'avantagent pas les entreprises publiques par rapport à leurs concurrentes du secteur privé. Les orientations définies en matière de tarification au Royaume-Uni illustrent ce type d'approche. L'efficacité de ces dispositions dépend du fait de savoir si elles s'appliquent à la totalité des organismes publics qui fournissent des services marchands sur des marchés effectivement ou potentiellement concurrentiels, si ces dispositions concernent toutes les sources d'avantages et de désavantages concurrentiels, et comment les pouvoirs publics mettent en œuvre et font appliquer ces dispositions.

Un troisième groupe de pays a réduit l'ampleur des problèmes de neutralité concurrentielle en revoyant à la baisse la présence de l'État dans le secteur marchand. Ainsi, les États-Unis indiquent dans leur contribution que les activités marchandes dans lesquelles sont impliquées les pouvoirs publics, au niveau fédéral, des États et local, sont « très limitées ». Israël a engagé un processus de privatisation qui réduit la participation de l'État au secteur marchand. Les pays qui retiennent cette approche sont conscients qu'il est quasiment impossible de supprimer tous les avantages et désavantages dont héritent les entreprises du secteur public en raison de leur appartenance à l'État. Ainsi, il est peu probable que les pouvoirs publics laissent leurs entreprises faire face à la discipline de marché liée au risque de faillite. L'État est souvent tenté d'intervenir dans le fonctionnement de ces entreprises pour réaliser des objectifs politiques, les clients peuvent accorder une plus grande confiance à ces entreprises parce qu'elles appartiennent à l'État, et leurs concurrents du secteur privé ont l'impression, à tort ou à raison, que les liens étroits qui existent entre ces entreprises et l'État leur confèrent des avantages.

La seule manière de garantir la suppression totale de ces avantages et désavantages est de privatiser les entreprises publiques. Des réformes du cadre de neutralité concurrentielle représentent toutefois une autre manière de traiter la question de ces avantages et désavantages, quand l'État ne souhaite pas s'engager dans la voie d'une privatisation complète. Lorsque l'option de la privatisation est retenue, des dispositions axées sur la neutralité concurrentielle peuvent être adoptées dans le cadre de la stratégie transitoire mise en œuvre pour préparer l'ouverture du marché à la concurrence.

(6) *Certains pays, mais pas tous, ont adopté ou sont en train d'élaborer des dispositions en matière de neutralité concurrentielle. Là encore, les approches varient considérablement.*

L'Union européenne (UE), l'Australie, les Pays-Bas, la Finlande et la Suède accordent tous une importance prioritaire au traitement direct des problèmes de neutralité concurrentielle. Tous ont, ou sont en train, d'adopter des dispositions fondées sur des principes de neutralité concurrentielle.

Dans le cas de l'UE, les principes de neutralité concurrentielle sont inscrits dans le Traité instituant la communauté européenne et font partie intégrante du droit de la concurrence. L'article 86 du Traité dispose que les services fournis par des entreprises publiques, ou des entreprises privées agissant pour le compte de l'État, doivent être soumis aux règles de concurrence du Traité instituant la Communauté européenne, à moins que cela ne remette en cause la fourniture de « services d'intérêt économique général ». Ces dispositions sont renforcées par les règles relatives aux aides d'État, qui font obligation aux États membres de notifier « les aides accordées par les États ou au moyen de ressources d'État sous quelque forme que ce soit qui faussent ou qui menacent de fausser la concurrence », et de solliciter l'aval de la Commission européenne en la matière. Pour approuver une telle aide, la Commission doit parvenir à la conclusion que l'État membre a confié au prestataire la tâche de fournir un service d'intérêt économique général clairement défini, et que l'aide est proportionnelle à l'objectif poursuivi et limitée au montant nécessaire à la prestation du service. Par ailleurs, la Directive relative à la transparence des relations financières entre les États

membres et les entreprises publiques ainsi qu'à la transparence financière dans certaines entreprises impose une obligation de transparence aux entreprises publiques, qui doivent tenir des comptes séparés sur leurs activités marchandes, d'une part, et non marchandes, d'autre part.

L'Australie applique une politique spécifique en matière de neutralité concurrentielle, fondée sur le principe que les entreprises publiques exerçant leurs activités sur des marchés effectivement ou potentiellement concurrentiels ne doivent jouir d'aucun avantage concurrentiel net sur le secteur privé au simple motif qu'elles appartiennent à l'État. Cette politique passe par l'application de principes exigeant que les secteurs privé et public soient soumis aux mêmes conditions en termes de fiscalité, d'endettement et de réglementation ; que les objectifs de rendement du capital fixés aux entités publiques correspondent à ceux du secteur privé ; et que les entités publiques qui se livrent à des activités marchandes importantes dans le cadre d'un plus large éventail de tâches pratiquent pour ces activités marchandes des tarifs correspondant à leur prix de revient complet, et s'abstiennent de toute subvention croisée. Une procédure de traitement des plaintes a été mise en place pour examiner les griefs d'entreprises du secteur privé affirmant que des entreprises publiques manquent à leurs obligations en termes de neutralité concurrentielle. Le gouvernement central australien recourt également à des incitations financières pour encourager les gouvernements des États et Territoires à continuer à appliquer les règles prévues en matière de neutralité concurrentielle.

Les Pays-Bas étudient actuellement un projet de loi sur le marché et l'État, qui régira les pratiques des entreprises du secteur public en concurrence avec le secteur privé. Il est prévu que ce projet de loi intègre des règles de conduite à l'intention des entités publiques dans la loi néerlandaise sur la concurrence. Dans leur contribution, les Pays-Bas évoquent quatre règles. La première réside dans l'interdiction des subventions croisées (hormis dans les cas où la suppression de ces subventions empêcherait l'organisme concerné d'accomplir sa mission de service public). De manière générale, les prix doivent couvrir l'intégralité des coûts, et les activités marchandes ne doivent pas être subventionnées par les autres activités des organismes publics. La deuxième règle réside dans l'interdiction pour tout organisme public de faire un usage exclusif des données qu'il a réunies dans l'accomplissement de sa mission de service public. Les données confidentielles ne peuvent être utilisées aux fins d'activités marchandes. Les autres types d'informations ne peuvent être utilisés que si les tiers y ont accès dans des conditions similaires. La troisième règle réside dans l'interdiction d'associer des tâches distinctes, ce qui implique que les activités marchandes et les missions de service public doivent être prises en charge par des composantes différentes de l'organisme public considéré. Enfin, la quatrième règle réside dans l'interdiction de tout traitement préférentiel pour les entreprises publiques, ce qui implique que les organismes publics ne doivent pas favoriser les entreprises publiques.

En Finlande, la neutralité concurrentielle et la transparence des entreprises du secteur public ont été améliorées par la loi sur les entreprises d'État (2003) et par une nouvelle décision du gouvernement concernant la politique de l'État en matière d'actifs publics (2004). La politique de l'État en matière d'actifs publics précise les fonctions des entreprises à capitaux publics qui opèrent aux conditions du marché. Dans sa contribution, la Finlande décrit le cadre dans lequel ces entreprises exercent leurs activités. Les entreprises fonctionnant aux conditions du marché, et les entreprises associées, doivent satisfaire aux mêmes règles et conditions que leurs concurrents. Cette politique ne s'applique cependant pas à toutes les entreprises à capitaux publics.

La Suède étudie actuellement une proposition de modification de la loi sur la concurrence qui autoriserait le tribunal de commerce à interdire aux organismes publics d'entraver le jeu effectif de la concurrence sur le marché. L'autorité de la concurrence s'est vu demander d'examiner cette question, et de proposer des mesures correctives susceptibles d'améliorer les conditions de concurrence entre les entreprises des secteurs public et privé.

- (7) *La contribution active des autorités de la concurrence au règlement des problèmes de neutralité concurrentielle dépend des moyens d'intervention utilisés, ainsi que des outils dont disposent ces autorités.*

Lorsque les problèmes de neutralité concurrentielle sont traités par le biais du droit de la concurrence, ce qui correspond au cas de figure décrit dans la contribution de la Commission européenne, l'autorité de la concurrence concourt généralement directement au règlement des problèmes de neutralité concurrentielle. Lorsque ce type de problème est traité au moyen de réformes administratives et du gouvernement d'entreprise, comme indiqué dans la contribution australienne, des organismes autres que l'autorité de la concurrence peuvent être chargés de l'application des principes relatifs à la neutralité concurrentielle. Le rôle de l'autorité de la concurrence concernant les problèmes de neutralité concurrentielle dépend également des ressources et des compétences dont elle dispose.

BACKGROUND NOTE

1. Introduction

The relationship between governments and the private sector is complex and occurs at several levels. The government makes laws and levies tax and the private sector has input into these processes through the standard political channels. The Government also provides public and other services to the private sector and sometimes in competition with the private sector. This paper is about the last dimension of this relationship, and its inter-relationships with the other dimensions.

Government provides a wide range of different services, and the relative importance of these different services varies significantly between countries. At a conceptual level two polar cases can be identified:

- **Public services** that are funded from the government budget and hence ultimately funded by general tax revenues. At the core of this category are the public goods of law and order and defence, but in many instances it also includes health, education and similar services. These services are not necessarily the exclusive domain of the government, as there may be an active private sector providing similar services on a fee for service basis. There may be a degree of substitutability between the public and privately provided services, but the price paid by consumers (where they have a choice) will differ fundamentally because the public service will be provided for a zero or nominal charge. This separation of price may be so significant that the public and private activities are taking place in essentially different economic markets.
- **Commercial services** provided on a fee-for-service basis, where the fee charged is the primary mechanism used to fund the service and the government does not explicitly restrict the profitability of the service to achieve social policy objectives. Examples include electricity or telecommunication services, in those countries where the government participates in those industries. For these types of services it is likely that there will be actual or potential private providers of the service operating on essentially the same commercial basis in the same economic markets in competition with the government provider. The only significant feature that distinguishes the government business in these cases is that it is owned by the government.

Real-world cases are typically found somewhere between these two extremes. For example, a government may partly fund private entities to provide public services through subsidies or tax preferences so that the price that such private entities can charge is less than full cost. In this case a private entity can take on some aspect of a public character. Such arrangements are common in the education sector. Similarly, a government owned commercial entity may undertake a mix of commercial and public services, such as where an electricity supplier is required to provide discounted services to disadvantaged groups. Or a government public entity might also provide commercial services, such as where a public hospital also treats private patients.

At the polar case where public and private entities operate in different economic markets they are not in competition with each other and distortions to the competitive process do not arise. At the other polar case, where a public entity provides commercial services in competition with a private entity, distortions to the competitive process can arise. In this paper, such distortions are called competitive neutrality problems. If an entity, by virtue of its government ownership or relationship, can charge prices that are below cost or otherwise behave anticompetitively, this can have both efficiency and fairness implications:

- Efficiency: If the public provider has higher costs (is less efficient) than actual or potential private providers, but is nevertheless able to “crowd out” private providers, then the total cost to the economy of the service will increase. Part of that additional cost is ultimately met through a higher tax burden and allocative efficiency is reduced. Dynamic efficiency of the economy may also be lower if the government entity is less likely to innovate and entry is deterred. Such government businesses will usually face fewer imperatives to improve their efficiency and, hence, technical efficiency is similarly reduced.
- Fairness: Distortions of this sort will also reduce the profitability and rate of return on capital of any private participants in competition with the government entity. At least for private participants, this is likely to be seen as fundamentally unfair, particularly if they regard part of any taxes that they pay as indirectly subsidising their government competitor.

The polar cases are relatively straightforward from a policy perspective. More difficult policy challenges arise when governments attempt to address problems that arise in intermediate cases, as the possible policy responses are varied and sometimes complex. Governments recognise these problems and have adopted a variety of policy responses. Again, these can be characterised into two conceptually polar cases:

- Fundamentalist approach: Here the policy response starts from an inquiry into the desirable limits of government activity. The result of that inquiry is likely to vary significantly from country to country. After the fundamental limits of the state have been determined, those functions that lie outside of that limit can be terminated or privatised. This approach reduces competitive neutrality problems if the state withdraws from functions that the private sector can, or does, provide on a commercial basis. The actual scope of competition between the government and the private sector is wound back. In part, this framework can be seen as motivating the privatisation program undertaken in the UK in 1980s.
- Instrumentalist approach: Here there is no predetermined fundamentally desirable limit to government activity, but there is a presumption that where a government commercial activity competes with private providers, the framework in which those entities compete should be neutral between them. Policy mechanisms that are involved in this approach include the application of competition law and instruments of public sector corporate governance such as corporatisation and commercialisation. In addition, explicit and targeted competitive neutrality frameworks can set up mechanisms to ensure that competition is neutral.

Virtually all governments have elements of their public sector policies that incorporate some or all of the policy mechanisms noted above, particularly the application of competition law and a variety of approaches to the corporate governance of government commercial entities. But relatively few have explicit competitive neutrality frameworks. Moreover, it is common for those countries that adopt an instrumentalist approach to find that the application of instrumentalist policies changes the nature of their government commercial entities over time to a point where it is convenient to privatise them on a case by case basis.

This paper focuses on instrumentalist policy options.

It begins with a brief examination of the scope of application of competition laws to the public sector, typically those dealing with abuse of dominance, and some illustrative examples.

Competition laws typically address problems on an *ex post* basis. Because competitive neutrality problems are caused within governments, and because governments have the regulatory tools to address them, it may be more appropriate for governments to prevent such problems from arising in the first place. Such *ex ante* policy approaches are the focus of this paper.

The second part of the paper briefly addresses public sector governance issues, including corporatisation and commercialisation. These policies are applied in many countries and can be seen as intending to prevent competitive neutrality problems arising by making government commercial entities behave in a more commercial manner. One of the key policy levers in this area is the requirement that government business activities earn a reasonable rate of return on the capital employed. Indeed it is this last feature that has often been the motivation to adopt these policies, specifically to reduce the drain on public resources that occurs when substantial government entities operate in an inefficient manner. Often these policies have been limited to more significant businesses because implementation involves significant transaction costs.

The final part of the paper focuses on policies in those countries that adopted explicit and targeted competitive neutrality frameworks. These frameworks include both *ex ante* and *ex post* elements and can be seen as an attempt to draw together the various policies discussed previously into a coherent whole. The *ex ante* elements in these frameworks are distinguished by more highly developed neutrality requirements (regulatory, tax, rate of return and so forth) and, potentially, can apply at lower threshold levels than is usual for competition laws or corporatisation of government businesses. The *ex post* elements in these frameworks involve a complaints mechanism that reflects that the processes are internal to government and hence seek rapid, effective solutions rather than an adversarial process. The successes and limitations of these policies are illustrated. A key conclusion is that fully effective implementation of an explicit competitive neutrality framework requires a cultural shift, both in the public enterprises themselves and at the policy/political level of governments. The policy's effectiveness also depends on the key policy question of the appropriate threshold for applying competitive neutrality requirements.

2. Competition law and public sector businesses

The application of competition law can be an important policy tool in addressing problems that arise when government entities compete with private entities. The most significant source of competitive distortions in public-private sector competition is the financial advantages enjoyed by government business activities. These can include:

- differences in the cost of capital because government businesses are not required to earn a commercial rate of return and can borrow funds at rates lower than commercial interest rates;
- differences in other costs facing government businesses, such as no requirement to pay taxes; and
- capacities to cross-subsidise competitive business activities from government funded and/or monopoly services.

Usually these competitive advantages do not include the ability to violate the competition law with impunity. Government-related undertakings are subject to the competition laws of all Member countries (except the US and a few specific enterprises that are exempted in some other countries). Commercial activity by non-corporatised government-related entities in competition with the private sector is often enough to make those entities “undertakings” or otherwise subject them to competition law jurisdiction. Some situations raise definitional and jurisdictional questions but, in general, to the extent the lack of competitive neutrality results from conduct that could be remedied by applying the competition laws, most Member countries could deal with it.

Some countries have special competition-law rules to deal with the effects of distortions in competition between government and private entities. Countries that use the EU toolkit often have a provision like Article 86, setting the rules for entities that perform services of general economic interest¹ or are granted special or exclusive rights. Broadly, Article 86 (see box 1) provides that the services performed by government entities, or private entities on behalf of the government, should be subject to the competition provision of the EC Treaty unless this would undermine the provision of services of general economic interest.

Box 1 – Article 86

- | | |
|---|--|
| 1 | In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89. |
| 2 | Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community. |
| 3 | The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States. |

Source: European Commission 2004, Article 86 of the EC Treaty (ex Article 90)

The European State Aid rules also address the effect of government intervention on the competitive environment. Some Members have similar rules. For example, the Danish Competition Act includes a provision to prevent state, municipality and local governments from subsidising services in a way that distorts competition. The provision applies to both public and private sector organisations.

Section 11 a. *The Competition Council may issue orders for the termination or repayment of aid granted from the public funds, which has been granted to the benefit of specific forms of business activities.*

(2) An order pursuant to subsection (1) may be issued, when the aid

- i) Directly or indirectly has as its objective or effect the distortion of competition, and
- ii) Is not legitimate according to public regulation. (OECD 2001, P.100)

In Denmark state aid is allowed if it is authorised through laws, regulations, instruments, general budget rules or the power of attorney of the local authority.

Finland had a provision in its competition law that “a restriction that is deemed to have harmful effects through decreasing efficiency or preventing or hindering the conduct of business in a manner ‘inappropriate for sound and effective competition’ may be enjoined even if it is not otherwise specifically prohibited in the statute”. (OECD 2003a)

The provision had been invoked by the competition authority (FCA) to advocate change where government-related activities affected market competition, notably through its “Government and Markets” project. The FCA investigated a number of state-owned activities from grain trading and meteorological services to road management and construction, and has been relatively successful in generating change (though not always enough). (OECD 2003a)

2.1 *The use of competition laws to achieve competitive neutrality*

There are numerous examples where competition laws have dealt with competitive neutrality problems arising between public and private sector entities competing in the same market. In March 2001 the Commission of the European Communities released a decision on a complaint by United Parcel Service that Deutsche Post AG was cross-subsidising competitive parcel services from its letter service monopoly. The Commission found that Deutsche Post AG had offered fidelity rebates and priced some services below cost. It concluded that these actions would have a significant effect on competition and on the efficiency of the industry. The Commission required Deutsche Post AG to separate its parcel business from other services and provide information to the Commission for three years on the costs and revenues of the parcel business, all transfer prices between the parcel business and Deutsche Post AG, and any rebates negotiated by the parcel business with the six largest mail order companies. Deutsche Post AG was also fined EUR 24 million. (Commission of the European Communities 2001)

Worldwide, there are other similar examples, such as recent findings by the South African Competition Commission in relation to Telkom, the South African telecommunications provider. The Commissioner concluded that Telkom imposed unreasonable conditions on value added network services providers, which had to purchase services from Telkom, but also competed against it in other markets. The South African Commission recommended a fine of up to 10 per cent of Telkom's annual revenue (Competition Commission 2004). The Competition Tribunal is still to consider this recommendation.

In France, there have been several comments about competitive neutrality related issues and at least one actual enforcement effort. The conditions in which the concepts of predatory pricing can be applied to diversification by public monopolies were set out in a 1996 Conseil opinion about La Poste. Predatory intent to exclude competition is generally presumed where price is below average variable cost, and intent must be proved independently where price is below average total cost, but not below average variable cost. A public entity is likely to have higher costs than a private firm, to the extent that the public entity is not subjected to the same profitability discipline, at least for activities devoted to delivering public services. Other aspects of its cost structure may necessarily differ from the costs facing the private sector. The status of its personnel, for instance, may increase its personnel costs, while its sources of funds may reduce its effective cost of capital. Thus, it may require close examination to determine whether what look like losses, when compared to the average costs of its competitive activities, actually imply predatory intent.

A cross-subsidy that does not amount to predation might still be objectionable. The Conseil has contended that low prices by an affiliate of a public entity can be anti-competitive, even if they are not technically predatory (that is, consistently below average variable cost), if they are possible only because of profits from the public monopoly activity and they lead to a lasting distortion of the market. That scenario was found in the lottery operator's effort to get business for its computer and information technology support unit. About one-sixth of the unit's bids for third-party maintenance contracts were below its average variable costs. That proportion might be too low to prove predation, but the subsidies were nonetheless found to be anticompetitive. The low bids were possible only because of the support from the parent's profits (and from the marketing advantage of the parent's reputation), and the effect on the capacity of competitors could not have happened without the cross-subsidies. These principles have potentially broad application in overseeing public service monopolies that diversify into competitive markets.

While competition law has addressed some significant competitive neutrality issues it is not well equipped to deal with all aspects of inefficient and unfair competition between public and private sector entities. The competition law provides a legal framework to correct or prevent abuses of market power or attempts to gain market power. Many competitive neutrality issues would not be reached by competition law, either because the relevant government businesses activities do not have market power or the

advantages they receive do not fall within the categories of market abuse that are covered by competition laws.

As noted in the comments by the French Conseil, it can be difficult to calculate the avoidable costs of government business activities and benchmark these costs against similar private entities. This difficulty is compounded where the governance arrangements for government businesses lack transparency, or their accounting practices are poor.

Some commentators argue that more stringent competition requirements should be placed on government businesses because they have greater incentives to exploit their market power and more opportunity to conceal anticompetitive practices. Sappington and Sidak (2003), for example, argue that state owned enterprises often have incentives to expand the scale of their operations as well as maximise profit. When this is the case, these entities will discount the cost of expanding output and have an incentive to engage in aggressive anticompetitive activities to expand the scale of their production.

In particular, an SOE [State Owned Enterprise] may set prices below marginal production costs, especially on products for which demand is price-elastic. An SOE also may understate its marginal cost of production and overinvest in capacity in order to relax a binding prohibition on pricing below cost. In addition, an SOE may have stronger incentives than a private, profit-maximizing firm to raise its rivals' costs and to undertake activities designed to exclude rivals from relevant markets. An SOE's incentive to undertake such anticompetitive activities generally increases as the SOE's concern with profit decreases and its concern with expanded scale and scope increases.

SOEs also commonly have an enhanced ability to engage in anticompetitive activities relative to private firms. The enhanced ability stems from several sources. For example, SOEs often enjoy privileges and immunities that afford them considerable discretion in the activities they undertake. In addition, an SOE's legal framework may impose upon it the duty, or confer upon it the prerogative, to pursue objectives other than profit maximization. Furthermore, SOEs often are multiproduct firms that benefit from statutory monopolies over related products. Consequently, SOEs, unlike their private competitors, may not need to recoup the costs of anticompetitive activities by raising prices in non reserved markets. (Sappington and Sidak 2003, pp. 522-523)

The arguments by Sappington and Sidak further emphasise the complexity of dealing with competition issues involving government business activities, and hence the difficulty of addressing competitive neutrality problems through general competition laws.

The point made about loss recoupment is particularly significant. In some jurisdictions, predatory behaviour does not violate the law unless the predator could recoup its losses. The rationale is that if loss recoupment is not feasible then competition has not been harmed (although competitors may have been) and the would-be predator has simply made a poor business decision. Competition law in these jurisdictions only punishes behaviour that damages competition, not a poor business decision that was an attempt to damage competition. It is implicit in this argument that businesses operate according to the profit motive and would not sensibly engage in behaviour that will result in losses.

Sappington and Sidak note that public enterprises may not be aiming to maximise profits, and thus they may have incentives to engage in predatory behaviour, even where loss recoupment by later raising prices is not possible. Such predation may be directed at maximising revenue rather than profit, or simply achieving a "quiet life".

An example occurred in Australia when a new entrant in the market for value added meteorology services sought to provide newspapers with enhanced graphical material for publication on the weather

pages. The public provider of meteorology services, the Australian Bureau of Meteorology responded by matching the improved quality and reducing its prices to zero. It is doubtful that recoupment would have been possible in this case, but clearly competition was chilled. In Australia, the provisions of the Trade Practices Act, governing the abuse of market power, do not require the predator to be able to recoup losses, so in this case, a competition law solution was found. The Bureau of Meteorology agreed, without admission, to develop a policy document on access to information and using a model licence agreement (ACCC 1997).

This case illustrates several points:

- Although not required under Australian law, it is unlikely that it would have been possible to prove that the Bureau of Meteorology intended to recoup its losses. Thus this problem would have been difficult to address under the competition laws in many countries.
- The Australian regulator needed to establish that the Bureau of Meteorology had taken advantage of its market power to prevent competition. Without such market power the case would have fallen outside the jurisdiction of the competition laws.
- The competition law solution did not fully resolve competitive neutrality problems in this industry. In 2001 a competitive neutrality complaint was lodged by Meta Information Limited (see section 4.3), a subsidiary of the original competitor in the trade practices case. The complaints office recommended further changes to address competitive neutrality issues.

Most competition laws would deal with market abuse by government businesses on an ad hoc basis after it has occurred. There are also many competitive neutrality issues that could not be addressed through competition laws, though the scope of these laws varies between countries. Governments, however, have the power and regulatory tools to address competitive neutrality issues systematically in advance, and thus avoid the costs that arise from distortions in the competitive process.

3. Public sector business governance arrangements

Competitive neutrality problems could be reduced by reforming the governance arrangements of government businesses so that these businesses have a commercial focus, operate efficiently and face all normal business costs, such as requirements to earn a rate of return and pay taxes. Such reforms could significantly reduce the advantages and disadvantages these businesses have compared with their private sector competitors. The OECD roundtables on reform in rail (1988), postal services (1999), telecommunications (2002) and local government services (such as waste management) (2000) all describe reforms that countries implemented to improve the commercial focus of their businesses.

For example, in the postal industry:

Over the last decade many countries have reformed the structure and governance of their incumbent postal operators, in a process known as enterprise reform or corporatisation. Such reforms have typically led to substantial improvements in profitability, service quality, productivity and efficiency. (*OECD 1999, p.7*)

These reforms not only improve the efficiency and financial performance of these businesses but also establish a platform for fairer competition between public and private sector entities.

3.1 *The use of governance reforms to achieve competitive neutrality*

Governance reforms better define the relationships between government business entities as service providers and the government as the business owner and regulator. In implementing such reforms many governments address issues such as:

- separating regulation from service provision; and
- clarifying the commercial objectives for the government business, the obligations to report to the government owner, and the mechanisms for monitoring business performance.

The first part of this section discusses approaches to these specific governance issues that are likely to deliver competitive neutrality between public and private sector competitors. The second part looks at the most common models for implementing governance reforms, that is, corporatisation and commercialisation. Finally the section discusses the strengths and shortcomings of corporatisation and commercialisation models in resolving competitive neutrality problems.

Specific governance issues

Separating regulation from service provision

Traditionally, when government service providers were part of central government it was very common for them to be responsible also for industry regulation. The distinction between service provision and regulation was often unclear. In the case of the traditional monopoly service provider this was not a significant issue from a competition perspective. However, as these sectors have been liberalised, with the commercialisation of the government businesses and entry of private competitors, competition issues arise if government businesses are responsible for both service provision and the regulation of other service providers. For example, a government railway may regulate the safety standards of all above rail operators but also provide above rail services in competition with other providers. Holding both service provision and regulation in the same agency creates several problems:

- there is confusion between the regulatory objectives of the agency and its competitive objectives;
- the agency can be perceived as favouring its own operator over its competitors;
- there is a risk that the commercial objectives of the agency will compromise the integrity of the regulation.

Many governments recognise the need to separate the regulatory functions of agencies from their business activities as part of their general reforms of government business activities. The separation of regulatory functions is a key component of many corporatisation and commercialisation processes. In Norway:

The government has moved a long way to implement separation, recognising its importance for competition and efficient resource use. In its ownership White Paper it underlined the value of separation as a means not only of enhancing confidence in the neutrality of government regulation, but also to increase the legitimacy of the state and confidence in state entities. It also notes the value of the EEA Agreement mechanism for raising issues of favouritism. With a few exceptions (for example the Norwegian Mapping Authority) service provision and regulation are now separate. (OECD 2003b. p.6)

The most rigorous form of regulatory separation occurs when the agency performing the regulatory functions is separate from the business activity, and different Ministers are responsible for the regulatory agency and the business activity.

Commercial management and governance

Public sector management structures are not necessarily well suited to competing in a commercial environment. For large business ventures a more commercial approach to management and governance may be desirable. This could involve setting up business objectives that reflect commercial drivers, establishing an independent board or chief executive officer, or separating the day-to-day management of the business from the political process.

The ability of managers of government business activities to manage their business in a commercial manner is critical to generating effective competition. Constraints on the flexibility and freedom of public sector managers will reduce their ability to adapt to changing markets and respond to the needs of their customers. This commercial freedom needs to be accompanied by governance arrangements that monitor and assess performance, and can take remedial action if poor performance is ongoing. While the approach taken to governance will vary between countries, as a general rule, the government shareholder should be responsible for setting the broad business framework, and managers should have the flexibility to manage within that framework. The OECD has developed general principles for corporate governance (see box 2).

Box 2 – General principles of corporate governance

The OECD Principles on Corporate Governance were originally approved by Ministers in 1999 and revised in 2004. They are intended to assist OECD and non-OECD countries to evaluate and improve their legal, institutional and regulatory framework for corporate governance. While they were primarily developed for publicly traded companies they are also, to the extent deemed applicable, a useful tool for non-traded companies and state owned enterprises. The six principles specify that the corporate governance framework should:

- promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities;
- protect and facilitate the exercise of shareholders' rights;
- ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights;
- recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises;
- ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company; and
- ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

Source: OECD 2004, The OECD Principles of Corporate Governance

Corporatisation and commercialisation

Governments often use corporatisation and commercialisation as models to reform governance arrangements for major business activities. Corporatisation involves separating the day-to-day activities of the business from the government and establishing an independent board of directors and transparent governance structures. The business is set up as a separate legal entity, distinct from its owner government, and can be constituted as a government owned enterprise under the corporations' law or as a statutory

authority under its own or umbrella legislation. The governance framework in the legislation covering a statutory authority is usually similar to that in the corporations' law, but it may also include specific mechanisms for the government to direct the entity to undertake certain activities in a particular way.

Internationally, there are many examples of models for corporatisation – government business enterprises in Australia, state-owned incorporated companies in Norway, crown companies in New Zealand.

Commercialisation is similar to corporatisation but the reforms are less extensive.

Unlike corporatisation, the process of emulating private sector conditions under commercialisation reform does not extend to the establishment of a full corporate structure, with an independent commercial board of directors and chief executive and shareholding Ministers. Another key difference is that commercialised activities remain within the operations of a Government department, whereas corporatised activities are separate legal entities, subject to a governance regime similar to Companies Law. (Queensland Government 1996, p.17)

Commercialisation is designed to put government businesses on an equivalent basis to the private sector through:

- clear and non-conflicting objectives;
- sufficient management responsibility, authority and autonomy;
- independent, objective performance monitoring; and
- an effective system of rewards and sanctions. (NSW Treasury 2002, p.4)

Countries such as Finland, Norway, New Zealand and Australia have reform programs that involve either the corporatisation or commercialisation of government owned businesses. To illustrate the approaches taken in each country, some of these reforms are discussed briefly in attachment 1.

The effectiveness of corporatisation and commercialisation in achieving competitive neutrality

To date, corporatisation and commercialisation reforms have focussed on large government businesses. Particularly in the case of corporatisation, this reflects the cost of establishing and monitoring a fully corporatised business, which involves:

- establishing a separate business entity, management structure and board;
- resourcing a public sector agency to monitor business performance and protect the government's interests as the owner and regulator of the business; and
- undertaking legislative reform to establish the corporatised business.

Such costs are only justified for large business activities. Corporatisation, however, also has the greatest potential to provide for competitive neutrality. Not only does it implement structures to ensure the government business operates on a commercial basis, it helps to eliminate perceptions that the business is advantaged by a close, non-transparent relationship with government. The commercial incentives are

stronger under corporatisation than commercialisation. Under commercialisation management is not as directly accountable for the performance of the business as a board of directors subject to corporations law. The distinction between the functions of the government and the business activity are less clear.

The costs of commercialisation will be less than corporatisation because there is no need to establish a full corporate structure and board of directors. The costs of commercialisation, however, are still significant and would not be justified for small business activities.

Still, where it is cost effective to apply models of commercialisation and corporatisation they are likely to alleviate many competitive neutrality problems. Unlike most competition law based solutions they address competition issues on an *ex ante* basis, so that the cost of market distortions are avoided. Whether corporatisation and commercialisation will redress all competitive neutrality problems will depend on the details of the model used — for example the accounting and costing arrangements and the mechanisms for monitoring and enforcing reforms. These are discussed in more detail in section 4. If governance reforms do not cover all of the competitive advantages and disadvantages of the government business, for instance ensuring that it complies with all the same regulations as similar private sector businesses, then governance reforms will not automatically achieve competitive neutrality.

A key shortcoming in using corporatisation or commercialisation to redress competitive neutrality problems is that it is not a cost effective to corporatise or commercialise small government business activities. Many of these business activities would still affect the market in which they compete. For example, a local government business, while small, many have a significant effect on the development of competing private sector businesses in that region. This is supported by evidence in Australia where applying competitive neutrality principles to local government business activities, such as recreational facilities, enhanced the financial viability of private local businesses in regional areas (Department of Treasury and Finance, 2004). If all local governments are active in a particular commercial service, without due regard for competitive neutrality, then that sector of the economy may exhibit significant distortions. Often, the cost of addressing such distortions by individually corporatising or commercialising each local government business would be prohibitive.

4. Competitive neutrality frameworks

While competition laws and governance reforms can make a significant contribution to achieving competitive neutrality between competing public and private sector business entities, they usually only apply to larger business activities and may not cover all competitive neutrality issues. An explicit, targeted competitive neutrality framework draws together those components of competition laws and governance reforms that redress competitive neutrality problems and extends the reform program to cover smaller government business activities and any remaining competitive advantages or disadvantages.

A few governments, such as the Netherlands (see box 3) and Australia (see box 4) have, or are considering, specific competitive neutrality frameworks. These frameworks systematically address all aspects of competition between public and private sector entities, identify areas where the public entity has artificial advantages or disadvantages and eliminate those advantages and disadvantages. These frameworks modify the management, regulation, governance and administration of government businesses to avoid, as far as possible, the costs of distorting competition. They also include *ex post* mechanisms to monitor the implementation and effectiveness of the competitive neutrality framework and rectify any remaining competitive neutrality problems.

Box 3 - Netherlands

The Netherlands is considering how to deal with the “market and government problem”. This problem arises when government businesses are operating in markets where they supply services in competition with the private sector. The problem stems from two risks:

- the risk that unequal competition between government activities and the private sector will lead to inefficiency; and
- the risk of a lack of transparency and integrity in government businesses competing with the private sector.

In 2001 a Markets and Government Bill was proposed in the Dutch Parliament. The Bill was strongly criticised by the Parliament because of the possible restrictions on government activities resulting from the proposed rules of entry to the markets.

The Dutch Government is now considering new ways of addressing the market and government problem. The ministry of Economic Affairs intends, together with the ministries of Justice and Internal Affairs, to implement new legislation that offers a solution to the problem of unequal competition between public agencies and private enterprises. The most important part of the solution is to enhance the Dutch Competition Act with rules of conduct for government organisations acting as enterprises. The rules would also aim at the conduct of private organisations to which the government has granted exclusive or special rights. (*OECD 2003d, p.31*)

Box 4 - Australia

The Australian, State, Territory and Local Governments commenced implementing competitive neutrality principles in 1995. While the details of these frameworks vary somewhat between jurisdictions the principles underlying the frameworks are the same.

The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities. (NCC 1998, p.17)

To achieve the objective of competitive neutrality policy, Australian Governments agreed to adopt a corporatisation model for significant business enterprises. When a government agency undertakes significant business activities as part of a broader range of functions, Australian Governments agreed to adopt a corporatisation model, or ensure that the prices charged for the goods and services are calculated on the same basis as private sector competitors, including all direct and indirect costs, with adjustments, such as debt guarantee fees, tax equivalent payments and commercial rates of return, to offset any cost advantages that stem directly from public sector ownership.

Australian Governments also introduced complaints handling arrangements to investigate complaints from private sector businesses that government businesses have not appropriately implemented competitive neutrality reforms.

In Australia a government can decide not implement competitive neutrality principles if it can demonstrate that the costs of the reform would outweigh the benefits. The Australian and each State and Territory Government produced a policy statement on competitive neutrality and a timetable for implementing reform and establishing their complaints handling arrangements.²

To implement an explicit competitive neutrality framework governments should consider three key questions.

1. Which government businesses will the competitive neutrality framework cover?
2. Which competitive neutrality obligations will be imposed on those government businesses?
3. How will the implementation of competitive neutrality be monitored and enforced?

This section will discuss these questions and some of the lessons from Australia's experience in implementing an explicit competitive neutrality framework.

4.1 Coverage of the competitive neutrality framework

While, at a broad level, it is relatively easy to describe the concept of competitive neutrality, the details of the policy and the scope of its application are more difficult to define. In particular, identifying the types of government activities covered by the competitive neutrality framework can be complex. It involves decisions on whether competitive neutrality reforms will be extended to all levels of government, national, regional and local, how government business activities will be distinguished from other government functions and whether competitive neutrality will be automatically applied to all business activities or subject to a public interest test to ensure that the benefits of reform outweigh the costs.

In most countries all levels of government, national, regional and local, are involved in business activities. Many government businesses are operated at regional and local levels. Work undertaken by the OECD illustrated the economic significance of local government. "Although the impact of any one local government may be small relative to the size of the national economy, the collective impact of all local government intervention can be sizeable relative to the national economy" (OECD 2000, p.19). The OECD estimated that local government receipts were between 7.5 per cent and 15 per cent of gross domestic product for most OECD countries and between 16 and 32 per cent of gross domestic product for the Nordic countries. These estimates included all local government receipts, not only those that would be subject to competitive neutrality, but they still indicated that local government has a significant economic impact on national economies.

While the services provided by local government differ widely between countries, they may compete with the private sector in industries like recreational activities, childcare, education, health care, housing and transport. Hence, competitive neutrality policies that do not extend across all levels of government would exclude a significant amount of government business activity and reduce the benefits of competitive neutrality reforms.

Competitive neutrality is intended to apply to the commercial services of government that compete, or potentially compete, with the private sector. There is no universal definition of a government business activity. In Finland, in a January 2002 decision about the Finnish Road Administration, the Finnish Competition Authority found that "the concept of a business undertaking includes all the activities of the state, municipalities and other public entities that have been organised in accordance with commercial principles as companies or public undertakings or that can otherwise be regarded as being primarily commercial in character." (OECD 2003e, p.27)

In Australia, the Australian Government applies competitive neutrality to businesses that meet the following criteria:

1. there must be charging for goods or services (not necessarily to the final consumer);
2. there must be an actual or potential competitor (either in the private or public sector) i.e. purchasers are not restricted by law or policy from choosing alternative sources of supply; and

3. managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided. (Commonwealth of Australia 2004, p.9)

States in Australia use slightly different definitions³.

In general, a government business activity can be identified by a combination of characteristics:

- the government intends to charge for the service;
- the activity is commercial in character;
- there are no explicit government restrictions on profitability;
- there are actual or potential competitors.

The intention to charge for an activity is important but does not, in itself, guarantee that the business activity is commercial. Governments partially or fully of cost recover many activities that are non-commercial. For example, they charge for many regulatory functions, through fees on licenses. These are obviously not commercial activities. Similarly, visitors may be charged to enter a national park, although the government has no intention to manage the park as a commercial business activity.

Business activities, consistent with the definition of the Finnish Competition Authority, need to be organised in accordance with commercial principles and be commercial in character. This involves considering the agency's objectives and plans and determining whether the government intends the activity to have a social policy or commercial focus.

While the activities subject to competitive neutrality should be commercial they do not need to be profitable. It is important to distinguish between non-profit and unprofitable activities. The government may explicitly direct an agency to provide certain services at zero profit, or at a loss, in order to meet social objectives. Such services are non-profit activities and beyond the scope of competitive neutrality policies. On other occasions a government business may conduct what is essentially a commercial activity but, because of pricing or business management practices, the activity is unprofitable. Under a competitive neutrality framework, this is a competitive neutrality issue, and should be addressed through competitive neutrality reforms.

For competitive neutrality principles to be relevant there should be actual or potential competitors. If, for example, legislation prohibits competition, then competitive neutrality reforms would be ineffective. Other policies to improve the efficiency of these businesses would be more appropriate. Actual competition, however, is not necessary for there to be benefits from competitive neutrality reforms. The existing advantages of government ownership may be so great that private sector operators could not compete and hence make no effort to enter. Competition would only emerge after competitive neutrality policies have been applied.

On the other hand, the existence of competitors does not guarantee that an activity is a commercial business activity. A government department may produce research reports. It may even charge for those reports. Private sector agencies also undertake research and produce reports. This does not mean, however, that the government agency is engaged in a business activity. It may simply be recovering some of the costs of its government functions.

Finally, governments can either wholly or partially own business activities. Clearly commercial business activities that are wholly government owned would fall within the scope of a competitive neutrality framework. Whether governments that adopted a competitive neutrality framework should apply that framework to businesses that are partially government owned depends on the conditions of government ownership. If part ownership by the government results in the business having competitive advantages or disadvantages, compared with competing private sector activities, then there may be benefits in implementing competitive neutrality reforms.

As with all policies, competitive neutrality reforms will only benefit the community where the benefits of the reforms are greater than the costs. A relevant consideration in designing a competitive neutrality framework is whether the application of reform to individual government businesses should be subject to a cost benefits analysis. For large government businesses, where there is significant potential for competition, the benefits of competitive neutrality will usually outweigh the costs. The results are less clear for a small government business activity, where there is little potential for competition, and substantial changes to the administration of the business would be needed to implement competitive neutrality reforms.

Global benchmarks are one way of delineating thresholds for competitive neutrality reforms. For example, a limit could be set on the size of the business activity subject to a competitive neutrality framework.⁴ Global benchmarks, however, are arbitrary and cannot guarantee that competitive neutrality will be implemented appropriately. A more precise approach could be to have a presumption that competitive neutrality will be introduced, while exempting the agencies responsible for individual activities if they provide a thorough, objective cost benefit analysis that demonstrates that the costs of reform outweigh the benefits. Alternatively, for competitive neutrality regimes that include a complaints handling mechanism (see the later discussion on monitoring and enforcement), this mechanism could be used to monitor complaints against small government business activities. When assessing the complaint, the complaints handling body could analyse the case for extending the competitive neutrality obligations to cover these smaller business activities.

4.2 Reform obligations under a competitive neutrality framework

After identifying the government business activities that will be subject to reform, the next step is to remove any competitive advantages or disadvantages that these businesses may have. Box 5 provides some common examples.

Box 5 - Competitive advantages and disadvantages

Competitive advantages

- No requirement earn a rate of return
- No requirement to pay dividends
- Exemptions from various national, regional or local government taxes and charges
- Access to debt at rates below the market rate
- Exemptions from legislation or regulation that affect the same activity when carried out by a private sector business
- Access to various corporate overheads or publicly owned resources free of charge, or at rates below the actual cost of provision
- Clients from elsewhere in the public sector who are unable to access alternative suppliers of goods and services

- The opportunity to cross-subsidise commercial activities from budget-funded activities elsewhere within the agency
- the ability to disadvantage competitors because of a dual role in regulating the industry and providing competing commercial services

Competitive disadvantages

- Accountability and/or reporting requirement which have no equivalent for a private sector business supplying the same goods or services
- Requirement to pay excessive dividends
- Restrictions on financial structure and financial management which have no equivalent in the private sector
- Less flexibility or discretion in managing operations because of the policies and/or practices of public-sector supervisory agencies
- Requirement to pay higher levels of employer superannuation contributions or remuneration
- Requirement to provide non-commercial goods or services without compensation

As discussed above in section 3, for large businesses, governance reforms such as corporatisation and commercialisation can provide a model for neutralising competitive advantages and disadvantages. But this model is costly to implement and is likely to be inappropriate for small business activities, and it may not cover all of the government business's competitive advantages and disadvantages. An explicit and targeted competitive neutrality framework addresses this question by further developing the approaches to cost allocation and asset valuation methodologies, rate of return requirements, tax equivalent obligations and debt guarantee fees so that the reforms to government businesses, as far as possible, neutralise any remaining competitive advantages and disadvantages and the policies can be applied to a broader range of business activities, including those operating within larger government agencies. For small commercial business activities, cost reflective pricing (covering all costs, including competitive neutrality adjustments) may be the appropriate model for implementing competitive neutrality reforms.

A range of frameworks can be used to calculate cost reflective prices. For illustrative purposes one approach is outlined below. It involves calculating:

- the cost base for each activity;
- the competitively neutral cost benchmark; and
- the competitively neutral market price.

The cost base includes all of the direct, indirect and depreciation costs of the activity and accounts for all of the real resources used to produce the service. In order to assess these costs, agencies need to have in place adequate financial management structures that allow costs, including indirect costs to be allocated to particular activities. Accrual accounting, output based costing and asset valuation systems, for example, would generate the information needed to calculate the cost base of a government business activity. The allocation of costs is discussed in more detail later in this paper.

The competitively neutral cost benchmark includes the cost base plus an adjustment for any advantages or disadvantages the activity receives because of government ownership.

The competitively neutral cost benchmark

| |
|-----------------------------------|
| Competitive neutrality adjustment |
| • private sector rate of return |
| • taxes |
| • regulation and legislation |
| Depreciation |
| Allocated indirect costs |
| • HR and IT services ¹ |
| • administration |
| • finance costs |
| Direct costs |
| • labour |
| • materials |
| • services |

1. Human resources and information technology services

Source: South Australian Department of Treasury and Finance 2000, A Guide to the Implementation of Cost Effective Pricing: A part of competitive neutrality policy, p.11

Care should be taken not to assume that a difference in the regulatory, management, legal or financial arrangements facing the public sector would automatically result in a competitive disadvantage. It needs to be demonstrated that the constraints are externally imposed, exceed those facing the private sector and subsequently impose a cost on the government agency. In many cases it would be preferable to remove the cost disadvantage rather than trying to adjust prices.

Calculating the competitively neutral market price is related but separate to the cost calculation.

The competitively neutral cost benchmark provides a reference point for price setting decisions. The pricing of a good or service will depend on a number of factors, in addition to the competitively neutral cost estimated as above, including:

- what the market will bear (which may change over time);
- the level of competition between service providers;
- any technological advantage available to other suppliers of goods and other service providers; and
- market strategic price behaviours, such as the introduction of loss leaders or cross product subsidisation, subject to the prohibitions of certain behaviours under the Trade Practices Act [Commonwealth] 1974. (South Australian Department of Treasury and Finance 2000, p.11)

Pricing needs to cover the cost benchmark in the medium to long run. Under a competitive neutrality framework, if this is not possible the government should consider discontinuing the activity or subsidise it for social policy reasons. In some cases it may be legitimate to run a particular service a loss for a short period. To be consistent with competitive neutrality principles such losses should be temporary to achieve a valid commercial objective.

Competitive Neutrality Calculations and Adjustments

Regardless of which model for achieving competitive neutrality is chosen, corporatisation, commercialisation or cost reflective pricing, the government and its businesses would need to grapple with calculating the competitive advantages and disadvantages facing government businesses and making adjustments to neutralise those advantages and disadvantages.

Section 3 on governance issues discussed providing government businesses with a commercial focus and adequate arrangements to monitor and assess the performance of the business, and separating regulation from service provision. These reforms are important to achieving competitive neutrality. This section discusses some of the other key issues facing governments that wish to implement a competitive neutrality framework:

- allocating costs between activities to ensure adequate levels of cost recovery and avoid cross-subsidies;
- setting an appropriate rate of return;
- ensuring government business activities account for all government taxes and charges;
- adjusting the cost of borrowing to reflect a commercial interest rate;
- ensuring all input prices are set appropriately;
- subjecting government businesses to the same regulation as similar private sector businesses;
- allowing for the subsidisation of activities targeted at achieving social policy objectives.

Cost allocation

Cost allocation is important to achieving competitive neutrality because it ensures that businesses have adequate information to allow them to price their services, those prices reflect the costs of the services, and there are no cross-subsidies between different activities undertaken by the agency. For government entities that provide both commercial services and public services the approach to cost allocation is both very important and complex. Governments are dealing with cost allocation issues in the context of other policies, not just competitive neutrality. The Danish Competition Authority administers provisions that look at the allocation of costs between activities, to assess whether subsidisation is occurring in a way that would distort competition.

The Danish Competition Authority and the Danish Competition Council do not wish to impose upon the county authorities and municipalities etc. unnecessary administrative burdens. Thus, specific accounting standards etc. are not required. It is important that it is rendered probable that the earnings in connection with the sale cover all the relevant costs when a business activity is operated under the auspices of the public sector. "All the relevant costs" cover direct costs of pay, materials etc., however, it also covers the indirect costs, i.e. expenses for return on and depreciation of machines, equipment, land, goodwill etc. and a well-founded share of the indirect costs such as administration and rent. How the indirect costs are dispersed may vary from case to case, however, the dispersion must be well founded.

Thus, it must be clearly shown which costs have been defrayed in connection with the presentation of the service and how the costs are included in the price of the service. When all

costs are included in the price, distortion of competition will as a principal rule not occur. (OECD 2001, p.97)

The Canadian Government prepared a best practice guide on the *Public Sector Comparator*, which is used by government officials to assess whether a private sector proposal offers value for money compared with public sector provision. That guide discusses a range of costing issues. (Industry Canada 2002)

Calculating the resources used to produce a particular service involves identifying all of the costs incurred by the government entity to undertake that activity, including direct costs, indirect costs and depreciation.

- **Direct costs** are those that can directly and unequivocally be attributed to an activity. They include labour (including on-costs) and materials used to produce the good or service. (CCNCO1998a, p.8)
- **Indirect costs** are those that are not directly attributable to an activity and are often referred to as overheads. They can include 'corporate services' costs such as the chief executive officer's salary costs, financial services, human resources, records management and information technology. (CCNCO1998a, p.8)
- **Depreciation** is an expense that measures the consumption of an asset (in terms of its value) over time and according to the intensiveness of its use. (South Australian Department of Treasury and Finance 2000, p.32)

As long as the accounting systems used are sufficiently disaggregated the direct costs are relatively easy to identify.

Allocating indirect costs can be much more complex. When a government organisation has a range of functions, rigorous cost allocation methods are needed to avoid cross-subsidies between commercial and non-commercial activities. The underlying objectives of competitive neutrality policies are economic efficiency and fairness. Hence, under a competitive neutrality framework the chosen cost allocation method should promote economic efficiency and ensure that all of the costs incurred by a government business activity are attributed to that activity. Some possible methods of allocating costs are outlined in attachment 3.

There are also various methods for calculating depreciation. Analysing the benefits and costs of these methodologies is a detailed, complex task. Such an analysis is beyond the scope of this paper. Governments implementing competitive neutrality would need to provide advice to agencies on the expected methodology or the parameters for choosing an appropriate methodology.

Another critical factor for competitive neutrality is obtaining appropriate asset valuations and allocating assets between the various activities of the government agency. The principles for allocating indirect costs discussed in attachment 3 also apply to the allocation of capital costs. Again, a full assessment of the merits of various asset valuation methodologies is beyond the scope of this paper⁵.

Rate of return

Private sector organisations often cite ‘no requirement to generate a rate of return’ as a key advantage for public sector businesses. Even if government policy states that businesses should generate appropriate returns there are often few sanctions if the business fails to meet these targets. An appropriate rate of return would be equivalent to that earned by similar private sector businesses. That is, the target should reflect the long term government bond rate (the risk free rate) plus an appropriate margin for risk.

Many governments already require some of their businesses to earn an appropriate rate of return. One example is New Zealand. In New Zealand the target rate of return is set using the weighted average cost of capital (WACC), taking into account the required rates of return attached to the different components of the company’s capital structure (CCMAU 2002, section 6). Attachment 5 outlines New Zealand’s approach to calculating the WACC in the electricity industry.

In applying its competitive neutrality framework the Australian Government requires managers of businesses subject to competitive neutrality to price their services so that they earn a commercial rate of return on their business activities overall, over a reasonable period of time. (Commonwealth of Australia 2004. p.29)

Under a competitive neutrality framework governments should determine the appropriate rates of return for their different business activities. The methods that can be used to calculate such returns vary considerably in their complexity and level of precision. Calculating the WACC, for example, can be complex, as it requires estimation of variables such as the required rate of return on debt and equity and the market values of assets, debt and equity (see attachment 5). It uses the cost of capital as the hurdle rate the business must achieve and is based on the presumption that a financially viable business must earn a return that is above its cost of capital. Because of the complexity of calculating the WACC it is most appropriate for large government business activities, particularly if there are well-established private sector competitors so that benchmark data on the cost of equity is available.

If calculating the WACC is not feasible, but managers are able to estimate the business’s market risk⁶, a target rate of return set using a broad-banding approach may be appropriate. “Broad-banding is based on typical WACCs for businesses with high, medium and low levels of market risk” (Commonwealth of Australia 2004, p.32). The broad-banded rate of return target has two components. A base cost of capital set, at say, the long term bond rate, and a premium for each level of market risk. For example, the Australian Government Competitive Neutrality Complaints Office recommended the following as reasonable rates of return for government business activities in Australia.

Typical rate of return targets for low, medium and high risk businesses

| <i>Market risk of the business</i> | <i>Nominal pre-tax target at a long term bond rate of 5%</i> | <i>Nominal pre-tax target expressed as a premium over the long term bond rate</i> |
|------------------------------------|--|---|
| Low Risk | 8 | Bond plus 3 percentage points |
| Medium (average) Risk | 10 | Bond plus 5 percentage points |
| High Risk | 12 | Bond plus 7 percentage points |

Source: Commonwealth Competitive Neutrality Complaints Office 1998b, Rate of Return Issues, CCNCO Research Paper, Productivity Commission, p.11

A uniform rate of return is the simplest method of establishing a rate of return target. Under this method government businesses generate a set level of return across all their assets. This return is based on a typical WACC calculation for agencies with average market risk. A uniform rate of return does not

recognise that different businesses have different market risks. Therefore, it does not take into account that investors would expect higher returns from risky businesses and lower returns from less risky businesses.

To implement a competitive neutrality framework governments should subsequently measure the actual rate of return achieved on business activities, so performance can be compared with the target.

Dividends

Like all company owners, the government is entitled to require its businesses to pay dividends. The Finnish Government, for example, sees dividend payments as an important part of its policy on State ownership. (Ministry of Trade and Industry (Finland) 2004):

The dividend policy of companies is essential for the State. The State values high and predictable dividend policy that takes the owner's interests into account and that is based on a comparable and even flow of dividends in the sector. The State's dividend expectations are annually evaluated so that the company's self-sufficiency needs and development potential are taken into account. (Ministry of Trade and Industry (Finland) 2004. p.8)

Some governments believe that the payment of dividends is important to dispel any misconceptions that the cost of government equity finance is zero. (Queensland Treasury 1994, p.39)

Competitive neutrality issues can arise if a government does not take a commercial approach to setting dividend targets. In New Zealand the shareholding Minister and the board of a crown company agree annually on the levels of dividends, set according to commercial criteria.

The level of estimated dividends is driven by the desired capital structure, the company's profitability and the level of future capital expenditure as outlined in the business plan and SCI/SOI [Statement of Corporate Intent/Statement of Intent]. (CCMAU 2002, section 6)

In many cases, however, governments are not rigorous in their process for setting the level of the dividends they require. A paper prepared for Australia's National Competition Council on dividend payments by Australian water authorities discusses the risks associated with inappropriate levels of dividend payments. These risks arise if dividend payments are either too low or too high. (NECG 2002)

If dividend payments are too low government business activities may have an advantage over their private sector competitors because they face a lower cost of equity funding. Dividend payments that are set too high can disadvantage government business activities. Dividends in excess of 100 per cent of profit, over an extended period, can put the financial viability of the business at risk. In the short term high dividends may be used by some governments to restructure the capital base of their businesses, reducing the proportion of equity relative to debt. While adopting a more commercial mix of debt and equity finance may be appropriate for government businesses, achieving this through dividend policy lacks transparency and does not provide clear goals for management.

One approach to ensuring that dividends are set consistent with a competitive neutrality framework is for governments to base their dividend policy on the same requirements as apply to private sector companies. Basing government dividend policies on the framework required by corporations' law would clearly ensure that government businesses face dividend arrangements that are consistent with those required in the private sector.

Taxation

Private sector businesses are often critical that their public sector competitors have an unfair advantage because they are not required to pay government taxes and charges. Increasingly, governments do ensure that their businesses face the same tax regime as the private sector.

In the UK the application of Value Added Tax (VAT) is based on the principle that public sector agencies should be subject to VAT in the same way as the private sector.

...VAT can be a complex area within the public sector. The biggest complexity is in the differentiation between business and non-business supplies. ...

Most activities of public bodies are carried out under a statutory duty and are not therefore "businesses" for VAT purposes — they are outside the scope of the tax. Therefore, provisions have been put in place to avoid distortion of competition with private business. (National Audit Office 2002, p.4)

Under a competitive neutrality framework government businesses should include in their cost base the cost of all national, regional and local government taxes, fees and charges (including any taxes on inputs such as labour). In applying competitive neutrality governments could consider three approaches to dealing with taxation.

1. Requiring government businesses to pay tax in the same way as equivalent private sector businesses. This approach is likely to be appropriate for government businesses that are structured as separate legal entities.
2. Establishing a tax equivalent regime where government businesses calculate their tax liability and make a specific payment into general revenue. When it is not possible to bring the government business under general tax legislation, a tax equivalent regime could be used. The details of any tax equivalent regime are likely to vary between countries. In Australia the Australian Government requires its significant business activities, which have a tax exemption, to make tax equivalent payments to the Official Public Account.

It may be very time consuming and expensive to set up, monitor and comply with an exact copy of the current income tax regime. For CN [competitive neutrality] purposes, it is accepted that full compliance reporting will not be required. In other words, you do not have to complete and lodge income tax returns with the Australian Taxation Office, or file returns or lodge documents with state revenue offices. However, you must still undertake the necessary calculations and remit TER [tax equivalent regime] payments to the OPA [official public account] in accordance with any payment schedule that private competitors must meet. The guiding principle for TERs is that the cost of calculating the liabilities should be kept in proportion to the amounts involved. (Commonwealth of Australia 2004, p.19)

1. Requiring government businesses to make tax neutrality adjustments to their prices to ensure that all prices in competitive markets take into account the cost of taxation. Tax neutrality adjustments involve calculating the tax liability in a comparable manner to the private sector but no actual payments are made. Instead the prices of the government services are adjusted to reflect the increased cost of taxation. This approach is likely to be most appropriate for small business activities, where the cost of establishing a full tax equivalent regime would outweigh the benefits.

Debt charges

Under a competitive neutrality framework all government businesses should meet the interest cost of borrowing. Government businesses will often be able to borrow funds at a lower cost than private sector businesses. Even if the government does not guarantee explicitly that they will meet any outstanding debts if the business fails, there is a perception among lending institutions that government businesses have a low risk of defaulting. As a result, when implementing competitive neutrality, government businesses, with significant amounts of debt finance, should adjust their costs to reflect the interest rate advantages they have over the private sector.

These adjustments could be made by adjusting the cost of debt provided through the government budget, to reflect the market cost of borrowing, or requiring businesses to pay a debt neutrality charge to the government to reflect the difference in the actual cost of borrowing and the cost of borrowing for a private entity under the same circumstances. The size of the debt guarantee fee will vary over time, with changes in the debt market.

Input pricing

Government businesses can receive a considerable advantage if they do not pay for all their inputs on the same basis as the private sector. As noted in the section on cost allocation, this involves meeting the cost of corporate overheads that are attributable to the business activity.

Another important issue for some government business activities is the price charged for natural resources, such as forest assets and water, compared with the price a private sector entity would need to pay. It can, however, be complex to value these types of resources. In a recent research report, Australia's Productivity Commission analysed the impact of log pricing policies on competitive neutrality in forestry (see box 6).

Box 6 – Case Study competitive neutrality in forestry

Under pricing by State forestry agencies can affect the balance between public and private sector wood production. Under pricing also affects the return the community achieves on its forest assets and may adversely influence agency investment and harvesting decisions.

A priori, the application of competitive neutrality would be expected to reduce the incidence of log under pricing, because it requires forest agencies to act more commercially by charging prices that cover all the costs of growing and managing the forest, including a commercially acceptable return to the land and timber assets. This should help ensure that the full market value is realised for logs sold by State forestry agencies. However, in some circumstances, it is possible that the cost of growing and managing the forest will be lower than the full market value (i.e. the realisable price) of logs. In other words, competitive neutrality encompasses a 'floor price' concept and will not identify situations when the potential price achievable by forestry agencies exceeds that realised in practice.

The likelihood of competitive neutrality monitoring detecting under pricing is also reduced by the degree of circularity that exists between log prices and asset values. This reflects two factors. First, if 'under priced' logs are used to determine forest asset values, the cost base will be understated, as will be the price required to cover all relevant forestry costs. Second, any understatement of asset values will, in turn, result in reported rates of return being overstated. The effectiveness of rate of return monitoring is also inhibited by a number of other factors, such as year-on-year variability in log sales volumes and fluctuations in market conditions.

These difficulties in monitoring the performance of forestry agencies suggest that, in assessing compliance with competitive neutrality, greater reliance should be placed on using residual values to determine the market value of logs, rather than prices actually realised by forestry agencies. Such values should also be used to estimate asset values. Where available, prices paid for harvesting rights could also be used to ascertain whether logs are being sold for their full market value.

Source: Commonwealth Competitive Neutrality Complaints Office (CCNCO) 2001a Competitive Neutrality in Forestry, CCNCO Research Paper, Productivity Commission, pp.39-40

Regulatory neutrality

The regulatory environment facing government business activities can differ from the private sector in many ways. Under a competitive neutrality framework both government and private sector businesses should, as far as possible, comply with the same regulations, such as planning, building and environmental laws, licensing and prudential requirements, and trade practices laws.

If it is not possible to equalise the regulatory environment the government may need to consider other ways of ensuring that the remaining differences do not affect the government business's ability to compete with the private sector. This could involve businesses making an equivalent payment into government revenue to adjust for regulatory advantages, or calculating the benefits of such advantages and adjusting the agency's pricing strategy to offset those benefits.

Social objectives or community service obligations

Governments often direct their businesses to undertake non-commercial or non-profit activities, in order to meet social policy objectives. Such directions can be accommodated under a competitive neutrality framework, but governments should review the method of providing and funding social policy objectives.

Under a competitive neutrality framework, governments considering subsidising services to achieve social policy objectives should, at a minimum:

- clearly define the social policy objectives and the services needed to achieve those objectives; and
- calculate the cost of those services and provide explicit funding to the agency responsible to compensate for the loss involved in delivering the social policy objectives.

This is consistent with the European Commission rules that allow state aid to be authorised by the Commission under Article 86(2) of the EC Treaty if:

- *the contents of the service of general economic interest is clearly defined;*
- *the Member State has entrusted a company with the provision of the service;*
- *the aid is proportional to the objective and thus limited to the amount necessary for the provision of the service, so that there is no over-compensation. It should for example be avoided that part of the aid paid to a company to compensate for a service of general economic interest is used by the company for other, competitive activities (cross-subsidisation). In these circumstances, the principle of proportionality would be respected.* (OECD 2001, p.162)

Accurately defining the social policy objectives and the activities that would deliver those objectives is important under competitive neutrality for transparency and to avoid confusion between commercial and subsidised activities. Under a competitive neutrality framework it is the government's responsibility to

define these objectives and activities, not the agency's. Only when this responsibility rests with the government, is it possible to guarantee that the agency's discretion in subsidising services could not be used to undermine the objectives of competitive neutrality.

The loss from subsidised activities, directed at achieving social objectives, should also be clearly costed and directly funded. Several countries already recognise the need to explicitly fund social objectives. For instance in Finland:

Companies operating on market terms always function with normal objectives of profitability and competitiveness. If one owner sets other targets for a State-owned company operating on market terms, all owners must approve this, and the additional costs incurred to the company must be compensated based on decisions made in advance. The State must, however, then act in such a manner that does not distort competition nor breach the obligations derived from Finland's EU membership. (Ministry of Trade and Industry (Finland) 2004, p.4)

Clear and accurate costing of the activities directed at achieving social policy objectives is important. If the compensation for these activities is too low then the government business activity will have a competitive disadvantage in meeting its other commercial targets. If compensation is too high the government business will have a competitive advantage over private businesses.

In most cases, accurately defining and explicitly funding activities directed at achieving social policy objectives will resolve most of the related competitive neutrality problems. But in some instances private sector competitors may still argue that the government business is charged with delivering the social objectives has a competitive advantage. This can occur if the social objective is a large part of the business's charter and it supports the business's capital base. For example, a postal authority that is subsidised to provide a universal delivery network or a transport provider that obtains a significant market share from subsidised services to disadvantaged groups. If funding for the social objective guarantees that these businesses retain a large customer base, then they may be perceived as having a competitive advantage. Governments that decide to address this issue could consider tendering for the delivery of the social objectives, so that both government and private providers can bid for the right to undertake the subsidised activity.

The Italian competition authority suggested that competitive tendering would help resolve complaints raised about subsidies in maritime services.

...state funds disbursed in order to ensure public interest services should be made available to anyone willing and able to provide such services. Their allocation should be made on the basis of companies bidding, through transparent and non-discriminatory procedures, as recommended by the European Commission guidelines with respect to state aids for maritime transport. (OECD 2001, p.132)

If the tender is competitive it is likely to improve the efficiency of the service, as competition would ensure that the successful bidder offers the best service at the lowest price. If the tender is not competitive the costs could potentially rise. This problem was illustrated in the tender for regional air services in Norway. When these services were first put to tender the subsidy paid by the government fell, even though the monopoly service provider won all of the tenders. The second tender process, however, led to a substantial increase in the subsidies paid by government for the services. Allegedly the higher prices were on the routes where the incumbent service provider knew there would be no competition. (OECD 2003b, p.21)

Directly funding specified government activities and allowing competition to operate freely would achieve most, but not all, of the social policy objectives currently delivered through government businesses. Some governments' social objectives involve providing services at a uniform price to all customers. It is more difficult to reconcile this objective with competitive neutrality objectives. If the private sector is allowed to compete they will offer lower prices to low cost customers (cherry picking) and leave the government provider with the high cost customers. This undermines the objective of uniformity. In these circumstances the government should consider whether the objective of uniformity is appropriate, or whether the social objectives can be achieved by guaranteeing a maximum affordable price and funding one provider to ensure that no customer pays more than the maximum price. This social obligation could be funded using various mechanisms, for example, a direct government subsidy, or a levy on service providers not required to provide the loss making services. If the approach of a maximum affordable price is not appropriate, and the government wants to achieve a uniform price, such services may need to be quarantined from competition, and not subject to competitive neutrality.

4.3 Monitoring and enforcement

As noted previously, explicit competitive neutrality frameworks include both *ex ante* elements (discussed in the preceding section), that reform the operation of government businesses to neutralise any competitive advantages or disadvantages, and *ex post* elements, that involve monitoring and adjusting the approach to reform to address ongoing competitive neutrality problems. This section looks briefly at possible approaches to monitoring and enforcement. Without ongoing monitoring and enforcement competitive neutrality reforms would be less effective. The best approach, however, will vary between countries depending on: their existing institutions and the current roles of those institutions; the extent of the competitive neutrality reforms being implemented; and the types of business activities that are subject to those reforms. Monitoring and enforcement are also more effective when accompanied by education and information programs for the businesses applying competitive neutrality reforms and competing private sector businesses.

Monitoring involves a formal process for reporting on the progress and success of competitive neutrality reforms. While monitoring alone does not compel organisations to implement the reforms, the added transparency can provide incentives that encourage reform implementation. This transparency is enhanced if the results of the monitoring are made public. The information obtained through monitoring can also indicate areas where amending the approach to competitive neutrality would improve its effectiveness. Similarly, information gained through monitoring can improve the effectiveness of enforcement mechanisms.

Monitoring can be conducted in a variety of ways:

- a regulator could be given responsibility for researching and reporting on the implementation and success of competitive neutrality policies;
- government departments or Ministers could be responsible for regularly reporting on the implementation of competitive neutrality in business activities within their area of responsibility;
- the businesses could be required to report on their progress in implementing competitive neutrality reforms;
- periodic reports could be commissioned to review the implementation and success of competitive neutrality policy.

Enforcement involves mechanisms that impose obligations on government businesses to implement competitive neutrality reforms. Again a variety of mechanisms are available with some approaches more

light handed than others. The most appropriate approach will depend on the circumstances of the country involved.

- Most governments have existing mechanisms under which agencies are accountable for their compliance with government policies. These mechanisms could be extended to cover competitive neutrality obligations.
- Legislation could be used to specify how government business activities must be conducted when a government entity is competing with the private sector.
- Administrative mechanisms could require government businesses to comply with their competitive neutrality obligations. The information from ongoing monitoring would help identify where action is needed.
- A formal complaints handling mechanism could be established. The complaints handling body would investigate claims from competing businesses that a government business activity is not complying with its competitive neutrality obligations. If the complaint is justified the government business could be required to take remedial action.

Complaints handling mechanisms

It is possible to implement competitive neutrality without setting up a complaints handling process. Other mechanisms for monitoring and enforcement can be used. Australia, however, uses complaints handling mechanisms as a key element of its competitive neutrality monitoring and enforcement program. The risk of an independent investigation of a complaint can encouraged government businesses to implement competitive neutrality reforms. Effective complaints handling mechanisms also provide a rapid low cost way of dealing with private sector concerns about the implementation of the competitive neutrality framework.

Because Australia is the only country with operational competitive neutrality complaints handling mechanisms this section focuses on the Australian experience to provide real life examples of this approach to handling competitive neutrality complaints.

In Australia, complaints handling units have been established at all levels of government, Commonwealth, State and Territory and local, to deal with complaints by private sector businesses that government businesses are not complying with their competitive neutrality obligations. The systems for handling complaints differ between the levels of government and the different States and Territories (see box 7).

Box 7 – Complaints mechanisms in Australia

In those jurisdictions where complaints can be made to an independent body, that body usually has been established to promote competition, pricing and market conduct outcomes, especially with regard to government entities. Examples of such bodies are New South Wales' Independent Pricing and Regulatory Tribunal, the Queensland Competition Authority, South Australia's Competition Commissioner, Tasmania's Government Prices Oversight Commission, and the ACT's Independent Competition and Regulatory Commission... The Commonwealth complaints unit is the Commonwealth Competitive Neutrality Complaints Office (CCNCO), which is located within the Productivity Commission.

In Victoria, the Competitive Neutrality Complaints Unit (located in Treasury) considers all complaints, although the unit encourages parties to seek to resolve the differences themselves in the first instance. In Western Australia, the Expenditure Review Committee of Cabinet handles complaints with administrative support from the Competitive Neutrality Complaints Secretariat. In the Northern Territory, the Treasury handles complaints.

Some governments allow complaints to be lodged only against government entities that are larger than specified thresholds, and thus directly subject to competitive neutrality principles. Others allow complaints to be made against any government business activity where there is an anti-competitive effect. In most States, complaints against local government businesses must be made in the first instance to the local government, and then to the complaints body of that State.

Source: National Competition Council 2002, Assessment of governments' progress in implementing the National Competition Policy and related reforms, Volume one: Assessment, August 2002, p.2.24

These complaints handling mechanisms have been active and considered a variety of complaints in recent years. A few examples are provided below.

The Victorian State Government investigated a complaint by a private livestock sale yard that the local government owned livestock exchange was advantaged because it received government funding that allowed it to set commercial yard fees below full commercial cost. It was found that the local government had not established a competitively neutral price scheme. In response the local government reviewed its cost allocations and pricing structure and now applies full cost reflective pricing. (Department of Treasury and Finance Competitive Neutrality Unit undated)

The Australian Government's Competitive Neutrality Complaints Office investigated a complaint against the Government's employment Service, OzJobs. The complaint alleged that the Commonwealth Government was subsidising OzJobs and that OzJobs was not paying payroll taxes on a comparable basis to private sector competitors providing job placement services. Discussions with the complainant also identified concerns that OzJobs may not be paying comparable insurance premiums (including public liability and workers compensation coverage). After investigating the complaint the complaints office found that OzJobs was meeting all of its obligations under competitive neutrality policy and no action was required with respect to the competitive neutrality complaint lodged against it. (CCNCO 2002)

The Australian Government's Complaints Office also investigated a complaint that the Bureau of Meteorology had a competitive advantage in providing meteorological services to aviation, because the administration of the services by the Civil Aviation Safety Authority prohibited other operators from supplying competing services. The complaints office found that there were benefits in opening this market to competition. The Australian Government was considering models for increased competition, such as opening some of the Bureau's services to competitive tender. Consequently, the complaints office recommended "The government should complete its consideration of the options for introducing competition in the provision of meteorological services to aviation as soon as possible. If no other model is likely to deliver greater net benefits to the community than competitive provision of value added services, this approach should be implemented forthwith." (CCNCO 2001b, p.16)

In Tasmania the Government Prices Oversight Commission received a competitive neutrality complaint about Hobart City Council's off-street parking business. The business had not been formally endorsed as a significant business activity, and the matter was referred to the Tasmanian Department of Treasury and Finance. The department discussed the matter with the Hobart City Council, which agreed to separate the financial reporting of its on-street and off-street parking businesses. The Tasmanian commission advised that this would meet the Hobart council's competitive neutrality obligations. (NCC 2002, p.2.27)

The National Competition Council has been monitoring the implementation of competitive neutrality in Australia since its introduction in 1995. A staff paper prepared within the Council suggested the following best practice guidelines for competitive neutrality complaints handling mechanisms:

- *any party can make complaints;*
- *complaints are heard by a body that is removed from the businesses that could be the subject of complaint, and their parent agencies or departments. There is merit in this body being experienced in dealing with pricing, market conduct and other competition issues. The complainant is not charged fees;*
- *complainants are required to approach initially the government business about which they are complaining. If they cannot gain satisfaction from the business, they may approach the jurisdiction's complaints body;*
- *all government businesses are potentially the subject of complaint, not just those classified as GBEs [Government Business Enterprises] or SBAs [Significant Business Activities];.*
- *a complaints-handling process provides for the reviewing body to request information from all affected parties (while respecting commercially confidential information) and to make public recommendations (and provide reasons) to the relevant portfolio Minister (within a defined period), who should decide on a course of action within a set period and make the decisions public.*

Some people may be prepared to make a competitive neutrality complaint only if they remain anonymous. This would imply that they would not wish to approach the government business about which they are complaining. Governments could consider allowing such complainants the option of approaching their complaints bodies in the first instance. (Trembath 2002, p.38)

All competitive neutrality complaints handling units in Australia are small groups of people working within larger agencies. Each group deals with inquiries and a small number of formal complaints. In 2002-03 the New South Wales, Queensland, South Australia and Australian Capital Territory complaints handling units did not receive any formal complaints. Given the small and decreasing number of formal investigations (as a compliance culture has taken hold) the Australian experience suggests that the cost of setting up a separate competitive neutrality complaints handling agency is not justified. The most cost effective approach is to charge an existing agency with the responsibility for dealing with competitive neutrality complaints.

4.4 *The effectiveness of competitive neutrality reforms in Australia*

Australia commenced implementing an explicit competitive neutrality framework in 1995. Nine years on, it is useful to consider whether other countries can draw lessons from the Australian experience.

The particular approach to implementing competitive neutrality reform in Australia is, in a large part, the result of Australia's government structure. The Australian Government does not have the power to require State Governments to reform their business activities. So an intergovernmental agreement was used to establish the reform framework. This agreement leaves individual governments with considerable flexibility in how they implement reform in their jurisdiction.

Overall, the implementation of competitive neutrality reforms in Australia is considered a success. Significant government businesses in all jurisdictions apply competitive neutrality principles and all governments have mechanisms for dealing with competitive neutrality complaints (NCC 2003a, p.69). It is possible to identify successful private competitors in many markets. The small number of competitive neutrality complaints, and the investigation of those complaints, reveals that most government business entities have implemented the competitive neutrality framework and the remaining issues centre on relatively small business activities.

There are still lessons that can be drawn from the Australian experience and some areas where the effectiveness of the Australian reform framework could be improved. There are several small issues, such as the application of competitive neutrality principles in industries like forestry, and the role of the Minister in deciding whether an independent body should hear a competitive neutrality complaint, that have been identified as ongoing issues in Australia (NCC 2003b pp.xxii-xxiii). This section, however, focuses on two broader issues:

- promoting consistency in the application of reforms across jurisdictions; and
- achieving cultural change and commitment by all agencies and levels of government.

Consistency in the application of reforms

Because competitive neutrality reform in Australia has been introduced through an intergovernmental agreement that gives jurisdictions considerable flexibility in the way reforms are implemented, the application of the competitive neutrality framework varies throughout Australia. States have different definitions of what is a government business activity, their approach to corporatisation and commercialisation varies, and there are substantial differences in the mechanisms for addressing competitive neutrality complaints.

The Australian Government does not have the power to require a uniform approach to competitive neutrality reforms. Hence, the differences between the States and between the large number of local governments also implementing reform, are confusing for private sector competitors. It is difficult for private businesses to clearly identify the competitive neutrality obligations of their public sector competitors, or how to make a competitive neutrality complaint if they believe that these obligations are not being met. The problems can be even greater for businesses that move between jurisdictions or operate in more than one State or Territory. Such businesses must develop an understanding of multiple competitive neutrality regimes.

The difficulties experienced in Australia illustrate the benefits from ensuring that, as far as possible, competitive neutrality regimes are consistent across levels of government. When private sector entities operate across jurisdictional boundaries, there are also benefits in having competitive neutrality frameworks that are consistent between jurisdictions.

Cultural change and commitment to reform implementation

Because of the complexity and diversity of competitive neutrality reforms their effective implementation requires commitment, and often cultural change, among public sector businesses, the agencies responsible for those businesses, policy agencies and politicians at all levels of government, national, regional and local.

In Australia, there has been a considerable cultural shift among the managers of government business activities, and at all levels of government, particularly local government. However, this commitment has not been universal and a few problems remain.

Not all businesses implemented reforms quickly and fully. Sometimes this was because business managers did not fully understand their competitive neutrality obligations. For example, they had difficulty identifying which activities should be subject to competitive neutrality reforms. Some smaller businesses may not have had the expertise to implement competitive neutrality reforms, such as allocating costs or calculating debt neutrality payments.

When competitive neutrality reforms were first implemented, some local governments misrepresented the competitive neutrality requirements and argued that other policies they were implementing, such as competitive tendering, were a requirement of competitive neutrality.

Governments are not always vigilant in ensuring that their business activities fully implement competitive neutrality reforms. Sometime they are slow to respond to a competitive neutrality complaint or to take remedial action after the complaints handling body has identified a deficiency in the approach to competitive neutrality.

Australian governments have various tools to increase the commitment to reform and generate cultural change:

- the *Competition Principles Agreement* and the *Agreement to Implement the National Competition Policy and Related Reforms* (NCC 1998) outline a commitment, at the highest political level, to implementing competitive neutrality reforms. In signing these agreements the Heads of Australian, State and Territory Governments committed to the principles underlying the reform program. The State and the Northern Territory Governments signed the agreements on behalf of local governments;
- benchmarking compares the application of competitive neutrality across different governments, and encourages them to implement reform. The National Competition Council is responsible for assessing whether all governments have implemented National Competition Policy, which includes competitive neutrality reforms. It produces an annual report that assesses the progress of all States and Territories and the Australian Government;
- the Australian Government uses financial incentives to encourage reform. It agreed to make incentive payments to the State and Territory Governments that fully implemented competition policy reforms, including competitive neutrality reforms (NCC 2003b, p.1.4). Some of the States also agreed to pass on incentive payments to local government authorities that implemented the reforms;
- education programs have been used to inform government agencies, at all levels of government, of their competitive neutrality obligations and how to meet those responsibilities. The Queensland Local Government Association in conjunction with the Queensland State Government implemented a comprehensive program to facilitate the adoption of competitive neutrality reforms by local governments in Queensland. The Business Management Assistance Program briefed councils, conducted in-house assessments, published simple guides to aid councils to comply with the requirements, trained council staff, and provided ongoing mentoring and technical advice⁷. The program was a success. Of the 107 local government authorities involved in the program 214 staff from 70 councils participated in training and 96 councils had an in-house assessment (Department of Local Government and Planning 2003, p.3). Prior to the

Business Management Assistance Program the level of compliance with competitive neutrality reforms among business activities in medium to small local governments was low. As a direct result of this assistance program the level of compliance increased significantly;

- in some cases State Governments have the power to direct local governments to adopt competitive neutrality policies. The Victorian State Government, for example, requires its local governments to adopt competitive neutrality principles and report on compliance. (Department of Treasury and Finance 2000, p.11);
- establishing complaints handling mechanisms, with compulsory reporting of complaints, has highlighted problems in the implementation of competitive neutrality principles and put some pressure on governments to redress those problems.

Despite a few remaining problems, all of the tools listed above assisted in generating commitment to reform and cultural change. The Australian experience illustrates that achieving cultural change is a slow and difficult process, but with a clear, well defined policy framework and incentives to implement reform, substantial changes can be achieved.

5. In Summary

Many governments have recognised the benefits of promoting efficient and fair competition between the public and private sector entities. Competitive neutrality problems arise when this competition is not equal because the government business activity has competitive advantages or disadvantages due to its government ownership. Improving competitive neutrality promotes efficiency and fairness. It is possible to identify many benefits that would flow from improving the environment for competition between the public and private sector.

- government businesses strive to be more efficient and innovative because they know their ability to win customers rests solely on their business performance. Competitive neutrality puts pressure on government business activities to reduce any past cost padding. Clear business objectives reduce conflicts of interest and increase the effectiveness of management;
- there is greater transparency in the management of government businesses and more opportunities to benchmark government businesses against similar private sector activities;
- private sector businesses will be more active in markets when they know that the public sector competitors do not have any artificial cost advantages;
- customers will benefit from lower prices and better quality services, driven by more direct competition between the public and private sectors;
- resource allocation will improve because those businesses that are most efficient, and deliver the services customers want, will be the most successful;
- governments will benefit from the economic growth and greater public sector efficiency that results from increased competition and improved resource allocation.

The policy responses governments use to improve the environment for public-private sector competition include: the application of competition law; various instruments of public sector corporate governance such as corporatisation and commercialisation; and explicit and targeted competitive neutrality frameworks, which set up mechanisms to ensure that competition is neutral. While, competition laws and

governance reforms can make a significant contribution to achieving competitive neutrality between competing public and private sector businesses, they usually only apply to larger business activities and may not cover all competitive neutrality issues. An explicit, targeted competitive neutrality framework draws together those components of competition laws and governance reforms that redress competitive neutrality problems and extends the reform program to cover smaller government business activities and any remaining competitive advantages or disadvantages.

Explicit competitive neutrality frameworks, however, are detailed and complex. While the potential advantages are large, considerable commitment, and often cultural change, is needed among public sector businesses, the agencies responsible for those businesses, policy agencies and politicians at all levels of government, national, regional and local. Without this commitment the benefits of the reforms would not be realised.

NOTES

1. Services of an economic nature, the provision of which can be considered to be in the general interest. The Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of the activities concerned. The European Commission's task is then to ensure that there are no manifest errors where Member States entrust undertakings to perform services of general economic interest under Article 86(2) of the EC Treaty. (European Commission 2002, p.42)
2. Attachment 2 is a list of these policy statements and other Australian guidelines on the implementation of competitive neutrality reforms. It provides information on the websites where these documents are available.
3. A full list of definitions for government business activities used by Australian Governments is in Trembath 2002, pp.9-12.
4. In Australia, for example, the Queensland government does not automatically introduce competitive neutrality reforms to business activities with annual expenditure less than \$A10 million. (Trembath 2002, p.10)
5. Attachment 4 lists some common asset valuation methodologies and outlines the framework recommended by the Australian Steering Committee on National Performance Monitoring of Government Trading Enterprises, to encourage consistency in the valuation of non-current assets for government trading enterprises in Australia.
6. Market risk is the variation in the business's return compared with the market overall.
7. Material prepared for the Business Management Assistance Program is available at http://www.orionco.net/comppol_qld.html

ATTACHMENT 1: APPROACHES TO CORPORATISATION AND COMMERCIALISATION OF GOVERNMENT BUSINESS ENTITIES

Finland

Traditionally, Finland had a high level of government involvement in providing goods and services. Over the last decade the Finnish Government commercialised many of these activities through the formation of state enterprises, and reformed the way these businesses operate and their relationship with the Government.

Broadly, it can be seen that there are two related objectives in these state enterprise reforms. The first relates to improving the operational performance (productivity and quality) of state economic activity through commercialisation. The second relates to establishing a robust but more flexible governance structure for activities that are still seen as having “public” characteristics (notwithstanding their commercialisation), but one in which the government has a less direct operational role with respect to “day-to-day” decisions. (OECD 2003c, p.11)

The Government decision on the State’s corporate ownership policies in 1999 set out principles for state-owned companies:

- once production is well established state-owned companies must be profitable;
- the solidity of companies is to be maintained by sound profitability and financial performance, and qualifying and allocating investments correctly;
- equity investments will be used to secure the solvency and development potential of companies;
- dividends will be set individually for each company, at a level that reflects the activities of the company, its solvency, international standards, and any other special circumstances;
- when decisions on government subsidies are made, state-owned companies shall be treated in the same way as other companies. State guarantees have been granted to state-owned companies very selectively;
- decisions on expanding the operations of the company will be made by the appropriate administrative bodies in the company. Decisions to diversify the company must be approved by the principal shareholder;
- state-owned companies may expand their operations into other countries on a sound business basis. Major cross-border investments are subject to the consent of the principal shareholder;
- the objective of the personnel policy will be for state-owned enterprises to be exemplary employers that comply with existing collective labour agreements, seek to develop their personnel policy on a sustained basis and take initiative in this respect. The appropriate ministry must be informed, in advance, of any major lay-offs or dismissals;

- state-owned companies will be exemplary and seek to foresee future developments so they can efficiently and economically balance production-related and environmental objectives, while still securing the company's competitiveness;
- executive management and the administrative bodies of the company are responsible for decisions on operations and are accountable for financial performance. If the responsible ministry, representing the company owner, wants to direct the company to adopt a different decision, such a decision must be taken at the general meeting of shareholders;
- state-owned companies can use incentive schemes to ensure the company's competitiveness in recruiting management resources. (Ministry of Trade and Industry (Finland) 1999)

The reform of Finland's state-owned companies has helped to place competition between public sector and the private sector businesses on a more equal basis.

In 2004 Finland's decision-in-principle on state ownership policy further confirmed the focus on separating the commercial activities of government businesses from the political process, while maintaining the Government's responsibilities as the owner of the businesses. It recognised the Government's commitment to efficient competition between the public and private sector.

The State's ownership policy must be open, predictable and consistent. The State-owned companies operating on market terms and the State's associated companies must operate following the same rules and conditions as their competitors. The State should not award benefits that other companies do not have, but the companies must be in the same position as other companies. If the State imposes special obligations on companies partly operating on market terms, the compensations paid for them must be public and based on cost correlation. (Ministry of Trade and Industry (Finland) 2004, p.9)

Norway

The *Norwegian Government Policy for Reduced and Improved State Ownership* outlines the Government's intention to improve the management of businesses retained in government ownership. The Government intends to clearly separate the state's regulatory authority from its role as business owner, and bring responsibility for state-owned business activities together under the one Ministry. The policy lists ten principles for state ownership:

1. all shareholders shall be treated equally;
2. there shall be transparency in the State's ownership of companies;
3. ownership decisions and resolutions shall be made at the general meeting;
4. the State may set performance targets for each company, together with other owners. The board will be responsible for meeting these target;
5. the capital structure of the company shall be consistent with the objective of the ownership and the company's situation;
6. the composition of the board shall be characterised by competence, capacity and diversity and shall reflect the distinctive characteristics of each company;

7. compensations and incentive systems shall promote the creation of value in the companies and shall be generally regarded as reasonable;
8. the board shall exercise an independent control of the company's management on behalf of the owners;
9. the board shall adopt a plan for its own work and shall work actively with development of its own competence. The board's activities shall be assessed;
10. the company shall recognise its responsibility to all shareholders and stakeholders in the company. (Ministry of Trade and Industry (Norway) 2001-02)

These reforms are still being implemented. As yet, not all of Norway's government businesses comply with this policy.

New Zealand

New Zealand defined its approach to corporatisation in 2002 through the *Owner's Expectations Manual*. That manual describes: the structure of crown companies; the roles and responsibilities of the shareholding minister, the board and various government advisory agencies; company reporting requirements; financial governance arrangements; processes for managing major new investments, changes in the capital structure, or significant business restructures; and board appointments.

The policy framework is designed to ensure that crown companies:

- *operate at "arm's length" from the Government. Unlike departments, they are not part of the Crown, but are instead owned by the Crown;*
- *have independent boards that are accountable for the performance;*
- *are separate legal entities (this means company directors are legally responsible for the companies' activities); and*
- *are subject to the financial reporting and other requirements applying to all companies, unless they are supplemented or changed by the Public Finance Act 1989 and/or any relevant sector-specific or company-specific statute.*

Under the Crown company model:

- *each company has the principal objective of acting as a successful business;*
- *compensation is paid to each Crown company for social objectives that the Crown requires to pursue;*
- *each company takes managerial responsibility for all operating decisions;*
- *competitive neutrality is maintained between Crown companies and the private sector; and*
- *each company is a separate legal identity, established as a limited liability company. (CCMAU 2002, section 2).*

Australia

In Australia corporatisation is the main vehicle for delivering competitive neutrality in significant government businesses. Australia's corporatisation model was developed by a government taskforce in 1991 (NCC 1997, pp.30-33). It involves the following areas of reform.

- clarifying objectives — clearly specify the objectives of the business, including its commercial objectives. Explicitly define and fund social policy objectives and separate regulation from the business;
- managerial responsibility, authority and autonomy — establish a skills based board with responsibility and accountability for management functions and business performance. Define the business's core activities and set dividend policy, rate of return targets and capital structure;
- effective performance monitoring by the owner government — separate the day-to-day management of the business from government with the board held personally accountable for performance. Establish an independent performance monitoring regime to track commercial performance against a corporate plan and business plan;
- effective rewards and sanctions related to performance — Pre-define targets and reward structures that encourage good performance and penalise poor performance;
- attaining competitive neutrality in input markets — make competitive neutrality adjustments such as: fees to offset existing (or perceived) government guarantees on debt; set rate of return targets that reflect those expected in the private sector; remove any unique restrictions on labour resources; and ensure the government enterprise faces tax obligations equivalent to the private sector, so the government enterprise does not have any competitive advantages or disadvantages over the private sector because of the cost of its inputs;
- attaining competitive neutrality in output markets — remove any barriers protecting the government business from private sector competition. Any remaining market failures should be addressed by a regulatory regime that applies equally to the government and private sectors;
- effective natural monopoly regulation — if the market is a natural monopoly the business should be regulated to prevent the exploitation of monopoly power. The natural monopoly elements should be separated from the competition elements. (NCC 1997, pp.30-33).

This model provides a guide to Australian Governments. Each has defined its own approach to corporatisation. While the model outlined above broadly reflects the approach adopted in Australia, not all corporatised businesses followed the model exactly. For example, structural separation has not taken place in all cases.

ATTACHMENT 2: AUSTRALIAN GUIDELINES ON COMPETITIVE NEUTRALITY

Australian Governments have prepared policy statements and guidelines on the application of competitive neutrality policies. In most cases these documents are available on the internet. This attachment lists these Australian publications.

Australian Government

Website: <http://www.pc.gov.au/ccnco/publications/index.html>

Australian Government Competitive Neutrality – Guidelines for Managers, February 2004

Rate of Return Issues, Commonwealth Competitive Neutrality Complaints Office Research Paper, Productivity Commission, December 1998

Cost Allocation and Pricing, Commonwealth Competitive Neutrality Complaints Office Research Paper, Productivity Commission, October 1998

Commonwealth Government Competitive Neutrality Statement, June 1996

Website: <http://www.ncc.gov.au/activity.asp>

Competitive Neutrality: Scope for Enhancement, Staff Discussion Paper, June 2002

Competitive Neutrality Reform: Issues in Implementing Clause 3 of the Competition Principles Agreement, January 1997

New South Wales Government

Website: <http://www.cabinet.nsw.gov.au/publications.html>

Policy Statement on the Application of Competitive Neutrality, Office of Financial Management, Policy and Guidelines Paper, January 2003

NSW Government Policy Statement on the Application of National Competition Policy to Local Government, June 1996

Website: <http://www.treasury.nsw.gov.au/indexes/tppdex.html>

Guidelines for Pricing of User Charges, Office of Financial Management, Policy and Guidelines Paper, June 2001

Victorian Government

Website: http://www.dtf.vic.gov.au/ncp/cn_pubs.htm

National Competition Policy and Local Government, January 2002

Competitive Neutrality Policy Guide, September 2001

Competitive Neutrality Policy, Department of Treasury and Finance, 2000

Procedure for Handling Complaints, Competitive Neutrality Unit, 2000

Queensland Government

Website: <http://www.treasury.qld.gov.au/office/services/regulatory-reform/neutralty.shtml>

Queensland's Competitive Neutrality Complaints Handling Process, March 2001

Competitive Neutrality and Queensland Government Business Activities – A Queensland Government Policy Statement, July 1996

Commercialisation of Government Service Functions in Queensland – Policy Framework, October 1994

Full Cost Pricing Policy – A Queensland Government Policy Statement, October 1994

Western Australian Government

Website: http://www.dtf.wa.gov.au/cms/tre_content.asp?id=605

Policy Statement on Competitive Neutrality, June 1996

Local Government Statement, June 1996

South Australian Government

Website: http://www.premcab.sa.gov.au/dpc/publications_competition_documents.html#comp_neutrality

Revised Clause 7 Statement on the Application of Competition Principles to Local Government Under the Competition Principles Agreement, September 2002

Competitive Neutrality Policy Statement, July 2002

A Guide to the Implementation of Cost Reflective Pricing – A Part of Competitive Neutrality Policy, October 2000

A Guide to the Implementation of Competitive Neutrality Policy, March 1998

Community Service Obligations – Policy Framework, December 1996

Tasmanian Government

Website: <http://www.gpoc.tas.gov.au/domino/gpoc.nsf/complaints-v/001>

National Competition Policy Competitive Neutrality Principles – Complaints Mechanism Guidelines, February 1999

Guidelines for Implementing Full Cost Attribution Principles in Government Agencies, September 1997

Full Cost Attribution Principles for Local Government, June 1997

Application of the Competitive Neutrality Principles Under National Competition Policy, June 1996

Application of the National Competition Policy to Local Government, June 1996

Northern Territory Government

Website: <http://www.nt.gov.au/ntt/financial/9697bps/bp5/b5c8.shtml>

Competition Policy and Competitive Neutrality, 1997

Australian Capital Territory Government

Website: <http://www.treasury.act.gov.au/competition/comp/index.html>

Competitive Neutrality in the ACT, January 2001

ATTACHMENT 3: COST ALLOCATION METHODS

In a research report, *Cost Allocation and Pricing* (CCNCO 1998a), the Australian Government's Competitive Neutrality Complaints Office discussed three approaches to allocating costs for agencies applying Australia's competitive neutrality framework.

Fully distributed costs

Under the fully distributed cost (FDC) method, the total costs of an agency or business are allocated across all commercial and non-commercial outputs. Direct costs are allocated to their respective output, while indirect and joint costs are averaged across all outputs. Thus, the cost base for each output will include a proportion of the direct capital costs, and those used indirectly to produce the output. These latter costs may include, for instance, a proportion of the capital costs of the agency's corporate services area. (CCNCO 1998a, p.7)

Indirect costs could be allocated based on a formula that reflects, for example, the percentage of total staff involved in the activity, or the activity's share of the organisation's total budget. Activity based costing is a more sophisticated method of allocating indirect costs, where the agency's outputs are linked to the activities undertaken to produce them. While it can take different forms activity based costing typically comprises:

- identifying full costs;
- identifying products and the agency's user groups;
- identifying all activities that the agency performs to produce products;
- tracing full costs to the activities; and
- identifying cost drivers¹ that link activities to products to give a cost per unit of product. (Productivity Commission 2001, p.H.14)

Activity based costing is more data intensive than other methods of allocating indirect costs. Often agencies would need new data management systems and to undertake regular internal surveys, or use timesheets, to track the amount of time staff spend on particular activities, and the contribution those activities make to the production of particular services. While activity based costing is the most accurate way of allocating costs, some overheads will still need to be allocated on a pro-rata basis because it is not possible to identify their contribution to particular outputs. The wages of the organisation's chief executive officer may fit into this category.

Fully distributed cost is most appropriate when the services being costed form a major part of the agency's output.

Marginal cost

Marginal cost is the cost of producing an additional unit of good or service. It will generally include direct costs that vary with output and some indirect costs. Marginal cost can be measured in the short run or the long run. (CCNCO 1998a, p.9)

Short run marginal cost does not cover fixed capital costs or those indirect costs that the agency would still incur if it did not produce the additional unit of product or service. Theoretically, short run marginal cost gives the best indication of the cost of producing an additional unit at a given point in time. However, pricing based on short run marginal cost is problematic, particularly under a competitive neutrality regime. Short run marginal cost is difficult to measure and it is difficult to manage the recovery of fixed costs in a way that does not result in extreme levels of price volatility.

Long run marginal cost attempts to deal with the allocation of fixed and indirect costs. It looks at the cost of delivering an additional unit of output in the long term, including capital costs that are required to make that production possible. It still excludes indirect costs that are fixed in the long run, such as corporate overheads and fixed infrastructure. Long run marginal cost is still complex to measure. Because of these measurement difficulties alternatives such as incremental cost and avoidable cost are often used as a proxy for marginal cost.

Incremental cost and avoidable cost

While there are a number of definitions of incremental cost, in practice, it is usually related to larger increments of output, and a longer timeframe than short run marginal cost. That is, incremental cost is the increase in a business's total cost attributable to the production of a particular type of good or service, rather than just the cost of producing the final, or marginal unit of that good or service. Long run incremental cost (LRIC) includes operating and maintenance costs, incremental capital costs (that is, a return on the additional assets required) and incremental indirect costs. Per unit incremental cost is the cost of the relevant increment (or block) of output divided by the number of additional units...

Avoidable cost is another practical measure of marginal cost. It includes all the costs that would be avoided if an output was not longer provided by the entity concerned. (CCNCO 1998a, p.10)

In practice, incremental cost and avoidable cost are usually similar because the costs associated with the decision to produce the product will be similar to those avoided if the business stops production.

Unlike fully distributed cost, long run incremental cost and avoidable cost exclude fixed indirect costs that do not vary with the level of production. An incremental cost or avoidable cost methodology is consistent with a competitive neutrality framework in some situations. Some government organisations have large fixed infrastructure, and the business activities subject to competitive neutrality are only a small part of the organisation's total functions. Often the organisation would need to maintain that infrastructure regardless of whether it undertook the business activities. In these cases it would be consistent with competitive neutrality principles to price these business activities based on long run incremental or avoidable cost.

NOTE

1. Cost drivers are factors that affect the level of activity, and thus costs, required to produce a unit of product. They include, for example, customer numbers or the level of service complexity.

ATTACHMENT 4: ASSET VALUATION METHODS

Government businesses already use a range of methods to value the assets. (PC 2001, p.H.7)

Historic cost values assets at the original cost to the organisation of acquiring the asset, including relevant financing and set-up costs. The historic valuation can be adjusted for depreciation, where an asset has a limited life, by the subtraction of accumulated depreciation. Accumulated depreciation represents the amount of the assets' service potential that has already been used.

Reproduction cost values assets at the current cost of reproducing the existing asset, mainly in its present form, using the specifications of the original asset.

Replacement cost values assets at the current cost of replacing the asset with a similar asset that can provide equivalent services and capacity.

Depreciated replacement cost adjusts replacement cost to account for asset consumption by subtracting accumulated depreciation.

Depreciated optimised replacement cost (DORC) values assets at the replacement cost of an 'optimised' asset, less accumulated depreciation. An 'optimised' asset is one that most efficiently produces a specified level of product. The effects of inefficiencies such as excess capacity, duplication, redundancy and poor location are removed from the valuation.

Fair market value uses the price the asset would sell at in a competitive open market, where both the buyer and seller are 'willing but not anxious'. It reflects the value of an asset in its best alternative use.

Net present value uses the present value of the predicted cash flows generated from the use of the asset to value the asset. It involves estimating the future income generated by an asset, then discounting that income stream at a discount rate that reflects the risks of owning the asset.

Deprival value represents the loss to the agency if it was deprived of the service potential or future economic benefits of the asset. If the asset to be lost to the organisation is to be replaced, then the asset should be valued at its market value, replacement cost or reproduction cost, depending on the circumstances. If the asset is not replaced, then it should be valued at its economic value, which is the greater of either the asset's net present value or fair market value. Where the asset is surplus to requirements, it should be valued at its fair market value.

Optimised deprival value is the lesser of DORC and the economic value of the asset, where the economic value is the greater of the asset's net present value or fair market value.

In Australia, the Steering Committee on National Performance Monitoring of Government Trading Enterprises produced a framework to encourage consistency in the valuation of non-current assets for government trading enterprises. That report proposed the use of a deprival value methodology because it "provides more relevant information about both the current cost of providing the goods and services as well as the current value of resources deployed" (SCNPMGTE 1994, p.iii). The Steering Committee produced the following table to summarise its proposed approach to asset valuation. (SCNPMGTE 1994, p.6)

Measurement Bases to be Applied Under these Guidelines to Particular Categories of Physical Non-Current Assets

| <i>Asset Category</i> | <i>Where service potential would be replaced if GTE was deprived of the asset</i> | <i>Where service potential would not (or could not) be replaced if GTE was deprived of asset</i> |
|--|--|--|
| <u>Asset Held for Continued Use</u> | | |
| Land (including land under infrastructure) | <p>The greater of:</p> <p>Current market buying price, taking into account the nature of the parcel, the legal restrictions on use, the opportunities and impediments to development that are inherent to the specific parcel of land or other constraints that exist in respect of that land, or any special attributes that the land may possess (value in use); and</p> <p>Current market value (selling price) of its feasible potential alternative use taking into account the costs of achieving that potential</p> | Greater of net present value and current market value (selling price) |
| Heritage assets | Current market buying price, current replacement cost or current reproduction cost, as applicable, of the gross service potential utilised by the GTE if the service potential would otherwise be acquired by the GTE | Greater of net present value and current market value (selling price) |
| General assets | | |
| – where there is a secondary market for the asset (non-specialised assets) | Current market buying price of the gross service potential of the existing asset - where new assets are normally acquired, new prices are relevant and where second hand assets are normally acquired, second hand prices are relevant | Greater of net present value and current market value (selling price) |
| – where there is no secondary market for the asset (specialised assets) | Lower of the current replacement cost or current reproduction cost of the gross service potential or future economic benefit of the existing asset | Greater of net present value and current market value (selling price) |
| <u>Surplus Assets</u> | | |
| All such assets | Not Applicable | Current market value (selling price) |

ATTACHMENT 5: TYPICAL WEIGHTED AVERAGE COST OF CAPITAL DEFINITIONS

The New Zealand Ministry of Economic Development provided advice on the calculation of the weighted average cost of capital (WACC) for the electricity sector. That advice noted that:

The WACC may be defined in alternative ways...The handbook does not mandate the definition to be used by whatever WACC formulation is used, it should be consistent with the formulation of cash flows to be discounted. The WACC in this handbook has been specified from a New Zealand investor perspective. It is presented as post-investor tax to reflect New Zealand's dividend imputation regime, and it is set in nominal (not real) terms consistent with FCF (Free Cash Flows). (Department of Economic Development 2004)

The New Zealand handbook provided the following commonly used definition for the WACC/

$$WACC = Re(E/V) + Rd(1-tc)(D/V)$$

where: Re = cost of equity capital
 Rd = cost of debt
 E = market value of equity
 D = market value of debt
 V = D + E = total value of business
 tc = corporate tax rate on debt

The Australian Government specified the following method for calculating the WACC for Australian government businesses subject to competitive neutrality. (Commonwealth of Australia 2004, pp.31-32):

$$WACC = Re(E/V) + Rd(D/V)$$

Re is the required rate of return on equity (the risk free rate plus a risk premium). The rate of return on equity can be determined by using the capital asset pricing model (CAPM). Determining the cost of equity for a WACC is often done by reference to financial markets and/or benchmarking similar businesses.

Rd is the required rate of return on debt (including and debt neutrality charges). The required rate of return on debt (Rd) represents the business's borrowing costs expressed as a percentage. It reflects the lender's required rate of return.

V is the market value of total assets (that is debt plus equity).

E is the market value of equity.

D is the market value of debt.

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NOTE DE RÉFÉRENCE

1. Introduction

La relation entre les gouvernements et le secteur privé est complexe et se joue à plusieurs niveaux. Le gouvernement fait les lois et lève l'impôt et le secteur privé apporte sa contribution à ces processus par le biais des canaux politiques standard. Le Gouvernement fournit également des services publics et autres au secteur privé et parfois en *concurrence avec le secteur privé*. Cette étude couvre la dernière dimension de cette relation, et ses interrelations avec les autres dimensions.

Le gouvernement fournit une vaste gamme de différents services, et l'importance relative de ces différents services varie d'un pays à l'autre. Au niveau conceptuel, deux cas extrêmes peuvent être identifiés :

- ***Les services publics*** qui sont financés sur le budget de l'État et, en dernier ressort, par les recettes fiscales générales. Au cœur de cette catégorie se trouvent les biens publics que sont la justice, la police et la défense, mais cette catégorie inclut également dans de nombreux cas la santé, l'éducation et des services similaires. Ces services ne relèvent pas nécessairement du domaine public réservé à l'État, car le secteur privé peut être actif dans ce domaine et fournir des services similaires rémunérés à la prestation. Il peut y avoir un certain degré d'interchangeabilité entre les services publics et les services externalisés fournis par des entreprises privées, mais le prix payé par des consommateurs (lorsqu'ils ont le choix) diffèrera fondamentalement car le service public sera fourni pour un prix égal à zéro ou symbolique. Cet écart de prix peut être si important que les activités publiques et privées se déroulent sur des marchés économiques fondamentalement différents.
- ***Les services commerciaux*** fournis sur la base d'une rémunération à la prestation ; la rémunération est le principal mécanisme utilisé pour financer le service, et le gouvernement ne limite pas explicitement la rentabilité du service pour réaliser des objectifs de politique sociale. On peut citer, à titre d'exemple, les services de distribution d'électricité et de télécommunications, dans les pays où l'État participe à ces industries. Pour ces types de services, il est probable qu'il existera des prestataires privés de ces services, réels ou potentiels, qui opéreront sur une base commerciale essentiellement identique, sur les mêmes marchés économiques, en concurrence avec le prestataire public. La seule caractéristique significative qui distingue le prestataire public, dans ce cas, tient au fait qu'il est la propriété de l'État.

Dans la réalité, les situations concrètes se trouvent généralement quelque part entre ces deux extrêmes. Par exemple, l'État peut financer partiellement des entités de droit privé pour fournir des services publics au moyen de subventions ou d'avantages fiscaux, de telle sorte que le prix que ces entités de droit privé peuvent facturer est inférieur au coût de revient total de ces services. Dans ce cas, l'entité de droit privé peut prendre certains des traits d'une entité de droit public. Ces accords sont fréquents dans le secteur de l'éducation. De la même manière, une entité commerciale de droit public peut fournir un ensemble de services commerciaux et publics ; tel est le cas, par exemple, lorsqu'un fournisseur d'électricité est tenu de fournir des services à prix réduit à des catégories défavorisées de la population. Ou encore, une entité de droit public peut également fournir des services commerciaux, par exemple lorsqu'un hôpital public traite également des patients privés.

Dans le cas extrême où des entités publiques et privées opèrent sur des marchés économiques différents, elles ne sont pas en concurrence entre elles et il ne se produit donc aucune distorsion dans le processus concurrentiel. A l'autre extrémité, lorsqu'une entité publique fournit des services commerciaux en concurrence avec une entité privée, des distorsions du processus concurrentiel peuvent se produire. Dans cette étude, ces distorsions sont désignées sous le terme de problèmes de neutralité concurrentielle. Si une entité peut, en raison de son appartenance à l'État ou de ses relations avec l'État, facturer des prix inférieurs au coût de revient ou se comporter autrement de manière anticoncurrentielle, cette situation peut avoir des implications, à la fois en termes d'efficacité et de loyauté :

- **Efficacité** : Si le prestataire public a des coûts plus élevés (est moins efficace) que les prestataires privés existants ou potentiels, mais est néanmoins capable d' "évincer" des prestataires privés, le coût total pour l'économie du service augmentera. Une partie de ce coût additionnel est finalement financée par une charge fiscale plus élevée et l'efficacité économique est donc réduite. L'efficacité dynamique de l'économie peut également être plus faible si l'entité de droit public est moins susceptible d'innover et si l'entrée sur le marché est rendue impossible. Ces entreprises de droit public seront généralement soumises à moins d'impératifs d'amélioration de leur efficacité, et l'efficacité technique s'en trouve donc également réduite.
- **Loyauté** : Les distorsions de ce type réduiront également la rentabilité et le taux de rémunération des capitaux de tous participants privés en concurrence avec l'entité de droit public. Cette situation risque de passer pour fondamentalement déloyale, à tout le moins pour les participants privés, particulièrement s'ils considèrent qu'une partie des impôts et taxes qu'ils paient subventionne indirectement leur concurrent de droit public.

Les cas extrêmes sont relativement simples dans une perspective politique. En revanche, des défis politiques plus délicats surgissent lorsque les gouvernements tentent de traiter des problèmes qui se posent dans les cas intermédiaires, car les réponses politiques possibles sont variées et parfois complexes. Les gouvernements reconnaissent ces problèmes et ont adopté diverses réponses politiques. Ici encore, ces réponses peuvent être rangées dans deux catégories conceptuellement extrêmes :

- **Approche fondamentaliste** : La réponse politique part ici d'une enquête sur les limites souhaitables de l'activité gouvernementale. Le résultat de cette enquête risque de varier dans une mesure significative d'un pays à l'autre. Après que les limites fondamentales de l'État aient été déterminées, les fonctions qui sortent de ces limites peuvent être terminées ou privatisées. Cette approche réduit les problèmes de neutralité concurrentielle si l'État se retire de fonctions que le secteur privé peut fournir, ou fournit sur une base commerciale. Le champ réel de la concurrence entre l'État et le secteur privé se rétracte. On peut considérer que ce cadre a motivé, en partie, le programme de privatisation entreprise au Royaume-Uni dans les années 1980.
- **Approche instrumentaliste** : Il n'existe ici aucune limite fondamentalement souhaitable de l'activité gouvernementale qui soit prédéterminée, mais il est présumé que lorsqu'une activité commerciale de l'État entre en concurrence avec des prestataires privés, le cadre dans lequel ces entités se font concurrence devrait être neutre entre elles. Les mécanismes politiques qui sont impliqués dans cette approche incluent l'application du droit de la concurrence et des instruments du gouvernement des entreprises du secteur public, comme la transformation en une société commerciale (« corporatisation ») et la commercialisation. En outre, des cadres de neutralité concurrentielle explicites et ciblés peuvent instituer des mécanismes afin de garantir la neutralité de la concurrence.

Les politiques de la quasi-totalité des gouvernements à l'égard de leur secteur public incorporent tout ou partie des mécanismes politiques évoqués ci-dessus, particulièrement l'application du droit de la concurrence et différentes approches du gouvernement d'entreprise pour les entités commerciales du secteur public. Mais relativement peu de pays se sont dotés de cadres explicites de neutralité concurrentielle. En outre, il est courant que les pays qui adoptent une approche instrumentaliste constatent que l'application de procédures instrumentalistes change la nature de leurs entités commerciales de droit public au fil du temps, à un point tel qu'il est opportun de les privatiser au cas par cas.

Cette étude se concentre sur les options de la politique instrumentaliste.

Elle s'ouvre sur un examen rapide du champ d'application des lois sur la concurrence au secteur public, habituellement celles qui traitent de l'abus de position dominante, et donne quelques exemples illustratifs.

Les lois sur la concurrence traitent généralement les problèmes sur une base *curative*. Étant donné que les problèmes de neutralité concurrentielle sont causés au sein des gouvernements, et sachant que ces derniers disposent des outils réglementaires pour les traiter, il peut être plus approprié pour les gouvernements de commencer par prévenir ces problèmes. Cette étude se focalise sur ces approches de politique *préventive*.

La seconde partie de l'étude traite brièvement des questions de gouvernance du secteur public, y compris la transformation en une société commerciale et la commercialisation. Ces politiques s'appliquent dans de nombreux pays et peuvent être interprétées comme visant à empêcher la naissance de problèmes de neutralité concurrentielle, en faisant en sorte que les entités commerciales du secteur public se comportent d'une manière plus commerciale. L'un des leviers clés de la politique dans ce domaine est l'exigence que les activités commerciales du secteur public génèrent un taux raisonnable de rendement des capitaux investis. C'est ce dernier point qui a souvent motivé l'adoption de ces politiques, spécifiquement pour réduire le gâchis de ressources publiques qui se produit lorsque de grandes entités de droit public opèrent d'une manière inefficace. Ces politiques ont souvent été limitées aux entreprises les plus grandes, car leur application implique des coûts de transaction significatifs.

La partie finale de l'étude se concentre sur les politiques mises en place dans les pays qui ont adopté des cadres de neutralité concurrentielle explicites et ciblés. Ces cadres englobent à la fois des éléments *préventifs* et *curatifs* et peuvent être interprétés comme une tentative de regroupement, dans un ensemble cohérent, des différentes politiques évoquées précédemment. Les éléments *préventifs* de ces cadres se distinguent par des exigences de neutralité élaborées de manière plus détaillée (en matière réglementaire, en matière fiscale, en matière de taux de rendement, etc.) et peuvent, potentiellement, s'appliquer à des niveaux de seuil plus bas qu'il n'est d'usage pour les lois sur la concurrence ou la transformation en une société commerciale d'entreprises publiques. Les éléments *curatifs* de ces cadres impliquent un mécanisme de réclamations qui reflète le fait que les processus sont internes au gouvernement et recherchent donc des solutions rapides et efficaces, plutôt qu'une procédure de débats contradictoires. La partie finale de l'étude illustre les succès et limites de ces politiques. La conclusion clé est que la mise en place d'un cadre explicite de neutralité concurrentielle exige, pour être pleinement efficace, un changement culturel à la fois au sein des entreprises publiques elles-mêmes et au niveau des politiques des États. L'efficacité de la politique dépend également de la question clé de savoir quel est le seuil approprié pour appliquer les exigences de neutralité concurrentielle.

2. Droit de la concurrence et entreprises du secteur public

L'application du droit de la concurrence peut être un outil politique important pour traiter les problèmes qui surgissent lorsque des entités publiques font concurrence à des entités privées. La source la

plus importante de distorsions de la concurrence en matière de concurrence entre le secteur public et le secteur privé tient aux avantages financiers dont jouissent les activités commerciales du secteur public. Ces avantages peuvent inclure :

- des différences de coût du capital car les entreprises publiques ne sont pas tenues de générer un taux commercial de rendement et peuvent emprunter à des taux inférieurs aux taux d'intérêt commerciaux ;
- des différences dans d'autres coûts supportés par les entreprises publiques, notamment du fait qu'elles bénéficient d'exemptions fiscales ; et
- des capacités à accorder des subventions croisées à des activités commerciales concurrentes, à l'aide de services financés par l'État et/ou monopolistiques.

Généralement, ces avantages concurrentiels n'incluent pas la possibilité de violer le droit de la concurrence en toute impunité. Les entreprises publiques sont soumises au droit de la concurrence de tous les Pays membres (à l'exception des USA et d'un petit nombre d'entreprises spécifiques qui sont exemptées dans certains autres pays). Les activités commerciales d'entités publiques non transformées en sociétés commerciales qui font concurrence au secteur privé, suffisent souvent à faire de ces entités des "entreprises" ou à les soumettre autrement au droit de la concurrence. Certaines situations posent des questions de définition et de compétence mais, en général, dans la mesure où le manque de neutralité concurrentielle résulte de conduites auxquelles le droit de la concurrence peut remédier, la plupart des Pays membres peuvent résoudre ces questions.

Certains pays se sont dotés de règles spéciales du droit de la concurrence pour traiter des effets des distorsions de la concurrence entre l'État et les entités privées. Les pays qui utilisent l'arsenal réglementaire de l'UE ont souvent une disposition comme l'Article 86, qui fixent les règles applicables aux entités fournissant des services d'intérêt économique général¹ ou bénéficient de droits spéciaux ou exclusifs. En résumé, l'Article 86 (voir encadré 1) dispose que les services fournis par des entreprises publiques, ou des entreprises privées agissant pour le compte de l'État, doivent être soumis aux règles de concurrence du Traité instituant l'UE, à moins que cela ne sape la fourniture de services d'intérêt économique général.

Encadré 1 – Article 86

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|---|--|
| 1 | Les États membres, en ce qui concerne les entreprises publiques et les entreprises auxquelles ils accordent des droits spéciaux ou exclusifs, n'éditent ni ne maintiennent aucune mesure contraire aux règles du présent traité, notamment celles prévues aux articles 12 et 81 à 89 inclus. |
| 2 | Les entreprises chargées de la gestion des services d'intérêt économique général ou présentant le caractère d'un monopole fiscal sont soumises aux règles du présent traité, notamment aux règles de concurrence, dans les limites où l'application de ces règles ne fait pas échec à l'accomplissement en droit ou en fait de la mission particulière qui leur a été impartie. Le développement des échanges ne doit pas être affecté dans une mesure contraire à l'intérêt de la Communauté. |
| 3 | La Commission veille à l'application des dispositions du présent article et adresse, en tant que de besoin, les directives ou décisions aux États membres. |

Source: Commission Européenne 2004, Article 86 du Traité instituant l'UE (ex Article 90)

Les règles européennes sur les aides de l'État traitent également de l'effet de l'intervention gouvernementale sur l'environnement concurrentiel. Certains Membres ont des règles similaires. Par exemple, la loi danoise sur la concurrence contient une disposition visant à interdire aux gouvernements

centraux, municipaux et locaux de subventionner des services d'une manière qui fausse la concurrence. Cette disposition s'applique à la fois aux entreprises du secteur public et à celles du secteur privé.

Article 11 a. *Le Conseil de la Concurrence peut prendre des décisions pour l'annulation ou le remboursement des subventions accordées par prélèvement sur des fonds publics, octroyées au profit de certaines formes spécifiques d'activités commerciales.*

(2) Une décision peut être prise en vertu de la sous-section (1) si la subvention

- i) a directement ou indirectement pour objectif ou pour effet de fausser la concurrence, et
- ii) n'est pas légitime en vertu de la réglementation publique. (OCDE 2001, P.100)

Au Danemark, une subvention est permise si elle est autorisée par des lois, réglementations, instruments, ou règles budgétaires générales ou dans l'exercice des pouvoirs dévolus à l'autorité publique locale.

La Finlande a adopté une disposition dans son droit de la concurrence prévoyant qu'"une restriction qui est réputée avoir des effets dommageables, au motif qu'elle réduit l'efficacité ou empêche ou gêne la conduite de l'activité d'une manière 'inappropriée pour le jeu d'une concurrence saine et effective' peut être interdite, quand bien même ne serait-elle pas autrement spécifiquement interdite par la loi". (OCDE 2003a)

Cette disposition a été invoquée par l'autorité de la concurrence (FCA) afin de prôner la réforme lorsque des activités liées au secteur public affectent la concurrence sur le marché, notamment via son projet "Gouvernement et Marchés". La FCA a enquêté sur plusieurs activités appartenant au secteur public, depuis le commerce de céréales et les services météorologiques, jusqu'à la construction et à l'exploitation du réseau routier, et a relativement réussi à générer le changement (bien que ce soit dans une mesure qui n'est pas toujours suffisante). (OCDE 2003a)

2.1 L'utilisation des lois sur la concurrence pour instaurer la neutralité concurrentielle

Il existe de nombreux exemples dans lesquels les lois sur la concurrence ont traité des problèmes de neutralité survenant entre des entités du secteur public et privé se concurrençant sur le même marché. En mars 2001, la Commission des Communautés Européennes a rendu sa décision sur une plainte de United Parcel Service, selon laquelle Deutsche Post AG accordait des subventions croisées à des services de messagerie concurrents, en se servant de son monopole d'acheminement du courrier. La Commission a constaté que Deutsche Post AG avait offert des remises de fidélité et tarifé certains services à un prix inférieur à leur coût de revient. Elle en a conclu que ces actions avaient un effet significatif sur la concurrence et l'efficacité de l'industrie. La Commission a exigé de Deutsche Post AG qu'elle sépare son activité messagerie et ses autres services, fournisse à la Commission des informations sur les coûts et chiffres d'affaires de l'activité de messagerie au cours des trois dernières années, lui communique tous les prix de transfert entre l'activité de messagerie et Deutsche Post AG, et lui indique les rabais négociés par l'activité de messagerie avec les six plus grandes sociétés de vente par correspondance. Deutsche Post AG a également été condamnée à une amende de EUR 24 millions. (Commission des Communautés Européennes 2001)

Il existe d'autres exemples similaires dans le monde entier, notamment les récentes conclusions de la Commission de la Concurrence sud-africaine en relation avec Telkom, prestataire de télécommunications sud-africain. Le Commissaire a conclu que Telkom avait imposé des conditions déraisonnables aux prestataires de services de réseau à valeur ajoutée, qui devaient acheter des services auprès de Telkom, mais leur faisait également concurrence sur d'autres marchés. La Commission sud-africaine a recommandé

une amende pouvant atteindre 10 pour cent du chiffre d'affaires annuel de Telkom (Commission de la Concurrence 2004). Le Tribunal de la Concurrence examine toujours cette recommandation.

En France, plusieurs commentaires ont été formulés à propos de questions liées à la neutralité concurrentielle, et une tentative au moins a été faite pour exercer des poursuites en application de la loi sur la concurrence. Les conditions dans lesquelles les concepts de prix prédateurs peuvent être appliqués à la diversification des monopoles publics ont été définies dans une opinion du Conseil de 1996, à propos de La Poste. L'intention de pratiquer des prix prédateurs pour exclure la concurrence est généralement présumée lorsque le prix est inférieur au coût variable moyen, et cette intention doit être prouvée indépendamment lorsque le prix est inférieur au coût total moyen, mais n'est pas inférieur au coût variable moyen. Une entité publique est susceptible d'avoir des coûts supérieurs à ceux d'une entreprise privée, dans la mesure où une entité publique n'est pas astreinte à la même discipline de rentabilité, à tout le moins pour ce qui concerne les activités consacrées à la fourniture de services publics. D'autres aspects de sa structure de coûts peuvent nécessairement différer des coûts supportés par le secteur privé. Le statut de son personnel peut, par exemple, augmenter sa masse salariale, tandis que ses sources de financement peuvent réduire son coût effectif du capital. Ainsi, il faut parfois un examen très attentif pour déterminer si ce qui ressemble à des pertes, par comparaison avec les coûts moyens de ses activités compétitives, implique effectivement une intention prédatrice.

Une subvention croisée qui n'équivaut pas à des prix prédateurs peut néanmoins donner lieu à des objections. Le Conseil a soutenu que les prix bas pratiqués par une société liée à une entité publique peuvent être anticoncurrentiels, même s'ils ne sont pas techniquement prédateurs (c'est-à-dire régulièrement inférieurs au coût variable moyen), dès lors qu'ils ne sont possibles qu'en raison des profits générés par les activités d'un monopole public et conduisent à une distorsion durable du marché. Le Conseil a diagnostiqué ce scénario dans l'effort déployé par l'opérateur des jeux de loterie pour conquérir des marchés en faveur de son unité informatique et maintenance informatique. Environ un sixième des offres de cette unité visant à obtenir des contrats de maintenance auprès de tiers l'ont été à des prix inférieurs à ses coûts variables moyens. Cette proportion était peut-être trop faible pour établir une pratique de prix prédateurs, mais les subventions ont néanmoins été jugées anticoncurrentielles. Les offres faites à bas prix n'ont été possibles qu'en raison du soutien apporté par les profits de la société mère (et de l'avantage commercial découlant de la réputation de la société mère), et l'effet produit sur la concurrence n'aurait pas été possible sans les subventions croisées. Ces principes ont une application potentiellement étendue pour contrôler les pratiques des monopoles de services publics qui se diversifient sur des marchés concurrentiels.

Le droit de la concurrence, bien qu'il traite certaines questions importantes de neutralité concurrentielle, n'est pas bien équipé pour traiter tous les aspects d'une concurrence inefficace et déloyale entre les entités du secteur public et les entités du secteur privé. Le droit de la concurrence fournit un cadre légal pour corriger ou prévenir des abus de pouvoir de marché ou des tentatives en vue de conquérir un pouvoir de marché. En revanche, un grand nombre de problèmes de neutralité concurrentielle échappent au droit de la concurrence, soit au motif que les entreprises commerciales de droit public ne détiennent pas un pouvoir de marché, soit au motif que les avantages qu'elles reçoivent n'entrent pas dans les catégories d'abus de pouvoir de marché qui sont couvertes par les lois sur la concurrence.

Comme le notent les commentaires du Conseil français, il peut être difficile de calculer les coûts évitables des activités commerciales des entreprises publiques et de les comparer avec ceux d'entités privées similaires. Cette difficulté est encore aggravée lorsque les systèmes de gouvernement d'entreprise des entités publiques manquent de transparence, ou lorsque leurs pratiques comptables sont de piètre qualité.

Certains commentateurs soutiennent que des règles de concurrence plus sévères devraient être imposées aux entreprises publiques, car elles ont plus d'incitations à exploiter leur pouvoir de marché et ont plus d'opportunités de dissimuler des pratiques anticoncurrentielles. Sappington et Sidak (2003), par exemple, arguent que les entreprises nationalisées sont souvent encouragées à élargir la gamme de leurs opérations et à maximiser leurs profits. Si cela est le cas, ces entités réduiront leurs coûts d'expansion et seront incitées à se livrer à des activités anticoncurrentielles agressives pour élargir l'échelle de leur production.

En particulier, une entreprise publique peut fixer des prix inférieurs aux coûts marginaux de production, particulièrement pour des produits caractérisés par l'élasticité-prix de la demande. Une entreprise publique peut également minimiser son coût marginal de production et surinvestir dans sa capacité afin d'assouplir l'interdiction de pratiquer des prix inférieurs au coût de revient. En outre, une entreprise publique peut avoir de plus grandes incitations qu'une entreprise privée à faire en sorte que les coûts de ses rivaux augmentent, dans le but de maximiser ses profits, et à se livrer à des activités visant à exclure ses rivaux des marchés en cause. L'incitation d'une entreprise publique à se livrer à ces activités anticoncurrentielles augmente généralement lorsque son souci de rentabilité décroît et lorsque sa volonté de développer son échelle et de se diversifier s'accroît..

Les entreprises publiques ont généralement une capacité accrue à se livrer à des activités anticoncurrentielles par rapport aux entreprises privées. Cette capacité accrue résulte de plusieurs sources. Par exemple, les entreprises publiques jouissent souvent de privilèges et d'immunités qui leur confèrent un pouvoir discrétionnaire considérable dans les activités qu'elles entreprennent. En outre, le cadre légal d'une entreprise publique peut lui imposer l'obligation, ou lui conférer la prérogative, de poursuivre des objectifs autres que la maximisation des profits. Par ailleurs, les entreprises publiques sont souvent des entreprises multi-produits qui bénéficient de monopoles légaux sur des produits connexes. En conséquence, les entreprises publiques, à la différence de leurs concurrents privés, peuvent ne pas devoir répercuter les coûts d'activités anticoncurrentielles en augmentant les prix sur des marchés non réservés. (Sappington et Sidak 2003, pp. 522-523)

Les arguments de Sappington et Sidak soulignent en outre la complexité du traitement des questions de concurrence impliquant les activités des entreprises publiques, et, dès lors, la difficulté de traiter des problèmes de neutralité concurrentielle par des lois générales sur la concurrence.

Le point soulevé à propos de la récupération des pertes est particulièrement important. Dans certaines juridictions, les pratiques de prix prédateurs ne violent pas la loi à moins que le prédateur ne puisse se faire récupérer ses pertes. L'argument justificatif est le suivant : si la récupération des pertes n'est pas faisable, la concurrence n'est pas lésée (bien que les concurrents aient pu l'être) et le prétendu prédateur a simplement pris une mauvaise décision commerciale. Le droit de la concurrence dans ces juridictions ne punit que les comportements qui nuisent à la concurrence, et non pas une mauvaise décision commerciale qui a tenté de nuire à la concurrence. Cet argument suggère implicitement que les entreprises sont motivées par le profit et ne vont raisonnablement pas s'engager dans des comportements entraînant des pertes.

Sappington et Sidak notent que les entreprises publiques peuvent ne pas poursuivre l'objectif de maximiser les profits, et qu'elles peuvent donc être incitées à se livrer à des pratiques de prix prédateurs, y compris si elles ne peuvent pas récupérer des pertes en augmentant ultérieurement les prix. Ces pratiques de prix prédateurs peuvent viser à maximiser le chiffre d'affaires plutôt que les profits, ou simplement à "vivre tranquillement".

Un exemple a été observé en Australie lorsqu'un nouvel entrant sur le marché de services météorologiques à valeur ajoutée a cherché à vendre aux journaux des matériels graphiques de meilleure qualité pour publication dans les pages météo. Le fournisseur public de services de météorologie, à savoir

l'Australian Bureau of Meteorology, a réagi en s'alignant sur cette qualité supérieure et en réduisant ses prix à zéro. Il est douteux que la récupération des pertes aurait été possible dans ce cas, mais il est clair que la concurrence a été paralysée. En Australie, les dispositions du Trade Practices Act (Loi sur les Pratiques Commerciales), régissant l'abus de pouvoir de marché, n'exigent pas que le prédateur soit capable de récupérer ses pertes, de telle sorte qu'une solution a pu être trouvée, en l'occurrence, en vertu du droit de la concurrence. Le Bureau of Meteorology a accepté, sans aveu de responsabilité, d'élaborer un document de politique sur l'accès à l'information et d'utiliser un contrat-type de licence (ACCC 1997).

Cette affaire illustre plusieurs points :

- Bien que cela ne soit pas exigé en vertu de la loi australienne, il est improbable qu'il eût été possible de prouver que le Bureau of Meteorology avait l'intention de récupérer ses pertes. Ainsi, ce problème aurait été difficile à traiter au moyen du droit de la concurrence dans de nombreux pays.
- L'autorité de la concurrence australienne a dû établir que le Bureau of Meteorology avait tiré avantage de son pouvoir de marché pour entraver la concurrence. Sans ce pouvoir de marché, l'affaire aurait échappé à la compétence du droit de la concurrence.
- La solution trouvée en vertu du droit de la concurrence n'a pas intégralement résolu les problèmes de neutralité concurrentielle dans cette industrie. En 2001, une plainte a été déposée, sur le fondement de cette neutralité concurrentielle, par Meta Information Limited (voir section 4.3), filiale du concurrent d'origine impliqué dans l'affaire des pratiques commerciales. La division chargée des plaintes a recommandé des changements supplémentaires pour traiter les questions de neutralité concurrentielle.

La plupart des lois sur la concurrence pourraient traiter de l'abus de pouvoir de marché par des entreprises publiques sur une base ad hoc après qu'il ait été commis. Il existe également un grand nombre de questions de neutralité concurrentielle qui ne pourraient pas être traitées par les lois sur la concurrence, bien que la portée de ces lois varie d'un pays à l'autre. Cependant, les gouvernements disposent du pouvoir et des outils réglementaires nécessaires pour traiter systématiquement et préventivement des questions de neutralité concurrentielle, et éviter ainsi les coûts découlant de distorsions du jeu de la concurrence.

3. Régimes de gouvernement d'entreprise du secteur public

Les problèmes de neutralité concurrentielle pourraient être réduits en réformant les régimes de gouvernement des entreprises publiques, de telle sorte que ces entreprises aient une optique commerciale, opèrent de manière efficiente et affrontent toutes les charges d'exploitation normales, notamment l'exigence de dégager un taux de rendement et de payer des impôts. Ces réformes pourraient réduire significativement les avantages et désavantages de ces entreprises par comparaison avec leurs concurrents du secteur privé. Les tables rondes de l'OCDE sur la réforme des transports ferroviaires (1988), des services postaux (1999), des télécommunications (2002) et des services publics locaux (telle la gestion des déchets) (2000) décrivent toutes des réformes que les pays ont mises en œuvre pour améliorer la focalisation commerciale de leurs entreprises.

Dans l'industrie postale, par exemple :

Au cours des dix dernières années, de nombreux pays ont réformé la structure et le mode de gestion de leur opérateur postal en titre dans le cadre d'un processus de réforme des entreprises ou de transformation en société commerciale. Ces réformes ont généralement abouti à des améliorations

importantes de la rentabilité, de la qualité du service, de la productivité et de l'efficacité. (OCDE 1999, p.7)

Ces réformes n'améliorent pas seulement l'efficacité et la performance financière de ces entreprises, mais établissent également une plate-forme pour une concurrence plus loyale entre les entités du secteur public et celles du secteur privé.

3.1 *L'utilisation des réformes du gouvernement d'entreprise pour instaurer une neutralité concurrentielle*

Les réformes du gouvernement d'entreprise définissent mieux les relations entre les entreprises publiques en tant que prestataires de services, et l'État, en tant que propriétaire de ces entreprises et d'autorité réglementaire. Pour appliquer ces réformes, de nombreux États s'attachent notamment à :

- séparer la réglementation de la prestation de services ; et
- clarifier les objectifs commerciaux des entreprises publiques, les obligations de rendre compte à l'État propriétaire, et les mécanismes de contrôle des performances des entreprises publiques.

La première partie de cette section discute des approches de ces questions spécifiques de gouvernement d'entreprise, qui sont susceptibles d'instaurer une neutralité concurrentielle entre les concurrents du secteur public et privé. La deuxième partie examine les modèles les plus courants pour appliquer des réformes du gouvernement d'entreprise, c'est-à-dire la transformation en société commerciale et la commercialisation. Enfin, la dernière section discute des forces et insuffisances des modèles de transformation en société commerciale et de commercialisation pour résoudre les problèmes de neutralité concurrentielle.

Questions spécifiques de gouvernement d'entreprise

Séparer la réglementation de la prestation de services

Traditionnellement, dans les cas où des prestataires de services du secteur public formaient partie du gouvernement central, il était très fréquent qu'ils soient également responsables de la réglementation de l'industrie. La distinction entre la prestation de services et la réglementation était souvent obscure. Dans le cas d'un prestataire de service revêtant la forme d'un monopole traditionnel, cela ne posait aucune difficulté significative dans une perspective concurrentielle. Cependant, lorsque ces secteurs ont été libéralisés, avec la commercialisation des entreprises publiques et l'entrée de concurrents privés, des problèmes de concurrence surgissent si les entreprises publiques sont responsables à la fois de la prestation de services et de la réglementation d'autres prestataires de services. Par exemple, une entreprise ferroviaire publique peut réglementer les normes de sécurité de tous les opérateurs ferroviaires, mais peut également fournir des services ferroviaires en concurrence avec d'autres prestataires. Le fait qu'une même agence administrative soit à la fois prestataire de services et autorité de réglementation crée plusieurs problèmes :

- il existe une confusion entre les objectifs réglementaires de l'agence et ses objectifs concurrentiels ;
- l'agence peut être perçue comme favorisant son propre opérateur par rapport à ses concurrents ;
- il existe un risque que les objectifs commerciaux de l'agence compromettent l'intégrité de la réglementation.

Un grand nombre de gouvernements reconnaissent la nécessité de séparer les fonctions réglementaires des agences de leurs activités commerciales, dans le cadre de leurs réformes générales des activités commerciales de l'État. La séparation des fonctions réglementaires est une composante clé de nombreux processus de transformation en société commerciale et de commercialisation. En Norvège :

Le gouvernement a parcouru un long chemin pour mettre la séparation en place, reconnaissant son importance pour la concurrence et une utilisation efficace des ressources. Dans son Livre Blanc sur la propriété des entreprises publiques, il a souligné la valeur de la séparation comme un moyen non seulement d'accroître la confiance dans la neutralité de la réglementation gouvernementale, mais également d'augmenter la légitimité de l'État et de la confiance dans les entreprises publiques. Il note également la valeur du mécanisme de l'Accord sur l'EEE pour soulever des questions de favoritisme. A quelques exceptions près (par exemple, la Norwegian Mapping Authority) la prestation de services et la réglementation sont désormais séparées. (OCDE 2003b, p.6)

La forme de séparation réglementaire la plus rigoureuse intervient lorsque l'agence chargée des fonctions réglementaires est séparée de l'activité commerciale, et lorsque différents Ministres sont responsables de l'agence réglementaire et de l'activité commerciale.

Gestion commerciale et gouvernement d'entreprise

Les structures de gestion du secteur public ne sont pas nécessairement bien adaptées à la concurrence dans un environnement commercial. Pour les grandes entreprises, il peut être souhaitable d'adopter une approche plus commerciale de la gestion et du gouvernement d'entreprise. Cela peut impliquer de fixer des objectifs commerciaux qui reflètent des motivations commerciales, d'instituer un conseil ou président-directeur général indépendant, ou de séparer la gestion quotidienne de l'entreprise du processus politique.

La capacité des dirigeants des entreprises commerciales publiques à gérer leur entreprise d'une manière commerciale est critiquée pour générer une concurrence effective. Les contraintes pesant sur la flexibilité et la liberté des dirigeants du secteur public réduiront leur capacité à s'adapter à des marchés changeants et à répondre aux besoins de leurs clients. Cette liberté commerciale doit s'accompagner de systèmes de gouvernement d'entreprise qui contrôlent et évaluent les performances, et permettent de prendre des mesures correctrices en cas de piètres performances. Bien que l'approche du gouvernement d'entreprise puisse varier d'un pays à l'autre, c'est en règle générale l'État actionnaire qui doit être responsable de fixer le cadre général d'exploitation commerciale de l'entreprise, et les dirigeants doivent avoir la flexibilité nécessaire afin de gérer l'entreprise dans ce cadre. L'OCDE a élaboré des principes généraux en matière de gouvernement d'entreprise (voir encadré 2).

Encadré 2 – Principes généraux de gouvernement d'entreprise

Les Principes de Gouvernement d'Entreprise de l'OCDE ont été initialement approuvés par les Ministres en 1999 et révisés en 2004. Ils entendent aider les Pays membres et non-membres de l'OCDE à évaluer et améliorer leur cadre légal, institutionnel et réglementaire pour le gouvernement d'entreprise. Bien qu'ils aient été essentiellement élaborés pour des sociétés cotées en bourse, ils constituent, dans la mesure jugée applicable, un outil utile pour des sociétés non cotées et des entreprises publiques. Les six principes spécifient que le cadre du gouvernement d'entreprise devrait :

- concourir à la transparence et à l'efficacité des marchés, être compatible avec l'état de droit et clairement définir la répartition des compétences entre les instances chargées de la surveillance, de la réglementation et de l'application des textes ;
- protéger les droits des actionnaires et faciliter leur exercice ;

- assurer un traitement équitable de tous les actionnaires, y compris les actionnaires minoritaires et étrangers. Tout actionnaire doit avoir la possibilité d'obtenir la réparation effective de toute violation de ses droits ;
- reconnaître les droits des différentes parties prenantes à la vie d'une société tels qu'ils sont définis par le droit en vigueur ou par des accords mutuels, et encourager une coopération active entre les sociétés et les différentes parties prenantes pour créer de la richesse et des emplois et assurer la pérennité des entreprises financièrement saines ;
- garantir la diffusion en temps opportun d'informations exactes sur tous les sujets significatifs concernant l'entreprise, notamment la situation financière, les résultats, l'actionnariat et le gouvernement de cette entreprise ; et
- assurer le pilotage stratégique de l'entreprise et la surveillance effective de la gestion par le conseil d'administration vis-à-vis de la société et de ses actionnaires.

Source: OCDE 2004, *les Principes de Gouvernement d'Entreprise de l'OCDE*

Transformation en société commerciale et commercialisation

Les États ont souvent recours à la transformation en société commerciale et à la commercialisation comme modèles pour réformer les régimes de gouvernement d'entreprise des grandes entreprises publiques. La transformation en société commerciale implique de séparer les activités quotidiennes de l'entreprise de l'État et de mettre en place un conseil d'administration indépendant et des structures de gouvernement transparentes. L'entreprise est constituée sous la forme d'une entité juridique séparée, distincte de l'État qui en est propriétaire, et peut être constituée sous la forme d'une société détenue par l'État régie par la loi sur les sociétés commerciales, ou sous la forme d'une autorité statutaire régie par sa propre législation ou une loi cadre. Le cadre de gouvernement d'entreprise institué par la législation régissant une autorité statutaire est généralement similaire à celui institué par la loi sur les sociétés commerciales, mais il peut également inclure des mécanismes spécifiques pour que le gouvernement ordonne à l'entité d'entreprendre certaines activités d'une manière particulière.

A l'échelle internationale, il existe de nombreux modèles de transformation en société commerciale – sociétés commerciales publiques en Australie, sociétés commerciales d'État en Norvège, sociétés appartenant à la Couronne en Nouvelle-Zélande.

La commercialisation est similaire à la transformation en société commerciale, mais les réformes sont moins profondes et étendues.

A la différence de la transformation en société commerciale, le processus d'émulation des conditions du secteur privé en vertu de la réforme de commercialisation ne va pas jusqu'à la création d'une structure de société commerciale complète, avec un conseil d'administration et un président-directeur général non fonctionnaires indépendants et des Ministres actionnaires. Une autre différence clé tient au fait que les activités commercialisées demeurent des opérations d'un département de l'État, tandis que les activités transformées en société commerciale sont des entités juridiques séparées, soumises à un régime de gouvernement d'entreprise similaire à celui institué par la Loi sur les Sociétés Commerciales. (Gouvernement du Queensland 1996, p.17)

La commercialisation vise à mettre les entreprises publiques sur un pied d'égalité par rapport au secteur privé par:

- des objectifs clairs et non conflictuels ;
- une responsabilité, une autorité et une autonomie de gestion suffisante ;

- un contrôle indépendant et objectif des performances ; et
- un système efficace de récompenses et de sanctions. (NSW Treasury 2002, p.4)

Des pays comme la Finlande, la Norvège, la Nouvelle Zélande et l'Australie se sont dotés de programmes de réforme qui impliquent soit la transformation en société commerciale soit la commercialisation d'entreprises publiques. Pour illustrer les approches adoptées dans chaque pays, certaines de ces réformes sont brièvement évoquées dans l'Annexe 1.

L'efficacité de la transformation en société commerciale et de la commercialisation pour instaurer une neutralité concurrentielle

A l'heure actuelle, les réformes par transformation en société commerciale et commercialisation se sont concentrées sur de grandes entreprises publiques. Cet élément reflète, particulièrement dans le cas des transformations en société commerciale, le coût de la création et du contrôle d'une entreprise sous la forme d'une société commerciale à part entière, qui implique :

- la création d'une entité commerciale, d'une structure de gestion et d'un conseil d'administration séparés ;
- la dotation de ressources suffisantes pour qu'une agence du secteur public puisse contrôler les performances de gestion et protéger les intérêts de l'État en tant que propriétaire et autorité de régulation de l'entreprise ; et
- l'engagement d'une réforme législative afin de créer l'entreprise sous la forme d'une société commerciale.

Ces coûts ne se justifient que pour de grandes entreprises. Toutefois, la transformation en société commerciale présente le plus grand potentiel pour instaurer la neutralité concurrentielle. Elle ne met pas seulement en place des structures afin de garantir que l'entreprise publique opère sur une base commerciale, mais aide également à éliminer des perceptions que l'entreprise est avantagée par une relation étroite et non transparente avec l'État. Les incitations commerciales sont plus puissantes dans le cadre d'une transformation en société commerciale qu'elles ne le sont dans le cadre d'une commercialisation. Dans le cadre d'une commercialisation, la direction n'est pas directement responsable des performances de l'entreprise, comme le serait un conseil d'administration sous l'empire de la loi sur les sociétés commerciales. La distinction entre les fonctions de l'État et les activités commerciales est moins claire.

Les coûts de la commercialisation seront inférieurs à ceux de la transformation en société commerciale, car il n'est pas nécessaire de créer une structure sociale complète et un conseil d'administration. Toutefois, les coûts de la commercialisation restent importants et ne se justifieraient pas pour de petites entreprises commerciales.

Il n'en demeure pas moins que lorsqu'il est rentable d'appliquer des modèles de commercialisation et de transformation en société commerciale, ces modèles sont susceptibles d'atténuer de nombreux problèmes de neutralité concurrentielle. A la différence de la plupart des solutions fondées sur le droit de la concurrence, ces modèles abordent les problèmes de concurrence sur une base *préventive* de telle sorte que le coût des distorsions du marché est évité. La question de savoir si la transformation en société commerciale et la commercialisation résoudront tous les problèmes de neutralité concurrentielle dépendra des détails du modèle utilisé — par exemple, les systèmes de comptabilisation et de fixation du coût de revient, et les mécanismes de contrôle et d'application des réformes. Ils sont évoqués de manière plus

détaillée à la section 4. Si les réformes du gouvernement d'entreprise ne couvrent pas tous les avantages et désavantages concurrentiels de l'entreprise publique, par exemple en garantissant qu'elle se conforme à toutes les réglementations auxquelles des entreprises du secteur privé sont assujetties, les réformes du gouvernement d'entreprise n'instaureront pas automatiquement une neutralité concurrentielle.

Le recours à la transformation en société commerciale ou à la commercialisation présente une insuffisance majeure, lorsqu'il s'agit de remédier à des problèmes de neutralité concurrentielle, qui tient au fait qu'il n'est pas rentable de transformer en société commerciale ou de commercialiser de petites entreprises publiques. Or, un grand nombre de ces entreprises peuvent continuer d'affecter le marché sur lequel elles se font concurrence. Par exemple, une entreprise publique locale, bien que petite, peut avoir un effet significatif sur le développement d'entreprises concurrentes du secteur privé dans cette région. L'Australie en donne la preuve, où l'application de principes de neutralité concurrentielle à des entreprises publiques locales, par exemple des établissements de loisirs, a accru la viabilité financière d'entreprises locales privées dans des zones régionales (Ministère du Trésor et des Finances australien, 2004). Si toutes les collectivités locales sont actives dans un service commercial particulier, sans tenir dûment compte de la neutralité concurrentielle, ce secteur de l'économie risque de présenter d'importantes distorsions. Dans de nombreux cas, le coût qu'il faudrait encourir pour corriger ces distorsions en transformant en société commerciale ou en commercialisant individuellement chaque entreprise publique locale, serait prohibitif.

4. Cadres de la neutralité concurrentielle

Bien que les lois sur la concurrence et les réformes du gouvernement d'entreprise puissent contribuer fortement à l'instauration d'une neutralité concurrentielle entre des entreprises concurrentes des secteurs public et privé, elles ne s'appliquent généralement qu'à de grandes entreprises et ne peuvent pas couvrir toutes les questions de neutralité concurrentielle. Un cadre explicite et ciblé de neutralité concurrentielle a le mérite de rassembler les éléments des lois sur la concurrence et des réformes du gouvernement d'entreprise qui peuvent remédier aux problèmes de neutralité concurrentielle, et d'élargir le programme de réforme afin de couvrir des entreprises publiques plus petites et tous avantages ou désavantages concurrentiels subsistants.

Un petit nombre de pays, tels les Pays-Bas (voir encadré 3) et l'Australie (voir encadré 4) ont étudié, ou étudient, des cadres spécifiques de neutralité concurrentielle. Ces cadres traitent systématiquement tous les aspects de la concurrence entre des entités du secteur public et des entités du secteur privé, identifient des domaines où l'entité publique a des avantages ou désavantages artificiels et éliminent ces avantages et désavantages. Ces cadres modifient la gestion, la réglementation, le gouvernement et l'administration des entreprises publiques afin d'éviter, dans toute la mesure du possible, les coûts de distorsion de la concurrence. Ils incluent également des mécanismes *curatifs* pour contrôler l'application et l'efficacité du cadre de neutralité concurrentielle et corriger tous problèmes de neutralité concurrentielle subsistants.

Encadré 3 - Pays-Bas

Les Pays-Bas étudient comment traiter le “problème des relations entre le marché et l’État”. Ce problème surgit lorsque des entreprises publiques opèrent sur des marchés où elles fournissent des services en concurrence avec le secteur privé. Le problème naît de deux risques :

- le risque qu’une concurrence inégale entre des activités du secteur public et le secteur privé ne conduise à l’inefficience ; et
- le risque d’un manque de transparence et d’intégrité des entreprises publiques opérant en concurrence avec le secteur privé.

En 2001, un projet de loi sur les relations entre les marchés et l’État a été déposé au Parlement néerlandais. Le projet de loi a été violemment critiqué par le Parlement, en raison des restrictions que les règles d’entrée sur les marchés qu’il propose risquent d’imposer aux activités du secteur public.

Le Gouvernement néerlandais étudie actuellement de nouveaux moyens de traiter le problème des relations entre le marché et l’État. Le ministère des Affaires Économiques a l’intention, avec les ministères de la Justice et des Affaires Intérieures, de mettre en œuvre une nouvelle législation qui offre une solution au problème d’une concurrence inégale entre les agences publiques et les entreprises privées. La partie la plus importante de la solution consiste à compléter la loi néerlandaise sur la concurrence par des règles de conduite pour les sociétés publiques agissant sous la forme d’entreprises. Ces règles viseraient également la conduite des sociétés privées auxquelles l’État a conféré des droits exclusifs ou spéciaux. (OCDE 2003d, p.31)

Encadré 4 - Australie

Le Gouvernement central et les gouvernements des États, des Territoires et des Collectivités Locales ont commencé à appliquer des principes de neutralité concurrentielle en 1995. Bien que les détails de ces cadres varient quelque peu d’une juridiction à l’autre, les principes sous-jacents à ces cadres sont les mêmes.

L’objectif de la politique de neutralité concurrentielle est l’élimination des distorsions en matière d’allocation de ressources, qui découlent de la propriété publique d’entités se livrant à des activités commerciales importantes : les entreprises publiques ne doivent jouir d’aucun avantage concurrentiel net au simple motif qu’elles appartiennent au secteur public. Ces principes s’appliquent uniquement aux activités commerciales des entreprises publiques, et non pas aux activités non commerciales et à but non lucratif de ces entreprises. (NCC 1998, p.17)

Pour réaliser l’objectif de cette politique de neutralité concurrentielle, les gouvernements australiens ont accepté d’adopter un modèle de transformation en société commerciale pour de grandes entreprises publiques. Lorsqu’une agence gouvernementale exploite des activités commerciales importantes, dans le cadre d’un éventail plus large de fonctions, les gouvernements australiens ont accepté d’adopter un modèle de transformation en société commerciale, ou de garantir que les prix facturés pour les produits et les services soient calculés sur la même base que les concurrents du secteur privé, y compris tous les coûts directs et indirects, avec certains ajustements, tels les commissions de garantie des emprunts, des paiements de nature parafiscale et des taux commerciaux de rendement, afin de compenser tous avantages en termes de coûts découlant directement de la propriété de l’État.

Les gouvernements australiens ont également introduit des mécanismes de traitement des plaintes, afin d’enquêter sur les plaintes d’entreprises du secteur privé alléguant que des entreprises publiques n’ont pas convenablement appliqué les réformes sur la neutralité concurrentielle.

En Australie, un gouvernement peut décider de ne pas appliquer des principes de neutralité concurrentielle s’il peut démontrer que les coûts de la réforme l’emporteraient sur ses bénéfices. Le Gouvernement central australien et chacun des Gouvernements des États et des Territoires australiens ont produit une déclaration de politique sur la neutralité concurrentielle, ainsi qu’un calendrier pour l’application de la réforme et la mise en place des systèmes de traitement des plaintes.²

Pour mettre en place un cadre explicite de neutralité concurrentielle, les gouvernements devraient considérer trois questions clés :

11. Quelles entreprises publiques le cadre de neutralité concurrentielle couvrira-t-il ?
12. A quelles obligations de neutralité concurrentielle ces entreprises publiques seront-elles soumises ?
13. Comment la mise en oeuvre de la neutralité concurrentielle sera-t-elle contrôlée et effectuée ?

Cette section analysera ces questions et certaines des leçons tirées de l'expérience de l'Australie dans la mise en place d'un cadre explicite de neutralité concurrentielle.

4.1 Couverture du cadre de neutralité concurrentielle

Bien qu'il soit relativement facile de décrire le concept de neutralité concurrentielle au sens large du terme, les détails de la politique et son champ d'application sont plus difficiles à définir. En particulier, il peut être complexe d'identifier les types d'activités du secteur public couverts par le cadre de neutralité concurrentielle. Cela suppose de prendre des décisions sur la question de savoir si les réformes visant à instaurer la neutralité concurrentielle s'étendront à tous les niveaux du gouvernement, national, régional et local, sur la manière dont les activités du secteur public seront distinguées d'autres fonctions de l'État et sur le point de savoir si la neutralité concurrentielle sera automatiquement appliquée à toutes les activités commerciales du secteur public, ou soumise à un critère d'intérêt public afin de garantir que les bénéfices de la réforme l'emportent sur les coûts.

Dans la plupart des pays, tous les niveaux de gouvernement, national, régional et local, sont impliqués dans des activités commerciales. Un grand nombre d'entreprises publiques sont exploitées aux niveaux régional et local. Les travaux entrepris par l'OCDE ont illustré l'importance économique du gouvernement local. "Bien que l'impact du gouvernement local puisse être faible par rapport à la taille de l'économie nationale, l'impact collectif de toutes les interventions de gouvernements locaux peut être assez considérable par rapport à l'économie nationale" (OCDE 2000, p.19). L'OCDE a estimé que les recettes des gouvernements locaux oscillent entre 7,5 pour cent et 15 pour cent du produit intérieur brut pour la plupart des Pays de l'OCDE, et entre 16 et 32 pour cent du produit intérieur brut pour les pays scandinaves. Ces estimations ont inclus toutes les recettes des gouvernements locaux, et non pas seulement celles qui seraient soumises à la neutralité concurrentielle, mais elles ont néanmoins révélé que les gouvernements locaux avaient un impact économique significatif sur les économies nationales.

Bien que les services fournis par le gouvernement local diffèrent largement d'un pays à l'autre, ces services peuvent concurrencer le service privé dans des industries comme les activités de loisirs, les crèches et garderies, l'éducation, la santé, le logement et les transports. En conséquence, des politiques de neutralité concurrentielle qui ne couvriraient pas tous les niveaux du gouvernement excluraient un volume significatif d'activités du secteur public et réduiraient les bénéfices des réformes visant à instaurer la neutralité concurrentielle.

La neutralité concurrentielle est destinée à s'appliquer aux services commerciaux du secteur public qui entrent en concurrence, ou peuvent entrer en concurrence, avec le secteur privé. Il n'existe aucune définition universelle de l'entreprise publique. En Finlande, dans une décision de janvier 2002 relative à l'administration routière finlandaise, l'autorité de la concurrence finlandaise a jugé que "le concept d'entreprise inclut toutes les activités des entités publiques, à l'échelle de l'État, des collectivités locales et autres, qui ont été organisées selon des principes commerciaux, sous la forme de sociétés ou d'entreprises publiques, ou qui peuvent être autrement considérées comme de nature essentiellement commerciale." (OCDE 2003e, p.27)

En Australie, le gouvernement australien applique les principes de la neutralité concurrentielle aux entreprises qui répondent aux critères suivants :

1. il doit y avoir facturation de produits ou services (sans que ce soit nécessairement au consommateur final) ;
2. il doit exister un concurrent réel ou potentiel (dans le secteur privé ou public) c'est-à-dire des acheteurs qui ne soient pas limités, par la loi ou la politique, dans leur droit de choisir des sources d'approvisionnement de remplacement ; et
3. les dirigeants de l'entreprise doivent avoir une certaine indépendance en relation avec la production ou l'offre de produits ou services et le prix auquel ils sont fournis. (Commonwealth d'Australie 2004, p.9)

Les États en Australie utilisent des définitions légèrement différentes³.

En général, l'activité commerciale d'une entreprise publique peut être identifiée par un ensemble de caractéristiques :

- l'État a l'intention de facturer le service ;
- l'activité est commerciale par nature ;
- il n'existe aucune restriction explicite imposée par l'État en matière de rentabilité ;
- il existe des concurrents réels ou potentiels.

L'intention de facturer une activité est importante mais ne garantit pas, en soi, que l'activité de l'entreprise soit commerciale. Les États récupèrent, partiellement ou intégralement, le coût de nombreuses activités qui sont non commerciales. Par exemple, ils facturent de nombreuses fonctions réglementaires, au moyen de redevances de licence. Or, il s'agit manifestement d'activités non commerciales. De la même manière, l'entrée d'un parc national peut être payante, alors que l'État n'a aucune intention de gérer le parc comme une activité commerciale.

Conformément à la définition de l'autorité de la concurrence finlandaise, les activités commerciales doivent être organisées selon des principes commerciaux et être de nature commerciale. Cela implique de considérer les objectifs et plans de l'agence administrative, et de déterminer si l'État entend que l'activité se focalise sur un objectif de politique sociale ou un objectif commercial.

Bien que les activités soumises aux principes de neutralité concurrentielle doivent être commerciales, il n'est pas nécessaire qu'elles soient rentables. Il est important d'opérer une distinction entre les activités à but non lucratif et les activités non rentables. L'État peut explicitement ordonner à une agence administrative de fournir certains services pour un bénéfice égal à zéro, ou à perte, afin de répondre à des objectifs sociaux. Ces services sont des activités à but non lucratif, qui sortent du cadre des politiques de neutralité concurrentielle. A d'autres occasions, une entreprise publique pourra exploiter une activité essentiellement commerciale mais qui sera non rentable, en raison des pratiques de tarification ou de gestion de l'entreprise. Dans un cadre de neutralité concurrentielle, cette situation pose un problème de neutralité concurrentielle, qui devra être traitée par des réformes visant à instaurer la neutralité concurrentielle.

Pour que les principes de neutralité concurrentielle soient applicables, il faut qu'il existe des concurrents réels ou potentiels. Si, par exemple, la législation interdit la concurrence, des réformes visant à instituer la neutralité concurrentielle seraient inefficaces. D'autres politiques visant à améliorer l'efficacité de ces entreprises seraient plus appropriées. Toutefois, il n'est pas nécessaire qu'il existe une concurrence réelle pour que des réformes visant à instituer la neutralité concurrentielle soient bénéfiques. Les avantages existants liés à la propriété de l'État peuvent être si importants qu'aucun opérateur du secteur privé ne pourrait être compétitif, et ne fera donc le moindre effort pour entrer sur le marché. La concurrence ne pourrait émerger qu'après la mise en application de politiques de neutralité concurrentielle.

Par ailleurs, l'existence de concurrents ne garantit pas qu'une activité soit de nature commerciale. Un département ministériel peut produire des rapports de recherche. Il peut même facturer ces rapports. Des sociétés privées assument également des travaux de recherche et produisent des rapports. Toutefois, cela ne signifie pas que l'agence gouvernementale se livre à une activité commerciale. Elle peut simplement récupérer certains des coûts de ses fonctions gouvernementales.

Enfin, les États peuvent détenir intégralement ou partiellement des entreprises commerciales. Il est clair que les entreprises commerciales intégralement détenues par l'État entreraient dans un cadre de neutralité concurrentielle. La question de savoir si les États qui ont adopté un cadre de neutralité concurrentielle devraient appliquer ce cadre à des entreprises qui sont partiellement détenues par l'État dépend des conditions dans lesquelles l'État en est propriétaire. Si la propriété partielle par l'État confère à l'entreprise des avantages ou désavantages par rapport aux entreprises concurrentes du secteur privé, l'application de réformes visant à instituer une neutralité concurrentielle pourra être bénéfique.

Comme pour toutes les politiques, les réformes visant à instituer une neutralité concurrentielle ne bénéficieront à la communauté que si les bénéfices des réformes l'emportent sur les coûts. Pour concevoir un cadre de neutralité concurrentielle, la considération clé est de savoir si l'application de la réforme à des entreprises publiques individuelles doit être soumise à une analyse coût/bénéfices. Pour les grandes entreprises publiques, lorsqu'il existe un potentiel significatif de concurrence, les bénéfices de la neutralité concurrentielle l'emporteront généralement sur les coûts. Les résultats sont moins clairs pour les petites entreprises publiques, où le potentiel de concurrence est faible, et où il faudrait apporter des changements substantiels à l'administration de l'entreprise pour mettre en application des réformes visant à instituer une neutralité concurrentielle.

Instituer des critères globaux de référence constitue un moyen de délimiter des seuils pour des réformes visant à instaurer une neutralité concurrentielle. Par exemple, il serait possible de fixer une limite à la taille de l'entreprise publique soumise à un cadre de neutralité concurrentielle⁴. Toutefois, ces critères globaux de référence sont arbitraires et ne peuvent pas garantir que la neutralité concurrentielle sera appliquée de manière appropriée. Une approche plus précise pourrait consister à poser en postulat l'introduction d'une neutralité concurrentielle, tout en exemptant les agences administratives responsables d'activités individuelles, si elles fournissent une analyse approfondie et objective du rapport coût/bénéfice, qui démontre que les coûts de la réforme l'emportent sur ses bénéfices. Alternativement, pour les régimes de neutralité concurrentielle qui comportent un mécanisme de traitement des plaintes (voir la discussion sur le contrôle et l'application, *infra*), ce mécanisme pourrait être utilisé pour surveiller les plaintes dirigées contre de petites entreprises publiques. Lorsqu'il étudiera les plaintes, l'organe chargé de leur traitement pourrait analyser l'intérêt d'étendre les obligations de neutralité concurrentielle afin de couvrir ces petites entreprises publiques.

4.2 *Obligations de réforme en vertu d'un cadre de neutralité concurrentielle*

Après avoir identifié les entreprises publiques qui seront sujettes à la réforme, la prochaine étape consiste à éliminer tous avantages ou désavantages concurrentiels que ces entreprises peuvent avoir. L'encadré 5 donne quelques exemples courants.

Encadré 5 - Avantages et Désavantages Concurrentiels

Avantages concurrentiels

- Aucune obligation de dégager un taux de rendement
- Aucune obligation de payer des dividendes
- Exemptions de différentes taxes et charges nationales, régionales ou locales
- Accès au crédit à des taux inférieurs au taux du marché
- Exemptions de la législation ou réglementation qui affecte la même activité lorsqu'elle est exercée par une entreprise du secteur privé
- Accès gratuit ou à taux bonifié à différentes ressources du siège du groupe ou à d'autres ressources détenues publiquement
- Clients originaires d'autres branches du secteur public qui ne peuvent pas accéder à des fournisseurs alternatifs de produits et services
- Opportunité d'accorder des subventions croisées au profit d'activités commerciales, grâce à d'autres activités de l'agence financées par le budget
- La capacité à désavantager des concurrents en raison du double rôle de régulateur de l'industrie et de prestataire de services commerciaux concurrents

Désavantages concurrentiels

- Responsabilité et/ou obligation de reddition de comptes qui n'ont pas d'équivalent pour une entreprise du secteur privé fournissant les mêmes produits ou services
- Obligation de payer des dividendes excessifs
- Restrictions en matière de structure financière et de gestion financière qui n'ont pas d'équivalent dans le secteur privé
- Moins de flexibilité ou de pouvoir discrétionnaire dans la gestion des opérations, en raison des politiques et/ou pratiques des agences de supervision du secteur public
- Obligation de payer des taux supérieurs de cotisations patronales de retraite ou de rémunération
- Obligation de fournir des produits ou services non commerciaux sans rémunération

Ainsi que l'a analysé la section 3 ci-dessus, les réformes du gouvernement d'entreprise – comme la transformation en société commerciale et la commercialisation – peuvent, pour les grandes entreprises, fournir un modèle permettant de neutraliser les avantages et désavantages concurrentiels. Mais ce modèle est coûteux à mettre en application, risque de ne pas être approprié aux petites entreprises, et peut ne pas couvrir tous les avantages et désavantages concurrentiels des entreprises publiques. Un cadre de neutralité concurrentielle explicite et ciblé traite cette question en développant davantage les approches des méthodologies d'allocation des coûts et d'évaluation des actifs, des exigences de taux de rendement, des obligations parafiscales et des commissions de garantie d'emprunts, de telle sorte que les réformes des entreprises publiques neutralisent, dans toute la mesure du possible, tous avantages et désavantages

concurrentiels restants et de manière à ce que les politiques puissent être appliquées à un plus vaste éventail d'entreprises, y compris celles qui opèrent au sein de grandes agences gouvernementales. Pour les petites entreprises commerciales publiques, une tarification reflétant les coûts de revient (c'est-à-dire couvrant tous les coûts, y compris les ajustements opérés pour parvenir à une neutralité concurrentielle) peut constituer le modèle approprié pour mettre en application des réformes tendant à la neutralité concurrentielle.

Plusieurs cadres peuvent être utilisés pour calculer des prix reflétant le coût de revient. A titre illustratif, l'une de ces approches est brièvement décrite ci-dessous. Elle implique de calculer :

- La structure de base du coût de revient pour chaque activité ;
- Le niveau de coût de revient concurrentiellement neutre ; et
- Le prix de marché concurrentiellement neutre.

La structure de base du coût de revient inclut tous les coûts directs, indirects et d'amortissement de l'activité, et tient compte de toutes les ressources réelles employées pour produire le service. Afin d'évaluer ces coûts, les agences administratives doivent mettre en place des structures de gestion financière adéquates, qui permettent d'imputer ces coûts, y compris des coûts indirects, à des activités particulières. A titre d'exemple, la comptabilité d'engagements, la comptabilité par fabrication et les systèmes d'évaluation d'actifs, sont capables de générer les informations nécessaires afin de calculer la structure de base du coût de revient d'une entreprise publique. L'allocation des coûts est étudiée de manière plus détaillée dans la suite de cette étude.

Le niveau de coût de revient concurrentiellement neutre inclut la structure de base du coût de revient plus un ajustement pour tenir compte de tous avantages ou désavantages que l'entreprise reçoit du fait qu'elle est la propriété de l'État.

Le niveau de coût de revient concurrentiellement neutre

| |
|--|
| Competitive neutrality adjustment <ul style="list-style-type: none"> • private sector rate of return • taxes |
| Depreciation |
| Allocated indirect costs <ul style="list-style-type: none"> • HR and IT services¹ • administration • finance costs |
| Direct costs <ul style="list-style-type: none"> • labour • materials • services |

1. Ressources humaines et services informatiques

Source: South Australian Department of Treasury and Finance (Ministère du Trésor et des Finances sud-australien) 2000, *A Guide to the*

Implementation of Cost Effective Pricing: A part of competitive neutrality policy, p.11

Il faut veiller à ne pas présumer qu'une différence des systèmes réglementaires, de gestion, juridiques ou financiers du secteur public va automatiquement entraîner un désavantage concurrentiel. Il faut démontrer que les contraintes sont imposées de l'extérieur, excèdent celles auxquelles le secteur privé est confronté et imposent ensuite un certain coût de revient à l'agence administrative. Dans de nombreux cas, il serait préférable d'éliminer le désavantage en termes de coûts plutôt que d'essayer d'ajuster les prix.

Calculer le prix de marché concurrentiellement neutre constitue une opération liée mais séparée du calcul du coût de revient.

Le niveau de coût de revient concurrentiellement neutre fournit un point de référence pour les décisions de fixation de prix. La tarification d'un produit ou service dépendra de plusieurs facteurs, outre le coût de revient concurrentiellement neutre estimé ainsi qu'il est dit ci-dessus, y compris :

- ce que le marché supportera (qui peut changer au fil du temps) ;
- le niveau de concurrence entre prestataires de services ;
- tout avantage technologique dont disposent d'autres fournisseurs de produits et d'autres prestataires de services ; et
- des comportements de positionnement de prix stratégiques sur le marché, notamment l'introduction de produits d'appel ou un subventionnement croisé de produits, sous réserve des interdictions de certains comportements en vertu du Trade Practices Act [Commonwealth] (Loi sur les Pratiques Commerciales [Commonwealth]) 1974. (Ministère du Trésor et des Finances sud-australien 2000, p.11)

La fixation des prix doit couvrir le niveau de coût de revient du moyen au long terme. Dans un cadre de neutralité concurrentielle, si cela n'est pas possible, l'État devra envisager de cesser l'activité ou de la subventionner pour des raisons de politique sociale. Dans certains cas, il pourra être légitime d'exploiter un service particulier à perte pendant une courte période. Pour respecter les principes de neutralité concurrentielle, ces pertes doivent être temporaires pour atteindre un objectif commercial valable.

Calculs de la Neutralité Concurrentielle et Ajustements

Quel que soit le modèle choisi pour atteindre la neutralité concurrentielle, -- transformation en société commerciale, commercialisation ou tarification reflétant le coût de revient --, l'État et ses entreprises devront s'atteler à calculer les avantages et désavantages concurrentiels des entreprises publiques et à opérer des ajustements pour neutraliser ces avantages et désavantages.

La Section 3 consacrée aux questions de gouvernement d'entreprise a évoqué les moyens de donner une focalisation commerciale aux entreprises publiques et de les doter de mécanismes adéquats pour contrôler et évaluer la performance de l'entreprise, ainsi que les moyens de séparer la réglementation de la prestation de services. Ces réformes sont importantes pour instaurer une neutralité concurrentielle. Cette section analyse certaines des autres questions clés auxquelles sont confrontés les États qui souhaitent mettre en place un cadre de neutralité concurrentielle :

- ventiler les coûts entre les différentes activités afin de garantir des niveaux appropriés de récupération des coûts et d'éviter des subventions croisées ;
- fixer un taux de rendement approprié ;
- veiller à ce que les entreprises publiques acquittent tous les impôts, taxes et charges obligatoires ;
- ajuster les coûts d'emprunt afin de refléter un taux d'intérêt commercial ;
- veiller à ce que tous les prix des facteurs de production soient fixés de manière appropriée ;
- soumettre les entreprises publiques à la même réglementation que des entreprises similaires du secteur privé ;
- permettre le subventionnement d'activités visant à réaliser des objectifs de politique sociale.

Allocation des Coûts

L'allocation des coûts est importante pour instaurer une neutralité concurrentielle, car elle garantit que les entreprises disposent d'informations appropriées pour leur permettre de fixer le prix de leurs services, que ces prix reflètent les coûts des services, et qu'il n'existe aucune subvention croisée entre les différentes activités exercées par l'agence administrative. Pour les entités gouvernementales qui fournissent à la fois des services commerciaux et des services publics, l'approche de l'allocation des coûts est à la fois très importante et très complexe. Les États traitent des questions d'allocation des coûts dans le contexte d'autres politiques, et non pas seulement dans celui de la neutralité concurrentielle. L'autorité de la concurrence danoise administre des dispositions qui visent à l'allocation des coûts entre activités, afin d'évaluer s'il existe un subventionnement de nature à fausser la concurrence.

L'autorité de la concurrence danoise et le Conseil de la Concurrence danois ne souhaitent pas imposer aux autorités de comté, aux municipalités, etc. ... des charges administratives inutiles. Ainsi, aucune norme comptable spécifique, etc., n'est exigée. Il est important qu'il soit rendu probable que les recettes générées par la vente couvrent tous les coûts applicables lorsqu'une activité commerciale est exercée sous les auspices du secteur public. L'expression "tous les coûts applicables" couvre les coûts directs de personnel, de matières premières, etc. ; toutefois, elle couvre également les coûts indirects, à savoir les coûts de retour sur, et d'amortissement des machines, matériels, outillages, terrains, éléments incorporels du fonds de commerce, etc., ainsi qu'une part dûment justifiée des coûts indirects comme les frais administratifs et de loyers. La manière dont les coûts indirects sont ventilés peut varier d'un cas à l'autre, mais il n'en demeure pas moins que la ventilation doit être dûment justifiée.

Ainsi, il faut démontrer clairement quels coûts ont été pris en charge, à l'occasion de la présentation du service, et comment les coûts sont inclus dans le prix du service. Lorsque tous les coûts sont inclus dans le prix, aucune distorsion de la concurrence n'aura lieu en principe. (OCDE 2001, p.97)

Le gouvernement canadien a élaboré un guide des meilleures pratiques sur le *Comparateur du Service Public*, qui est utilisé par les fonctionnaires gouvernementaux pour évaluer si une offre du secteur privé présente un bon rapport qualité/prix par comparaison avec la prestation du secteur public. Ce guide étudie toute une série de questions liées au calcul du coût de revient. (Industrie Canada 2002)

Calculer les ressources employées pour produire un service particulier implique d'identifier tous les coûts encourus par l'entité publique pour assurer cette activité, y compris les coûts directs, les coûts indirects et l'amortissement.

- **Les coûts directs** sont les coûts qui peuvent être attribués directement et sans équivoque à une activité. Ils incluent les coûts de personnel (y compris les frais généraux) et de matières premières employées pour produire le produit ou service. (CCNCO1998a, p.8)
- **Les coûts indirects** sont ceux qui ne sont pas directement imputables à une activité et sont souvent visés sous le terme de frais généraux. Ils peuvent inclure les coûts des 'services généraux', tels les salaires du président-directeur général, les services financiers, les ressources humaines, la comptabilité et l'informatique. (CCNCO1998a, p.8)
- **L'amortissement** est une charge qui mesure la consommation d'un actif (en termes de valeur) au fil du temps et en fonction de l'intensité de son utilisation. (Ministère du Trésor et des Finances sud-australien, 2000, p.32)

Dès lors que les systèmes de comptabilisation utilisés sont suffisamment séparés, les coûts directs sont relativement faciles à identifier.

L'allocation des coûts indirects peut être beaucoup plus complexe. Lorsqu'une entreprise publique comporte de nombreuses fonctions, des méthodes rigoureuses d'allocation des coûts sont indispensables pour éviter des subventions croisées entre des activités commerciales et non commerciales. Les objectifs sous-jacents des politiques de neutralité concurrentielle sont l'efficacité économique et la loyauté. Dès lors, la méthode d'allocation des coûts choisie en vertu d'un cadre de neutralité concurrentielle doit promouvoir l'efficacité économique et veiller à ce que tous les coûts encourus par une entreprise publique soient imputés à cette activité. Certaines méthodes possibles d'allocation des coûts sont brièvement exposées dans l'annexe 3.

Il existe également différentes méthodes de calcul de l'amortissement. Analyser les bénéfices et coûts de ces méthodologies constitue une tâche minutieuse et complexe. Cette analyse sort du cadre de la présente étude. Les États qui mettent en œuvre une politique de neutralité concurrentielle devraient fournir des conseils aux agences administratives à propos de la méthodologie attendue d'elles ou des paramètres de choix d'une méthodologie appropriée.

L'obtention d'évaluations d'actifs appropriées et la ventilation des actifs entre les différentes activités de l'agence gouvernementale constituent un autre facteur critique pour instituer la neutralité concurrentielle. Les principes d'allocation des coûts indirects, analysés dans l'annexe 3, s'appliquent également à l'allocation des coûts du capital. Ici encore, l'évaluation approfondie des mérites des différentes méthodologies d'évaluation des actifs sort du cadre de la présente étude⁵.

Taux de rendement

Les sociétés du secteur privé citent souvent 'l'absence d'obligation de générer un taux de rendement' comme l'avantage clé dont jouissent les entreprises du secteur public. A supposer même que la politique gouvernementale décrète que les entreprises doivent générer des rendements appropriés, il existe souvent peu de sanctions si l'entreprise échoue à atteindre ces objectifs. Un taux de rendement approprié serait équivalent à celui généré par des entreprises similaires du secteur privé. En d'autres termes, l'objectif

devrait refléter le taux des obligations d'État à long terme (le taux de rendement sans risque) plus une marge appropriée pour tenir compte du risque.

Un grand nombre d'États exigent déjà que certaines de leurs entreprises génèrent un taux de rendement approprié. La Nouvelle-Zélande en est un exemple. En Nouvelle-Zélande, le taux de rendement cible est fixé en utilisant le coût moyen pondéré du capital (CMPC), en tenant compte des taux de rendement exigés s'attachant aux différentes composantes de la structure du capital de la société (CCMAU 2002, section 6). L'annexe 5 présente l'approche de la Nouvelle-Zélande pour le calcul du CMPC dans l'industrie de l'électricité.

Pour l'application de son cadre de neutralité concurrentielle, le gouvernement australien exige des dirigeants d'entreprises soumises à la neutralité concurrentielle qu'elles fixent le prix de leurs services de manière à pouvoir générer un taux de rendement commercial sur l'ensemble de leurs activités commerciales, pendant une période de temps raisonnable. (Commonwealth d'Australie 2004. p.29)

Dans un cadre de neutralité concurrentielle, les États doivent déterminer les taux de rendement appropriés pour leurs différentes activités commerciales. Les méthodes pouvant être utilisées pour calculer ces rendements varient considérablement dans leur complexité et leur niveau de précision. Le calcul du CMPC, par exemple, peut être complexe car il exige l'estimation de variables comme le taux de rendement exigé des capitaux d'emprunt et des capitaux propres et les valeurs de marché des actifs, des capitaux d'emprunt et des capitaux propres (voir annexe 5). Il utilise le coût du capital comme le taux de rendement minimal que l'entreprise doit atteindre et se fonde sur la présomption qu'une entreprise financièrement viable doit générer un rendement supérieur à son coût du capital. En raison de la complexité du calcul du CMPC, il est plus approprié pour les grandes entreprises publiques, particulièrement s'il existe des concurrents du secteur privé solidement établis, de telle sorte que l'on dispose de données de référence sur le coût des capitaux propres.

S'il est impossible de calculer le CMPC, mais si les dirigeants sont capables d'estimer le risque de marché de l'entreprise⁶, un taux de rendement cible, fixé en utilisant une approche à bande large, peut être approprié. "La bande large se fonde sur des CMPC types, pour les entreprises à risque de marché élevé, moyen ou faible" (Commonwealth d'Australie 2004, p.32). Le taux de rendement cible à bande large a deux composantes. Un coût de base du capital est fixé, par exemple, au taux des obligations à long terme, et une prime est définie pour chaque niveau de risque de marché. Par exemple, le Bureau des Plaintes sur la Neutralité Concurrentielle du gouvernement australien a recommandé les taux de rendement suivants, comme des taux de rendement raisonnables pour les entreprises publiques en Australie.

Objectifs de taux de rendement types pour les entreprises à risque faible, moyen et élevé

| <i>Risque de marché de l'entreprise</i> | <i>Objectif nominal avant impôts pour un taux des obligations à long terme de 5%</i> | <i>Objectif nominal avant impôts exprimé sous forme de prime sur le taux des obligations à long terme</i> |
|---|--|---|
| Risque faible | 8 | Obligation plus 3 points de pourcentage |
| Risque moyen | 10 | Obligation plus 5 points de pourcentage |
| Risque élevé | 12 | Obligation plus 7 points de pourcentage |

Source: Bureau des Plaintes sur la Neutralité Concurrentielle du Commonwealth d'Australie 1998b, Questions relatives au Taux de Rendement, Rapport de Recherche du CCNCO, Commission de la Productivité, p.11

Un taux de rendement uniforme est la méthode la plus simple pour fixer un taux de rendement cible. Selon cette méthode, les entreprises publiques génèrent un niveau de rendement prédéterminé sur tous leurs actifs. Ce rendement se fonde sur un calcul de CMPC type pour les entreprises présentant un risque de marché moyen. Un taux de rendement uniforme ne reconnaît pas le fait que différentes entreprises soient exposées à différents risques de marché. En conséquence, il ne tient pas compte du fait que les investisseurs attendent des rendements plus élevés d'entreprises risquées et des rendements plus faibles d'entreprises moins risquées.

Afin d'instituer un cadre de neutralité concurrentielle, les États devraient ensuite mesurer le taux de rendement réel généré par les entreprises, de manière à pouvoir comparer la performance avec l'objectif.

Dividendes

Comme tous les propriétaires d'entreprises, l'État est en droit d'exiger que ses entreprises paient des dividendes. Le gouvernement finlandais, par exemple, considère que les paiements de dividendes constituent un élément important de sa politique d'État actionnaire. (Ministère du Commerce et de l'Industrie (Finlande) 2004) :

La politique de dividendes des sociétés est essentielle pour l'État. L'État apprécie une politique de dividendes élevés et prévisibles qui tienne compte des intérêts du propriétaire et soit fondée sur un flux de dividendes régulier et comparable à celui du secteur. Les prévisions de dividendes de l'État sont évaluées annuellement, de manière à prendre en compte les besoins d'autosuffisance et le potentiel de développement de la société. (Ministère du Commerce et de l'Industrie (Finlande) 2004. p.8)

Certains États considèrent que le paiement de dividendes est important pour dissiper tout malentendu qui pourrait faire croire que le coût du capital apporté par l'État est égal à zéro. (Ministère du Trésor du Queensland 1994, p.39)

Des problèmes de neutralité concurrentielle peuvent surgir si un gouvernement n'adopte pas une approche commerciale pour la fixation d'objectifs de dividendes. En Nouvelle-Zélande, le Ministre actionnaire et le conseil d'administration d'une entreprise publique conviennent annuellement des niveaux de dividendes, fixés selon des critères commerciaux.

Le niveau des dividendes estimés est dicté par la structure de capital souhaitée, la rentabilité de la société et le niveau des futures dépenses d'investissement, tels qu'ils sont indiqués dans le plan d'exploitation et le SCI/SOI [Statement of Corporate Intent/Statement of Intent (Déclaration d'Intention de l'Entreprise/Déclaration d'Intention)]. (CCMAU 2002, section 6)

Dans de nombreux cas, cependant, les États ne sont pas rigoureux dans leur processus de fixation du niveau de dividendes qu'ils exigent. Une étude préparée pour le Conseil National de la Concurrence d'Australie, relative aux paiements de dividendes par les autorités australiennes de distribution d'eau, analyse les risques liés à des niveaux appropriés de paiement de dividendes. Ces risques surgissent si les paiements de dividendes sont soit trop faibles soit trop élevés. (NECG 2002)

Si les paiements de dividendes sont trop faibles, les entreprises publiques peuvent disposer d'un avantage sur leurs concurrents du secteur privé, car elles bénéficient d'une capitalisation à moindre coût. Au contraire, des paiements de dividendes trop élevés peuvent désavantager les entreprises publiques. Sur une longue période, des dividendes supérieurs à 100 pour cent du bénéfice peuvent mettre en risque la viabilité financière de l'entreprise. A court terme, certains États peuvent utiliser des dividendes élevés pour restructurer la base de capitalisation de leurs entreprises, réduisant ainsi le ratio des fonds propres par rapport à l'endettement. Bien que l'adoption d'un mix plus commercial de financement par l'emprunt et de

capitaux propres puisse être appropriée pour des entreprises publiques, y parvenir par une politique de dividendes manque de transparence et ne fournit pas des objectifs clairs pour la direction.

Pour garantir que les dividendes soient fixés conformément à un cadre de neutralité concurrentielle, les gouvernements peuvent fonder leur politique de dividendes sur les mêmes exigences que celles qui s'appliquent aux entreprises du secteur privé. Fonder les politiques de dividendes du secteur public sur le cadre exigé par le droit des sociétés garantirait clairement que les entreprises publiques ont des systèmes de paiement de dividendes compatibles avec ceux du secteur privé.

Régime Fiscal

Les entreprises du secteur privé critiquent fréquemment le fait que leurs concurrents du secteur public bénéficient d'un avantage déloyal au motif qu'ils ne sont pas tenus de payer des taxes et charges gouvernementales. Les États veillent dans une mesure croissante à ce que leurs entreprises soient assujetties au même régime fiscal que le secteur privé.

Au Royaume-Uni, l'application de la Taxe sur la Valeur Ajoutée (TVA) repose sur le principe que les entreprises du secteur public doivent être assujetties à la TVA de la même manière que les entreprises du secteur privé.

...La TVA peut être un sujet complexe dans le secteur public. La question la plus complexe est la différenciation entre les prestations commerciales et non commerciales. ...

La plupart des activités des entités publiques sont exercées en vertu d'une obligation légale et ne sont donc pas des "activités commerciales" pour les besoins de la TVA —elles sortent du cadre de la taxe. En conséquence, des dispositions ont été mises en place pour éviter la distorsion de la concurrence avec les entreprises privées.. (National Audit Office 2002, p.4)

Dans un cadre de neutralité concurrentielle, les entreprises publiques devront inclure dans leur structure de coût de revient le coût de toutes les taxes, cotisations et charges gouvernementales nationales, régionales et locales (y compris toutes taxes sur des facteurs de production comme la main-d'oeuvre). Pour l'application de la neutralité concurrentielle, les États peuvent prendre trois approches en considération pour traiter de la fiscalité.

3. Exiger des entreprises publiques qu'elles paient des impôts et taxes de la même manière que les entreprises du secteur privé. Cette approche peut être appropriée pour des entreprises publiques qui sont structurées comme des entités juridiques séparées.
4. Mettre en place un régime d'équivalents d'impôts dans lequel les entreprises publiques calculent leur facture fiscale et effectuent un paiement spécifique dans les caisses de l'État. S'il n'est pas possible d'assujettir l'entreprise publique à la législation fiscale générale, un régime d'équivalents d'impôts peut être utilisé. Les détails de ce régime d'équivalents d'impôts sont susceptibles de varier d'un pays à l'autre. En Australie, le Gouvernement australien exige de ses grandes entreprises publiques, qui bénéficient d'une exemption fiscale, de payer des équivalents d'impôts à l'Official Public Account.

La mise en place, le contrôle et le respect d'une réplique exacte de l'actuel régime d'imposition des revenus et des bénéfices peuvent prendre beaucoup de temps et entraîner beaucoup de frais. Pour les besoins de la NC [neutralité concurrentielle], il est admis que les obligations de déclaration ne seront pas intégralement répliquées. En d'autres termes, il n'est pas nécessaire de compléter et déposer des déclarations de revenus ou de résultats auprès de l'Administration Fiscale australienne, ni de déposer

d'autres déclarations, états ou documents auprès des administrations fiscales d'État. Toutefois, il faut néanmoins procéder aux calculs nécessaires et effectuer des paiements TER [régime d'équivalents d'impôts] à l'OPA [official public account] selon le même échéancier que celui qui s'applique aux concurrents privés. Le principe directeur pour les TERs exige que le coût de calcul des impôts et taxes à payer doit être proportionné aux montants impliqués. (Commonwealth d'Australie 2004, p.19)

1. Exiger des entreprises publiques qu'elles apportent des ajustements de neutralité fiscale à leurs prix, afin de garantir que tous les prix sur des marchés concurrents tiennent compte du coût de la fiscalité. Les ajustements pour neutralité concurrentielle impliquent de calculer les impôts à payer d'une manière comparable à celle du secteur privé, mais aucun paiement effectif n'est effectué. En revanche, les prix des services publics sont ajustés pour refléter le coût accru de la fiscalité. Cette approche est susceptible d'être la plus appropriée pour les petites entreprises, où le coût de la mise en place d'un régime d'équivalents d'impôts l'emporterait sur les bénéfices de ce régime.

Charges financières

Dans un cadre de neutralité concurrentielle, toutes les entreprises publiques devraient supporter les intérêts de leurs emprunts. Or, les entreprises publiques peuvent souvent emprunter à un coût inférieur à celui des entreprises privées. Même si le gouvernement ne garantit pas explicitement qu'il honorera toutes les dettes de l'entreprise en cas de faillite de celle-ci, les établissements prêteurs ont l'impression que les entreprises publiques ont un faible risque de défaillance. En conséquence, pour la mise en place d'un cadre de neutralité concurrentielle, il faudrait que les entreprises publiques fortement endettées ajustent leurs coûts de revient pour refléter les avantages qu'elles ont par rapport au secteur privé en termes de taux d'intérêt.

Ces ajustements pourraient être effectués en ajustant le coût des emprunts financés par le budget public, afin de refléter le coût d'emprunt sur le marché, ou en exigeant des entreprises qu'elles paient une taxe de neutralité au gouvernement, afin de refléter la différence entre le coût réel d'emprunt et le coût d'emprunt qu'une entité privée devrait supporter dans les mêmes circonstances. L'importance de cette taxe de neutralisation de la garantie des emprunts variera au fil du temps, en fonction des changements intervenant sur le marché du crédit.

Fixation des prix des facteurs de production

Les entreprises publiques peuvent recevoir un avantage considérable si elles ne paient pas leurs facteurs de production sur la même base que le secteur privé. Comme nous l'avons déjà fait observer dans la section consacrée à l'allocation des coûts, cela implique de supporter le coût des services généraux qui sont imputables à l'activité de l'entreprise publique.

Il convient de citer une autre question importante pour certaines entreprises publiques, à savoir le prix facturé pour des ressources naturelles, notamment les actifs forestiers et l'eau, par comparaison avec le prix qu'une entité du secteur privé devrait payer. Toutefois, il peut être complexe d'évaluer ces types de ressources. Dans un récent rapport de recherche, la Commission de Productivité australienne a analysé l'impact des politiques de tarification du bois en rondis sur la neutralité concurrentielle dans l'industrie forestière (voir encadré 6).

Encadré 6 – Étude de cas sur la neutralité concurrentielle dans l'industrie forestière

La fixation de prix trop bas par les entreprises forestières publiques peut affecter l'équilibre entre le secteur public et privé dans le domaine de la production de bois. Elle affecte également le rendement que la communauté tire de ses actifs forestiers et peut avoir une influence défavorable sur les décisions d'investissement et de récolte des entreprises forestières publiques.

A priori, l'application de la neutralité concurrentielle devrait réduire l'incidence de la fixation de prix trop bas pour le bois en rondins, car elle exige que les entreprises forestières publiques agissent de manière plus commerciale en facturant des prix qui couvrent tous les coûts d'élevage et de gestion de la forêt, y compris un rendement commercialement acceptable des actifs fonciers et forestiers. Cela aide à garantir que les bois en rondins vendus par les entreprises forestières publiques le soient à leur pleine valeur de marché. Cependant, dans certaines circonstances, il est possible que le coût d'élevage et de gestion de la forêt soit inférieur à la pleine valeur de marché (c'est-à-dire la valeur réalisable) des bois en rondins. En d'autres termes, la neutralité concurrentielle englobe un concept de 'prix plancher' et n'identifie pas les situations dans lesquelles le prix potentiel pouvant être atteint par les entreprises forestières publiques excède celui atteint en pratique.

La probabilité que le contrôle exercé en vertu de la neutralité concurrentielle permette de détecter la fixation de prix trop bas est également réduite par le degré de circularité qui existe entre les prix des bois en rondins et les valeurs des actifs forestiers. Cette situation reflète deux facteurs. En premier lieu, si des bois en rondins 'à prix trop bas' servent à déterminer les valeurs des actifs forestiers, la structure de base du coût de revient sera sous-estimée, tout comme le sera le prix exigé pour couvrir tous les coûts applicables de l'exploitation forestière. En second lieu, toute sous-estimation des valeurs d'actifs entraînera, à son tour, une surestimation des taux de rendement déclarés. L'efficacité du contrôle du taux de rendement est également inhibée par plusieurs autres facteurs, notamment la variabilité en glissement annuel des volumes de ventes de bois en rondins et les fluctuations des conditions du marché.

Ces difficultés de contrôle de la performance des entreprises forestières publiques suggèrent qu'il faudrait, pour évaluer le respect de la neutralité concurrentielle, se fonder davantage sur l'utilisation de valeurs résiduelles afin de déterminer la valeur de marché des bois en rondins, plutôt que sur les prix réellement atteints par les entreprises forestières publiques. Ces valeurs devraient également être utilisées pour estimer les valeurs des actifs forestiers. S'ils sont disponibles, les prix payés pour les droits de récolte pourraient également être servir à déterminer si les bois en rondins sont vendus pour leur pleine valeur de marché.

Source: Commonwealth Competitive Neutrality Complaints Office (CCNCO) (Bureau des Plaintes sur la Neutralité Concurrentielle du Commonwealth d'Australie) 2001a Competitive Neutrality in Forestry (Neutralité Concurrentielle dans l'Industrie Forestière), CCNCO Étude de Recherche, Commission de la Productivité, pp.39-40

Neutralité réglementaire

L'environnement réglementaire des entreprises publiques peut différer de celui des entreprises du secteur privé à de nombreux égards. Dans un cadre de neutralité concurrentielle, les entreprises du secteur public et celles du secteur privé devraient, dans la mesure du possible, se conformer aux mêmes réglementations, notamment aux lois, obligations de licence et exigences prudentielles en vigueur matière d'urbanisme, de construction et d'environnement, et aux mêmes lois en matière de pratiques commerciales.

S'il n'est pas possible d'égaliser l'environnement réglementaire, l'État peut devoir envisager d'autres moyens de garantir que les différences restantes n'affectent pas la capacité de l'entreprise publique à concurrencer le secteur privé. Cela pourrait impliquer l'obligation pour les entreprises d'effectuer un paiement équivalent dans les caisses de l'État pour corriger les avantages réglementaires, ou de calculer les bénéfices de ces avantages et d'ajuster la stratégie de tarification de l'entreprise publique afin de compenser ces bénéfices.

Objectifs sociaux ou obligations de service public

Les États donnent souvent instructions à leurs entreprises de se livrer à des activités non commerciales ou sans but lucratif, afin de répondre à des objectifs de politique sociale. Ces instructions peuvent s'adapter à un cadre de neutralité concurrentielle, mais les États doivent revoir la méthode de fixation et de financement d'objectifs de politique sociale.

Dans un cadre de neutralité concurrentielle, les États qui envisagent de subventionner des services pour réaliser des objectifs de politique sociale doivent, au minimum :

- Définir clairement les objectifs de politique sociale et les services nécessaires pour atteindre ces objectifs ; et
- Calculer le coût de ces services et fournir un financement explicite à l'entreprise publique responsable, afin d'indemniser la perte impliquée par la réalisation des objectifs de politique sociale.

Cette position est cohérente avec les règles de la Commission Européenne qui permettent l'autorisation de subventions publiques par la Commission en vertu de l'Article 86(2) du Traité instituant l'UE, si :

- *le contenu du service d'intérêt économique général est clairement défini ;*
- *l'État membre a confié la prestation du service à une société ;*
- *la subvention est proportionnelle à l'objectif et est donc limitée au montant nécessaire à la prestation du service, de telle sorte qu'il n'existe aucune surcompensation. Il faudrait par exemple éviter qu'une partie de la subvention payée à une société pour compenser la prestation d'un service d'intérêt économique général soit utilisée par la société pour d'autres activités concurrentes (subvention croisée). Dans ces circonstances, le principe de la proportionnalité serait respecté. (OCDE 2001, p.162)*

Il est important, dans un cadre de neutralité concurrentielle, de définir précisément les objectifs de politique sociale et les activités qui permettront de réaliser ces objectifs, afin de garantir la transparence et d'éviter la confusion entre les activités commerciales et les activités subventionnées. Dans un cadre de neutralité concurrentielle, c'est le gouvernement, et non l'entreprise publique, qui a la responsabilité de définir ces objectifs et activités. En effet, le gouvernement doit assumer cette responsabilité pour qu'il soit possible de garantir que le pouvoir discrétionnaire de l'entreprise publique en matière de subventionnement de services ne serve pas à saper les objectifs de neutralité concurrentielle.

Il convient en outre de chiffrer clairement et de financer directement la perte découlant d'activités subventionnées qui visent à réaliser des objectifs sociaux. Plusieurs pays reconnaissent déjà la nécessité de financer explicitement des objectifs sociaux. En Finlande, par exemple :

Les sociétés opérant aux conditions du marché fonctionnent toujours avec des objectifs normaux de rentabilité et de compétitivité. Si un actionnaire fixe d'autres objectifs pour une entreprise publique opérant aux conditions du marché, tous les actionnaires doivent approuver ces objectifs, et les coûts supplémentaires encourus par la société doivent être compensés sur la base de décisions prises à l'avance. L'État doit toutefois agir de manière à ne pas fausser la concurrence et à ne pas violer les obligations découlant de l'appartenance de la Finlande à l'UE. (Ministère du Commerce et de l'Industrie (Finlande) 2004, p.4)

Il est important de chiffrer clairement et précisément les coûts des activités visant à réaliser des objectifs de politique sociale. Si la compensation fixée pour ces activités est trop faible, l'entreprise publique aura un désavantage concurrentiel pour atteindre ses autres objectifs commerciaux. Si la compensation est trop élevée, l'entreprise publique aura un avantage concurrentiel sur les entreprises privées.

Dans la plupart des cas, la définition précise et le financement explicite des activités visant à réaliser des objectifs de politique sociale résoudront la plupart des problèmes de neutralité concurrentielle connexes. Mais dans certains cas, les concurrents du secteur privé peuvent toujours arguer que l'entreprise publique chargée d'atteindre les objectifs sociaux détient un avantage concurrentiel. Tel peut être le cas si l'objectif social constitue une grande partie de l'objet social statutaire de l'entreprise et soutient la base de capital de l'entreprise. Par exemple, une entreprise publique postale qui est subventionnée pour fournir un réseau de distribution universel ou un prestataire de transport qui obtient une part de marché significative grâce à des services subventionnés au profit de groupes défavorisés. Si le financement de l'objectif social garantit que ces entreprises conservent une base de clientèle importante, ces entreprises pourront être perçues comme détenant un avantage concurrentiel. Les États qui décident de traiter ce problème pourraient envisager de lancer un appel d'offres pour la réalisation de ces objectifs sociaux, de telle sorte que les entreprises du secteur public et celles du secteur privé puissent soumissionner pour obtenir le droit d'entreprendre l'activité subventionnée.

L'autorité de la concurrence italienne a suggéré qu'une procédure d'appel d'offres contribuerait à résoudre les réclamations formulées à propos des subventions dans le secteur des transports maritimes.

...les fonds publics dépensés pour garantir la fourniture de services d'intérêt public doivent être mis à la disposition de quiconque veut et peut fournir ces services. Leur attribution doit être faite sur la base d'offres soumises dans le cadre de procédures d'adjudication transparentes et non discriminatoires, comme le recommandent les directives de la Commission Européenne en matière de subventions publiques pour le transport maritime. (OCDE 2001, p.132)

Si elle est compétitive, l'offre sera susceptible d'améliorer l'efficacité du service, car la concurrence garantira que l'enchérisseur gagnant offre le meilleur service au plus bas prix. En revanche, si elle n'est pas compétitive, l'offre sera susceptible d'entraîner une hausse des coûts. Ce problème a été illustré dans le cadre de l'avis d'appel d'offres lancé dans le secteur des services aériens régionaux en Norvège. Lorsque ces services ont été mis aux enchères pour la première fois, la subvention payée par le gouvernement a chuté, en dépit du fait que le prestataire de services monopolistique ait gagné toutes les enchères. La seconde procédure d'enchères a conduit à une augmentation substantielle des subventions payées par le gouvernement pour ces services. Les prix les plus élevés concernaient, paraît-il, les itinéraires sur lesquels le prestataire de services concerné savait qu'il n'y aurait aucune concurrence. (OCDE 2003b, p.21)

Financer directement des entreprises publiques spécifiées et permettre à la concurrence d'opérer librement permettrait de réaliser la plupart, sinon la totalité, des objectifs de politique sociale actuellement assurés par des entreprises publiques. Certains objectifs sociaux de l'État impliquent de fournir des services à un prix uniforme à tous les clients. Il est plus difficile de concilier cet objectif avec des objectifs de neutralité concurrentielle. Si le secteur privé est autorisé à entrer en concurrence, il offrira des prix inférieurs aux clients à bas coût (« picorage ») et laissera au prestataire public les clients à coût élevé. Cette situation saperait l'objectif d'uniformité. Dans ces circonstances, l'État devrait examiner si l'objectif d'uniformité est approprié, ou si les objectifs sociaux peuvent être atteints en garantissant un prix maximum atteignable et en finançant un prestataire, afin de garantir qu'aucun client ne paie plus que le prix maximum. Cette obligation sociale pourrait être financée en recourant à différents mécanismes, par exemple une subvention gouvernementale directe, ou une taxe sur les prestataires de services qui ne sont pas obligés de fournir les services déficitaires. Si l'approche d'un prix maximum atteignable n'est pas

appropriée, et si l'État souhaite atteindre un prix uniforme, ces services pourront devoir être placés en quarantaine par rapport à la concurrence, et ne pas devoir être soumis à une neutralité concurrentielle.

4.3 *Contrôle et application*

Ainsi que nous l'avons déjà noté, des cadres explicites de neutralité concurrentielle englobent à la fois des éléments préventifs (étudiés à la section précédente), qui réforment le fonctionnement des entreprises publiques pour neutraliser tous avantages ou désavantages concurrentiels, et des éléments curatifs qui impliquent de contrôler et d'ajuster l'approche de la réforme, afin de traiter des problèmes courants de neutralité concurrentielle. Cette section examine brièvement les approches possibles du contrôle et de l'application. Sans un contrôle et une application permanentes, les réformes visant à instaurer une neutralité concurrentielle seraient moins efficaces. Toutefois, la meilleure approche variera selon les pays en fonction de leurs institutions existantes et des rôles actuels de ces institutions ; de l'étendue des réformes mises en application en vue d'instituer une neutralité concurrentielle ; et des types d'entreprises publiques qui font l'objet de cette réforme. Le contrôle et l'application sont également plus efficaces lorsqu'ils s'accompagnent de programmes d'éducation et d'information à l'intention des entreprises appliquant des réformes en vue d'instituer une neutralité concurrentielle et des entreprises concurrentes du secteur privé.

Le contrôle implique un processus formel de signalement des progrès et succès des réformes visant à instituer une neutralité concurrentielle. Bien que le contrôle seul ne contraigne pas les entreprises à mettre les réformes en application, un supplément de transparence peut fournir des incitations qui encouragent l'application des réformes. Cette transparence est accrue si les résultats du contrôle sont rendus publics. Les informations obtenues grâce au contrôle peuvent également indiquer les domaines où la modification de l'approche de la neutralité concurrentielle améliorerait son efficacité. De la même manière, les informations obtenues grâce au contrôle peuvent améliorer l'efficacité des mécanismes d'application.

Le contrôle peut prendre différentes formes :

- une autorité réglementaire peut se voir confier la responsabilité d'enquêter sur l'application et le succès des politiques de neutralité concurrentielle et d'en rendre compte ;
- des départements gouvernementaux ou Ministres pourraient être tenus responsables de rendre périodiquement compte de l'application de la neutralité concurrentielle dans les entreprises publiques relevant de leur sphère de responsabilité ;
- les entreprises pourraient être tenues de rendre compte de leurs progrès dans l'application des réformes visant à instaurer une neutralité concurrentielle ;
- des rapports périodiques pourraient être commandités pour revoir l'application et le succès des politiques de neutralité concurrentielle.

L'application implique des mécanismes qui imposent des obligations aux entreprises publiques afin de mettre en application des réformes visant à instaurer une neutralité concurrentielle. Ici encore, plusieurs mécanismes sont disponibles et certaines approches sont plus souples que d'autres. L'approche la plus appropriée dépendra de la situation du pays concerné.

- La plupart des États ont mis en place des mécanismes en vertu desquels les agences publiques sont responsables de leur respect des politiques gouvernementales. Ces mécanismes pourraient être étendus pour couvrir des obligations de neutralité concurrentielle.

- La législation pourrait être utilisée afin de spécifier comment les activités des entreprises publiques doivent être conduites si une entreprise publique fait concurrence au secteur privé.
- Des mécanismes administratifs pourraient exiger des entreprises publiques qu'elles se conforment à leurs obligations de neutralité concurrentielle. Les informations issues du contrôle continu aideraient à identifier les cas dans lesquels une action est nécessaire.
- Un mécanisme officiel de traitement des réclamations pourrait être mis en place. L'organisme chargé du traitement de ces réclamations enquêterait sur les plaintes déposées par des entreprises concurrentes, alléguant qu'une entreprise publique ne se conforme pas à ses obligations de neutralité concurrentielle. Si la plainte est justifiée, l'entreprise publique pourrait être contrainte de prendre des mesures correctrices.

Mécanismes de traitement des réclamations

Il est possible d'instaurer une neutralité concurrentielle sans mettre en place un processus de traitement des réclamations. D'autres mécanismes de contrôle et d'application pourraient être utilisés. L'Australie utilise toutefois les mécanismes de traitement des réclamations comme un élément clé de son programme de contrôle et d'application de la neutralité concurrentielle. Le risque d'une enquête indépendante sur une réclamation peut encourager les entreprises publiques à appliquer des réformes visant à instituer une neutralité concurrentielle. Des mécanismes efficaces de traitement des réclamations fournissent également un moyen rapide et à bas coût pour répondre aux inquiétudes du secteur privé à propos de l'application d'un cadre de neutralité concurrentielle.

Étant donné que l'Australie est le seul pays doté de mécanismes opérationnels de traitement des plaintes en matière de neutralité concurrentielle, cette section se focalise sur l'expérience australienne pour fournir des exemples réels de cette approche du traitement de ces plaintes.

En Australie, des unités de traitement des plaintes ont été mises en place à tous les niveaux du gouvernement, à l'échelle du Commonwealth, des États, des Territoires et local, afin de régler les plaintes déposées par des entreprises du secteur privé alléguant que des entreprises publiques ne se conforment pas à leur obligations de neutralité concurrentielle. Les systèmes de traitement des plaintes diffèrent selon les niveaux de gouvernement et les différents États et Territoires (voir encadré 7).

Encadré 7 – Mécanismes de traitement des plaintes en Australie

Dans les juridictions où des plaintes peuvent être déposées auprès d'un organisme indépendant, cet organisme a généralement été mis en place pour promouvoir la concurrence, et le respect de la législation en matière de prix et de conduite sur le marché, spécialement en ce qui concerne les entreprises publiques. Voici quelques exemples de ces organismes : l'Independent Pricing and Regulatory Tribunal (Tribunal Indépendant de la Concurrence et des Prix) de Nouvelle-Galles du Sud, la Competition Authority (Autorité de la Concurrence) du Queensland, le Commissaire à la Concurrence d'Australie Méridionale, la Government Prices Oversight Commission (Commission Gouvernementale de Contrôle des Prix) de Tasmanie, et l'Independent Competition and Regulatory Commission (Commission Indépendante de la Concurrence et de la Réglementation) de l'ACT. L'unité de traitement des plaintes au niveau du Commonwealth est le Commonwealth Competitive Neutrality Complaints Office (Bureau des Plaintes sur la Neutralité Concurrentielle du Commonwealth) (CCNCO), qui dépend de la Commission de la Productivité. Dans l'État de Victoria, l'Unité de traitement des Plaintes sur la Neutralité Concurrentielle (qui dépend du Ministère des Finances) examine toutes les plaintes, bien que l'unité encourage les parties à chercher à résoudre elles-mêmes les différends dans un premier temps. En Australie Occidentale, le Comité de Contrôle des Dépenses du Ministère du Conseil des Ministres traite les plaintes avec l'appui administratif du Secrétariat aux Plaintes sur la Neutralité Concurrentielle. Dans le Territoire du Nord, le Ministère des Finances traite les plaintes.

Certains gouvernements ne permettent le dépôt de plaintes qu'à l'encontre d'entreprises publiques qui dépassent certains seuils, et sont donc directement soumises à des principes de neutralité concurrentielle. D'autres autorisent le dépôt de plaintes contre toute entreprise publique, dès lors qu'il existe un effet anticoncurrentiel. Dans la plupart des États, les plaintes contre des entreprises publiques doivent d'abord être déposées auprès du gouvernement local, puis auprès de l'organisme chargé de ces plaintes au niveau de cet État.

Source: National Competition Council 2002, Assessment of governments' progress in implementing the National Competition Policy and related reforms, Volume one: Assessment, Août 2002, p.2.24

Ces mécanismes de traitement des plaintes ont été actifs et ont examiné de nombreuses plaintes au cours des dernières années. En voici quelques exemples.

Le Gouvernement de l'État de Victoria a enquêté sur une plainte déposée par une entreprise privée de vente de bétail, alléguant que la bourse au bétail du gouvernement local était avantagée car elle recevait un financement public qui lui permettait de fixer des tarifs de vente de bétail inférieurs aux coûts des éleveurs privés. Il a été constaté que le gouvernement local n'avait pas mis en place un régime de prix concurrentiellement neutre. En réaction à ce constat, le gouvernement local a revu ses allocations de coûts et sa structure de tarification et applique dorénavant un système de tarification reflétant intégralement son coût de revient. (Unité de Neutralité Concurrentielle du Ministère du Trésor et des Finances, décision non datée)

Le Bureau des Plaintes sur la Neutralité Concurrentielle du Gouvernement australien a enquêté sur une plainte déposée à l'encontre de l'Agence nationale pour l'emploi du Gouvernement, OzJobs. La plainte alléguait que le Gouvernement du Commonwealth subventionnait OzJobs et que OzJobs ne payait pas des taxes sur les salaires sur une base comparable à celle des concurrents du secteur privé fournissant des services de placement. Les discussions avec le plaignant ont également identifié des craintes que OzJobs ne paie pas des primes d'assurance comparables (y compris pour la garantie responsabilité civile et la garantie accidents du travail). Après enquête sur la plainte, le bureau des plaintes a constaté que OzJobs honorait toutes ses obligations en vertu de la politique de neutralité concurrentielle et qu'aucune mesure n'avait à être prise au titre de la plainte pour neutralité concurrentielle déposée à son encontre. (CCNCO 2002)

Le Bureau des Plaintes du Gouvernement australien a également enquêté sur une plainte alléguant que le Bureau de la Météorologie jouissait d'un avantage concurrentiel pour la fourniture de services météorologiques à l'aviation, au motif que l'administration des services par l'Autorité de Sécurité de l'Aviation Civile interdisait à d'autres opérateurs de fournir des services concurrents. Le bureau des plaintes a jugé qu'il y aurait des avantages à ouvrir ce marché à la concurrence. Le Gouvernement australien a envisagé plusieurs modèles permettant d'accroître la concurrence, notamment l'ouverture de certains des services du Bureau à la concurrence, par voie d'appels d'offres. En conséquence, le bureau des plaintes a recommandé ce qui suit : "Le gouvernement doit achever dès que possible son étude des options pour introduire la concurrence dans la fourniture de services météorologiques à l'aviation. Si aucun autre modèle n'est susceptible de fournir des bénéfices nets supérieurs à la collectivité que la prestation concurrentielle de services à valeur ajoutée, cette approche devra être immédiatement mise en application." (CCNCO 2001b, p.16)

En Tasmanie, la Commission Gouvernementale de Contrôle des Prix a reçu une plainte pour défaut de neutralité concurrentielle à propos de l'entreprise gérant le stationnement hors de la voie publique du Conseil Municipal de Hobart. L'entreprise n'a pas été formellement considérée comme une entreprise publique importante, et l'affaire a été renvoyée au Ministère du Trésor et des Finances de l'État de Tasmanie. Le ministère a discuté de l'affaire avec le Conseil Municipal de Hobart, qui s'est obligé à séparer le reporting financier de ses entreprises de stationnement sur la voie publique et hors de la voie publique. La commission de Tasmanie a émis l'avis que cette solution permettrait d'honorer les obligations de neutralité concurrentielle du Conseil Municipal de Hobart. (NCC 2002, p.2.27)

Le Conseil National de la Concurrence a surveillé la mise en place d'un système de neutralité concurrentielle en Australie, depuis sa création en 1995. Un document interne préparé par les services du Conseil a suggéré de suivre les directives suivantes pour le traitement des plaintes pour défaut de neutralité concurrentielle :

- n'importe quelle partie peut déposer une plainte ;
- les plaintes sont reçues par un organisme indépendant des entreprises pouvant faire l'objet de plaintes et de leurs agences ou départements apparentés ou de tutelle. Cet organisme doit être expérimenté dans le traitement des questions de fixation des prix, de conduite sur le marché et autres questions de concurrence. Aucune taxe n'est facturée aux plaignants ;
- les plaignants doivent d'abord se rapprocher des entreprises publiques à propos desquelles ils se plaignent. S'ils ne peuvent pas obtenir satisfaction auprès de l'entreprise, ils peuvent se rapprocher de l'organisme chargé du traitement des plaintes compétent dans le ressort concerné ;
- toutes les entreprises publiques peuvent faire l'objet d'une plainte, et non pas seulement celles classées comme des GBEs [Government Business Enterprises] [Entreprises Commerciales du Secteur Public] ou des SBAs [Significant Business Activities] [Activités Publiques Significatives] ;
- La procédure de traitement des plaintes prévoit que l'organisme de traitement des plaintes demandera des informations à toutes les parties concernées (tout en respectant des informations commercialement confidentielles), et fera des recommandations publiques (et motivées) au Ministre de tutelle concerné (dans un délai défini), qui décidera de la conduite à tenir dans un délai prédéfini et rendra les décisions publiques.

Certaines personnes ne peuvent être disposées à déposer une plainte pour défaut de neutralité concurrentielle qu'à condition qu'elles restent anonymes. Cela impliquerait qu'elles ne souhaiteraient pas se rapprocher préalablement de l'entreprise publique dont elles se plaignent. Les États devront envisager de donner à ces plaignants l'option de se rapprocher d'abord des organismes chargés du traitement des plaintes. (Trembath 2002, p.38)

Toutes les unités chargées du traitement des plaintes pour défaut de neutralité concurrentielle en Australie sont de petites équipes travaillant au sein d'agences plus importantes. Chaque groupe s'occupe des enquêtes et d'un petit nombre de plaintes formelles. En 2002-03, les unités de traitement des plaintes de la Nouvelle Galles du Sud, du Queensland, de l'Australie Méridionale et du Territoire de la Capitale Australienne n'ont reçu aucune plainte formelle. Sachant le petit nombre d'enquêtes formelles, qui va d'ailleurs se réduisant (au fur à mesure qu'une culture du respect de la neutralité concurrentielle se développe), l'expérience australienne suggère que le coût de mise en place d'une agence séparée chargée des plaintes pour défaut de neutralité concurrentielle n'est pas justifié. L'approche la plus rentable consiste à confier à l'agence existante la responsabilité de traiter les plaintes pour défaut de neutralité concurrentielle.

4.4 L'efficacité des réformes visant à instituer une neutralité concurrentielle en Australie

L'Australie a commencé à mettre en place un cadre de neutralité concurrentielle en 1995. Neuf ans plus tard, il est utile d'examiner si d'autres pays peuvent tirer des leçons de l'expérience australienne.

L'approche particulière suivie pour l'application de la réforme visant à instituer une neutralité concurrentielle en Australie résulte largement de la structure gouvernementale en Australie. Le Gouvernement australien n'a pas le pouvoir d'exiger que les Gouvernements des États réforment leurs entreprises publiques. Ainsi, un accord intergouvernemental a été utilisé pour établir le cadre de la réforme. Cet accord laisse aux gouvernements individuels une souplesse considérable pour définir la manière dont ils appliqueront la réforme dans leur juridiction.

Dans l'ensemble, l'application des réformes visant à instituer une neutralité concurrentielle en Australie est considérée comme un succès. Les entreprises publiques significatives appliquent des principes de neutralité concurrentielle dans toutes les juridictions et tous les gouvernements ont mis en place des mécanismes pour traiter les plaintes pour défaut de neutralité concurrentielle (NCC 2003a, p.69). Il est possible d'identifier des concurrents privés qui enregistrent des succès sur de nombreux marchés. Le petit nombre de plaintes pour défaut de neutralité concurrentielle, et l'enquête sur ces plaintes, révèlent que la plupart des entreprises publiques ont mis en place le cadre de neutralité concurrentielle et que les difficultés restantes se concentrent sur un nombre relativement faible d'entreprises publiques.

D'autres leçons peuvent encore être tirées de l'expérience australienne, et il subsiste des domaines où l'efficacité du cadre de la réforme australienne peut être améliorée. Il subsiste plusieurs difficultés mineures, notamment l'application des principes de neutralité concurrentielle dans des industries comme l'industrie forestière, et le rôle du Ministre pour décider si un organisme indépendant doit traiter les plaintes pour défaut de neutralité concurrentielle, qui ont été identifiées comme des questions persistantes en Australie (NCC 2003b pp.xxii-xxiii). Cependant, cette section se focalise sur deux questions plus larges :

- promouvoir la cohérence dans l'application des réformes d'une juridiction à l'autre ; et
- opérer un changement culturel et mobiliser toutes les agences et tous les niveaux de gouvernement.

Cohérence dans l'application de réformes

Étant donné que la réforme visant à instituer une neutralité concurrentielle en Australie a été introduite par un accord intergouvernemental qui confère aux juridictions une souplesse considérable dans la manière dont les réformes sont mises en oeuvre, l'application du cadre de neutralité concurrentielle varie d'un État australien à l'autre. Les États ont adopté des définitions différentes de ce qui constitue une entreprise publique, leur approche de la transformation en société commerciale et de la commercialisation est différente, et il existe des différences substantielles dans les mécanismes de traitement des plaintes pour défaut de neutralité concurrentielle.

Le Gouvernement australien n'a pas le pouvoir d'exiger une approche uniforme des réformes visant à instituer la neutralité concurrentielle. Dès lors, les différences entre les États et entre le grand nombre de gouvernements locaux qui appliquent également la réforme, sont sources de confusion pour les concurrents du secteur privé. Il est difficile aux entreprises privées d'identifier les obligations de neutralité concurrentielle de leurs concurrents du secteur public, ou la manière de déposer une plainte pour défaut de neutralité concurrentielle, si elles estiment que ces obligations ne sont pas respectées. Ces problèmes peuvent encore être aggravés pour les entreprises qui sont transférées d'une juridiction à l'autre ou opèrent dans plusieurs États ou Territoires. Ces entreprises doivent acquérir une connaissance des multiples régimes de neutralité concurrentielle.

Les difficultés expérimentées en Australie illustrent les bienfaits qui s'attachent à garantir que, dans toute la mesure du possible, les régimes de neutralité concurrentielle soient cohérents à tous les niveaux du gouvernement. Si des entreprises du secteur privé opèrent dans plusieurs juridictions, il y a également des bénéfices à avoir des cadres de neutralité concurrentielle qui soient cohérents d'une juridiction à l'autre.

Changement culturel et engagement de mettre la réforme en application

En raison de la complexité et de la diversité des réformes visant à instituer une neutralité concurrentielle, leur application effective exige un engagement et souvent un changement culturel de la part des entreprises du secteur public, des agences responsables de ces entreprises, des agences responsables de la politique en la matière, des milieux politiques et de tous les niveaux de gouvernement national, régional et local.

En Australie, il s'est produit une mutation culturelle considérable parmi les dirigeants d'entreprises publiques, et à tous les niveaux de gouvernement, particulièrement au niveau du gouvernement local. Cependant, cet engagement n'a pas été universel et quelques problèmes subsistent.

Les entreprises n'ont pas toutes mis les réformes en application rapidement et intégralement. Dans certains cas, c'est parce que les dirigeants d'entreprises n'ont pas pleinement compris leurs obligations de neutralité concurrentielle. Par exemple, ils ont eu des difficultés à identifier quelles activités devraient être soumises à des réformes de neutralité concurrentielle. Quelques entreprises plus petites peuvent ne pas avoir eu l'expertise nécessaire pour appliquer des réformes visant à instaurer une neutralité concurrentielle, par exemple pour l'allocation des coûts ou le calcul des paiements destinés à restaurer la neutralité en matière d'accès au crédit.

Lorsque les réformes visant à instaurer une neutralité concurrentielle ont été mises en application pour la première fois, certains gouvernements locaux ont dénaturé les exigences de neutralité concurrentielle et argué que d'autres politiques qu'ils mettaient en oeuvre, notamment des avis d'appels d'offres, constituaient une exigence de neutralité concurrentielle.

Les États ne sont pas toujours vigilants à s'assurer que leurs entreprises publiques appliquent pleinement des réformes visant à instaurer une neutralité concurrentielle. Ils sont parfois lents à répondre à une plainte pour défaut de neutralité concurrentielle ou à prendre des mesures correctrices après que l'organisme de traitement des plaintes ait identifié une défaillance dans l'approche de la neutralité concurrentielle.

Les gouvernements australiens disposent de différents outils pour accroître leur engagement de réforme et générer un changement culturel :

- l'Accord sur les Principes de Concurrence et l'Accord pour Appliquer la Politique Nationale de la Concurrence et les Réformes Connexes (NCC 1998) définissent un engagement, au plus haut niveau politique, pour appliquer des réformes visant à instituer une neutralité concurrentielle. En signant ces accords, les Chefs des gouvernements au niveau du Commonwealth, des États et des Territoires se sont engagés sur les principes sous-jacents au programme de réforme. Les Gouvernements des États et du Territoire du Nord ont signé les accords pour le compte des gouvernements locaux ;
- l'établissement de données de référence compare l'application de la neutralité concurrentielle dans les différents gouvernements, et les encourage à appliquer la réforme. Le Conseil National de la Concurrence (National Competition Council) a la responsabilité d'évaluer si tous les gouvernements ont appliqué la Politique de Concurrence Nationale, qui inclut des réformes

visant à instituer une neutralité concurrentielle. Il produit un rapport annuel qui évalue les progrès de tous les États et Territoires et du Gouvernement australien ;

- le Gouvernement australien recourt à des incitations financières pour encourager la réforme. Il s'est engagé à faire des paiements incitatifs aux Gouvernements des États et Territoires qui ont intégralement appliqué des réformes de la politique de la concurrence, y compris des réformes visant à instituer une neutralité concurrentielle (NCC 2003b, p.1.4). Certains États se sont également engagés à céder le bénéfice de ces paiements incitatifs à des autorités gouvernementales locales qui ont mis les réformes en application ;
- des programmes d'éducation ont été utilisés pour informer des agences gouvernementales, à tous les niveaux du gouvernement, de leurs obligations de neutralité concurrentielle et de la manière d'assumer ces responsabilités. L'Association du Gouvernement Local du Queensland, conjointement avec le Gouvernement de l'État du Queensland, a mis en œuvre un vaste programme visant à faciliter l'adoption de réformes de neutralité concurrentielle par les gouvernements locaux du Queensland. Le Programme d'Assistance à la Gestion d'Entreprises a briefé des conseils municipaux, conduit des missions d'étude internes, publié des guides simples afin d'aider les conseils municipaux à se conformer aux exigences de neutralité concurrentielle et fourni du mentorat et des conseils techniques⁷. Le programme a été un succès. Sur les 107 autorités gouvernementales locales impliquées dans le programme, 214 personnes venant de 70 conseils municipaux ont participé à des formations et 96 conseils municipaux ont fait l'objet d'une mission d'étude interne (Ministère des Gouvernements Locaux et de la Planification 2003, p.3). Avant le Programme d'Assistance à la Gestion d'Entreprises, le niveau de respect des réformes de neutralité concurrentielle était faible, dans les petites et moyennes entreprises publiques. En conséquence directe de ce programme d'assistance, le niveau de respect a augmenté dans une mesure significative ;
- dans certains cas, les Gouvernements d'États ont le pouvoir de donner instruction aux gouvernements locaux d'adopter des politiques de neutralité concurrentielle. Le Gouvernement de l'État de Victoria, par exemple, exige de ses gouvernements locaux qu'ils adoptent des principes de neutralité concurrentielle et fassent des rapports sur le respect de ces principes. (Ministère du Trésor et des Finances 2000, p.11) ;
- l'institution de mécanismes de traitement des plaintes, assortis d'une obligation de déclaration des plaintes, a mis en lumière des problèmes d'application de principes de neutralité concurrentielle et fait peser une certaine pression sur les États afin de remédier à ces problèmes.

En dépit de quelques problèmes persistants, tous les outils énumérés ci-dessus ont contribué à susciter une mobilisation en faveur de la réforme et du changement culturel. L'expérience australienne illustre le fait que le changement culturel est un processus lent et difficile, mais, dans un cadre politique clair et bien défini, et avec des incitatifs de réforme suffisants, des changements substantiels peuvent être réalisés.

5. En Résumé

De nombreux États ont reconnu les bienfaits de la promotion d'une concurrence efficiente et loyale entre les entités du secteur public et celles du secteur privé. Des problèmes de neutralité concurrentielle surgissent lorsque cette concurrence n'est pas égale, au motif que l'entreprise publique détient des avantages ou souffre de désavantages en raison du fait qu'elle est la propriété de l'État. Améliorer la neutralité concurrentielle promeut l'efficacité et la loyauté de la concurrence. Il est possible d'identifier un

grand nombre de bienfaits qui découleraient de l'amélioration de l'environnement concurrentiel entre secteur public et secteur privé.

- Les entreprises publiques s'efforcent d'être plus efficaces et innovantes car elles savent que leur capacité à conquérir des clients dépend uniquement de leurs performances commerciales. La neutralité concurrentielle fait pression sur les entreprises publiques afin de réduire toute pratique antérieure de « remboursement » des coûts de revient. Des objectifs commerciaux clairs réduisent les conflits d'intérêts et accroissent l'efficacité de la gestion ;
- il y a une plus grande transparence dans la gestion des entreprises publiques et plus d'opportunités de comparer les performances des entreprises publiques par rapport à des activités similaires du secteur privé ;
- les entreprises du secteur privé seront plus actives sur des marchés où elles savent que leurs concurrents du secteur public ne bénéficient pas d'avantages artificiels en termes de coûts ;
- les clients bénéficieront de prix inférieurs et de services de meilleure qualité, mus par une concurrence plus directe entre les secteurs public et privé ;
- l'allocation de ressources s'améliorera car les entreprises qui sont les plus efficaces, et fournissent les services que veulent les clients, seront les plus couronnées de succès ;
- les États bénéficieront de la croissance économique et de la plus grande efficacité du secteur public qui résultent d'une concurrence accrue et d'une meilleure allocation des ressources.

Les réponses politiques que les États emploient pour améliorer l'environnement de la concurrence secteur public privé incluent : l'application du droit de la concurrence, différents instruments du gouvernement d'entreprise du secteur public, comme la transformation en société commerciale et la commercialisation, et des cadres de neutralité concurrentielle explicites et ciblés, qui instituent des mécanismes garantissant la neutralité de la concurrence. Bien que les lois sur la concurrence et les réformes du gouvernement d'entreprise puissent contribuer à instaurer une neutralité concurrentielle entre les entreprises du secteur public et les entreprises du secteur privé qui sont en concurrence, elles ne s'appliquent généralement qu'aux grandes entreprises publiques et ne peuvent pas couvrir toutes les questions de neutralité concurrentielle. Un cadre de neutralité concurrentielle explicite et ciblé rassemble les composantes des lois sur la concurrence et des réformes du gouvernement d'entreprise qui remédient aux problèmes de neutralité concurrentielle et élargit le programme de réforme afin de couvrir des entreprises publiques plus petites et tous avantages ou désavantages concurrentiels restants.

Toutefois, les cadres de neutralité concurrentielle explicites sont détaillés et complexes. Bien que les avantages potentiels soient importants, il faut une mobilisation considérable, et souvent un changement culturel, de la part des entreprises du secteur public, des agences responsables de ces entreprises, des agences politiques et des responsables politiques à tous les niveaux du gouvernement, national, régional et local. Sans cette mobilisation, les bénéfices des réformes ne seraient pas réalisés.

NOTES

1. Services de nature économique, dont la fourniture peut être jugée d'intérêt général. Les États membres sont principalement responsables de définir ce qu'ils considèrent comme des services d'intérêt économique général, sur la base des caractéristiques spécifiques des activités concernées. La Commission Européenne a ensuite pour tâche de veiller à ce qu'il n'y ait pas d'erreurs manifestes lorsque les États membres confient à certaines entreprises la prestation de services d'intérêt économique général en vertu de l'Article 86(2) du Traité instituant l'Union Européenne. (Commission Européenne 2002, p.42)
2. L'Annexe 2 donne la liste de ces déclarations de politique et autres directives australiennes sur l'application des réformes visant à instituer la neutralité concurrentielle. Elle donne des informations sur les sites internet où ces documents sont disponibles.
3. La liste complète des définitions des entreprises publiques utilisées par les Gouvernements australiens figure dans Trembath 2002, pp.9-12.
4. En Australie, par exemple, le gouvernement du Queensland n'introduit pas automatiquement des réformes visant à instituer la neutralité concurrentielle dans les entreprises publiques dont les dépenses annuelles sont inférieures à \$A10 millions. (Trembath 2002, p.10)
5. L'Annexe 4 énumère certaines méthodologies courantes d'évaluation des actifs et expose le cadre recommandé par l'Australian Steering Committee on National Performance Monitoring of Government Trading Enterprises (Comité de Direction australien sur le contrôle des performances nationales des entreprises commerciales publiques), afin d'encourager la cohérence d'évaluation des actifs immobilisés pour les entreprises commerciales publiques en Australie..
6. Le risque de marché est la variation observée entre le rendement de l'entreprise et le rendement sur le marché en général.
7. Les documents préparés pour le Programme d'Assistance à la Gestion d'Entreprises sont disponibles sur le site http://www.orionco.net/comppol_qld.html.

ANNEXE 1 : APPROCHES DE LA TRANSFORMATION EN SOCIÉTÉ COMMERCIALE ET DE LA COMMERCIALISATION DES ENTREPRISES PUBLIQUES

Finlande

Traditionnellement, l'État s'est toujours fortement impliqué dans la fourniture de produits et services. Au cours des dix dernières années, le gouvernement finlandais a commercialisé un grand nombre de ces activités en constituant des entreprises publiques, et réformé la manière dont ces entreprises opèrent et leurs relations avec l'État.

Généralement, ces réformes des entreprises publiques poursuivent deux objectifs connexes. Le premier est d'améliorer la performance opérationnelle (productivité et qualité) des activités économiques de l'État au moyen de la commercialisation. Le second est d'établir une structure de gouvernement d'entreprise robuste mais plus flexible pour des activités qui sont toutes considérées comme présentant des caractéristiques "publiques" (nonobstant leur commercialisation), mais dans laquelle l'État joue un rôle opérationnel moins direct dans les décisions "au jour le jour". (OCDE 2003c, p.11)

La décision de l'État sur les politiques de propriété des entreprises publiques en 1999 définit les principes suivants pour les entreprises publiques :

- Lorsque la production est solidement établie, les entreprises publiques doivent être rentables ;
- La solidité des entreprises doit être maintenue par une bonne rentabilité et une bonne performance financière, et par une qualification et une allocation correctes des investissements ;
- Les investissements en fonds propres doivent servir à assurer la solvabilité et le potentiel de développement des sociétés ;
- Les dividendes seront fixés individuellement pour chaque société, à un niveau qui reflète les activités de la société, sa solvabilité, les normes internationales et toutes autres circonstances particulières ;
- Pour la prise de décisions sur des subventions gouvernementales, les entreprises publiques doivent être traitées de la même manière que d'autres sociétés. Les garanties d'État ont été consenties très sélectivement aux entreprises publiques ;
- Les décisions sur l'expansion des activités de la société seront prises par les organes d'administration appropriés de la société. Les décisions de diversification de la société doivent être approuvées par le principal actionnaire ;
- Les entreprises publiques peuvent étendre leurs opérations à d'autres pays, sur une base commerciale saine. Les investissements transfrontaliers majeurs sont soumis à l'accord du principal actionnaire ;
- L'objectif de la politique sociale des entreprises publiques sera de faire d'elles des employeurs exemplaires qui se conforment aux conventions collectives de travail existantes, cherchent à développer leur politique sociale sur une base soutenue, et prennent

des initiatives à ce sujet. Le ministre approprié doit être préalablement informé de tous licenciements collectifs majeurs ;

- Les entreprises publiques seront exemplaires et chercheront à prévoir leurs développements futurs, de manière à pouvoir équilibrer de manière efficiente et économique les objectifs de production et les objectifs environnementaux, tout en garantissant la compétitivité de la société ;
- Les organes de direction et d'administration de la société sont responsables des décisions en matière d'exploitation et répondent de la performance financière. Si le ministère responsable, représentant l'État propriétaire de la société, souhaite obtenir que la société adopte une décision différente, cette décision devra être prise par l'assemblée générale des actionnaires ;
- Les entreprises publiques peuvent recourir à des régimes de rémunération incitative afin de garantir la compétitivité de la société dans le recrutement de ressources de direction. (Ministère du Commerce & de l'Industrie (Finlande) 1999)

La réforme des entreprises publiques de Finlande a contribué à placer la concurrence entre les entreprises du secteur public et les entreprises du secteur privé sur une base plus égale.

En 2004, la décision de principe de la Finlande sur la politique d'actionnariat de l'État a réaffirmé l'importance de séparer les activités commerciales des entreprises publiques du processus politique, tout en maintenant les responsabilités de l'État en sa qualité de propriétaire de ces entreprises. Cette décision a reconnu l'engagement de l'État sur une concurrence efficiente entre le secteur public et le secteur privé.

La politique d'actionnariat de l'État doit être ouverte, prévisible et cohérente. Les entreprises publiques qui sont la propriété de l'État et opèrent aux conditions du marché et les entreprises dans lesquelles l'État détient une participation doivent opérer selon les mêmes règles et conditions que leurs concurrents. L'État ne doit pas accorder des avantages que d'autres sociétés n'ont pas, mais les sociétés doivent être dans la même situation que d'autres sociétés. Si l'État impose des obligations particulières aux sociétés opérant partiellement aux conditions du marché, les compensations payées à ce titre doivent être publiques et fondées sur une corrélation avec les coûts de ces obligations (Ministère du Commerce & de l'Industrie (Finlande) 2004, p. 9).

Norvège

La *Politique du Gouvernement norvégien pour un actionnariat réduit et amélioré de l'État* affirme et définit l'intention de l'État d'améliorer la gestion des entreprises détenues par l'État. L'État entend clairement séparer les pouvoirs réglementaires de l'État de son rôle en tant que propriétaire de ces entreprises, et confier la responsabilité des activités des entreprises publiques à un seul Ministère. Cette politique énumère dix principes en la matière :

1. tous les actionnaires doivent être traités sur un pied d'égalité ;
2. l'actionnariat de l'État dans ces sociétés doit être transparent ;
3. les décisions et résolutions sociales doivent être adoptées en assemblée générale ;
4. l'État peut fixer des objectifs de performance pour chaque société, avec les autres actionnaires. Le conseil aura la responsabilité d'atteindre ces objectifs ;
5. la structure du capital de la société doit être compatible avec l'objectif d'actionnariat et la situation de la société ;

6. *la composition du conseil doit être caractérisée par la compétence, la capacité et la diversité de ses membres et refléter les caractéristiques distinctives de chaque société ;*
7. *les systèmes de rémunération et d'intéressement doivent promouvoir la création de valeur au sein des sociétés et être généralement considérés comme raisonnables ;*
8. *le conseil doit exercer un contrôle indépendant sur la direction de la société pour le compte des actionnaires ;*
9. *le conseil doit adopter un plan pour ses propres travaux et travailler activement au développement de ses propres compétences. Les activités du conseil doivent faire l'objet d'une évaluation ;*
10. *la société doit reconnaître sa responsabilité envers tous les actionnaires et toutes les parties prenantes de la société. (Ministère du Commerce et de l'Industrie (Norvège) 2001-02)*

Ces réformes en sont encore au stade de la mise en application. Actuellement, les entreprises publiques de Norvège ne se conforment pas toutes à cette politique.

Nouvelle Zélande

La Nouvelle Zélande a défini son approche de la transformation en société commerciale en 2002 dans le *Owner's Expectations Manual*. Ce manuel décrit la structure des sociétés de la Couronne, les rôles et responsabilités du ministre actionnaire, du conseil d'administration et des différentes agences gouvernementales consultatives ; les obligations de publication financière de la société ; les accords de gouvernance financière ; les procédés de gestion des nouveaux investissements majeurs, des changements de la structure du capital ou des grandes restructurations d'entreprises ; et les nominations au conseil d'administration.

Le cadre politique est conçu pour garantir que les sociétés de la Couronne :

- opèrent à des “conditions de pleine concurrence” : à la différence des ministères, elles ne forment pas partie de la Couronne, mais en sont la propriété ;
- aient des conseils d'administration indépendants qui soient responsables des performances de l'entreprise ;
- soient des entités juridiques séparées (ce qui signifie que les administrateurs de la société sont légalement responsables des activités des sociétés) ; et
- soient soumises à des obligations de publication financière et autres obligations s'appliquant à toutes les sociétés, à moins qu'elles ne soient complétées ou modifiées par le Public Finance Act (Loi sur les Finances Publiques) de 1989 et/ou par toute loi applicable spécifique au secteur ou à la société.

En vertu du modèle applicable aux sociétés de la Couronne :

- chaque société a pour objectif principal d'agir comme une entreprise couronnée de succès ;
- une compensation est payée à chaque société de la Couronne pour les objectifs sociaux que la Couronne exige de poursuivre ;

- chaque société prend la responsabilité de toutes les décisions d'exploitation ;
- la neutralité concurrentielle est maintenue entre des sociétés de la Couronne et le secteur privé ; et
- chaque société est une entité juridique séparée, constituée sous la forme d'une société anonyme. (CCMAU 2002, section 2).

Australie

En Australie, la transformation en société commerciale est le véhicule principal utilisé pour instituer une neutralité concurrentielle dans les grandes entreprises publiques. Le modèle australien de transformation en société commerciale a été élaboré par un groupe de travail du gouvernement en 1991 (NCC 1997, pp.30-33). Il implique les domaines de réforme suivants.

- Clarification des objectifs — spécifier clairement les objectifs de l'entreprise, y compris ses objectifs commerciaux. Définir explicitement et financer des objectifs de politique sociale et une réglementation séparée des activités commerciales ;
- Responsabilité, autorité et autonomie du management — mettre en place un conseil d'administration fondé sur les compétences, responsable des fonctions de gestion et des performances de l'entreprise. Définir les activités clés de l'entreprise (son cœur de métier) et fixer sa politique de dividendes, ses objectifs de taux de rendement et sa structure de capital ;
- Contrôle effectif des performances par l'État actionnaire — séparer la gestion quotidienne de l'entreprise de l'État, en rendant le conseil d'administration personnellement responsable des performances. Instaurer un régime de contrôle indépendant des performances pour suivre les performances commerciales par rapport à un plan de gestion et d'affaires ;
- Instaurer un régime de récompenses et de sanctions efficaces par rapport aux performances — Prédéfinir des objectifs et structures de récompenses qui encouragent de bonnes performances et pénalisent les mauvaises performances ;
- Atteindre la neutralité concurrentielle sur les marchés des facteurs de production — procéder à des ajustements de neutralité concurrentielle, par exemple : taxes pour compenser les cautions d'emprunts par l'État existantes (ou perçues) ; fixation d'objectifs de taux de rendement qui reflètent ceux attendus dans le secteur privé ; levée de toutes restrictions spécifiques sur les ressources de personnel ; et garantie que l'entreprise publique soit soumise à des obligations fiscales équivalentes à celles du secteur privé, de telle sorte que l'entreprise publique n'ait aucun avantage ni désavantage concurrentiel par rapport au secteur privé en raison du coût de ses facteurs de production ;
- Atteindre la neutralité concurrentielle sur les marchés des facteurs de production — éliminer toutes barrières protégeant l'entreprise publique contre la concurrence du secteur privé. Toutes défaillances subsistant dans le fonctionnement du marché doivent être traitées par un régime réglementaire qui s'applique également au secteur public et au secteur privé ;
- Instaurer une réglementation efficace du monopole naturel — si le marché est un monopole naturel, l'entreprise doit être réglementée de manière à éviter l'exploitation du pouvoir monopolistique. Les éléments du monopole naturel doivent être séparés des éléments concurrentiels. (NCC 1997, pp.30-33).

Ce modèle sert de guide aux gouvernements australiens. Chacun a défini sa propre approche de la transformation en société commerciale. Bien que le modèle évoqué ci-dessus reflète l'approche adoptée en Australie, toutes les entreprises publiques transformées en sociétés commerciales n'ont pas suivi exactement le même modèle. Par exemple, une séparation structurelle n'a pas eu lieu dans tous les cas.

ANNEXE 2 : DIRECTIVES AUSTRALIENNES SUR LA NEUTRALITE CONCURRENTIELLE

Les gouvernements australiens ont élaboré des déclarations et directives politiques sur l'application des politiques de neutralité concurrentielle. Dans la plupart des cas, ces documents sont disponibles sur internet. Cette Annexe donne la liste de ces publications australiennes.

Gouvernement australien

Website: <http://www.pc.gov.au/ccnco/publications/index.html>

Australian Government Competitive Neutrality – Guidelines for Managers, February 2004

Rate of Return Issues, Commonwealth Competitive Neutrality Complaints Office Research Paper, Productivity Commission, December 1998

Cost Allocation and Pricing, Commonwealth Competitive Neutrality Complaints Office Research Paper, Productivity Commission, October 1998

Commonwealth Government Competitive Neutrality Statement, June 1996 **Website:**
<http://www.ncc.gov.au/activity.asp>

Competitive Neutrality: Scope for Enhancement, Staff Discussion Paper, June 2002

Competitive Neutrality Reform: Issues in Implementing Clause 3 of the Competition Principles Agreement, January 1997

Gouvernement de Nouvelle-Galles du Sud

Website: <http://www.cabinet.nsw.gov.au/publications.html>

Policy Statement on the Application of Competitive Neutrality, Office of Financial Management, Policy and Guidelines Paper, January 2003

NSW Government Policy Statement on the Application of National Competition Policy to Local Government, June 1996

Website: <http://www.treasury.nsw.gov.au/indexes/tppdex.html>

Guidelines for Pricing of User Charges, Office of Financial Management, Policy and Guidelines Paper, June 2001

Gouvernement du Victoria

Website: http://www.dtf.vic.gov.au/ncp/cn_pubs.htm

National Competition Policy and Local Government, January 2002

Competitive Neutrality Policy Guide, September 2001

Competitive Neutrality Policy, Department of Treasury and Finance, 2000

Procedure for Handling Complaints, Competitive Neutrality Unit, 2000

Gouvernement du Queensland

Website: <http://www.treasury.qld.gov.au/office/services/regulatory-reform/neutrality.shtml>

Queensland's Competitive Neutrality Complaints Handling Process, March 2001

Competitive Neutrality and Queensland Government Business Activities – A Queensland Government Policy Statement, July 1996

Commercialisation of Government Service Functions in Queensland – Policy Framework, October 1994

Full Cost Pricing Policy – A Queensland Government Policy Statement, October 1994

Gouvernement d'Australie Occidentale

Website: http://www.dtf.wa.gov.au/cms/tre_content.asp?id=605

Policy Statement on Competitive Neutrality, June 1996

Local Government Statement, June 1996

Gouvernement d'Australie Méridionale

Website: http://www.premcab.sa.gov.au/dpc/publications_competition_documents.html#comp_neutrality

Revised Clause 7 Statement on the Application of Competition Principles to Local Government Under the Competition Principles Agreement, September 2002

Competitive Neutrality Policy Statement, July 2002

A Guide to the Implementation of Cost Reflective Pricing – A Part of Competitive Neutrality Policy, October 2000

A Guide to the Implementation of Competitive Neutrality Policy, March 1998

Community Service Obligations – Policy Framework, December 1996

Gouvernement de Tasmanie

Website: <http://www.gpoc.tas.gov.au/domino/gpoc.nsf/complaints-v/001>

National Competition Policy Competitive Neutrality Principles – Complaints Mechanism Guidelines,
February 1999

Guidelines for Implementing Full Cost Attribution Principles in Government Agencies, September 1997

Full Cost Attribution Principles for Local Government, June 1997

Application of the Competitive Neutrality Principles Under National Competition Policy, June 1996

Application of the National Competition Policy to Local Government, June 1996

Gouvernement du Territoire du Nord

Website: <http://www.nt.gov.au/ntt/financial/9697bps/bp5/b5c8.shtml>

Competition Policy and Competitive Neutrality, 1997

Gouvernement du Territoire de la Capitale Australienne

Website: <http://www.treasury.act.gov.au/competition/comp/index.html>

Competitive Neutrality in the ACT, January 2001

ANNEXE 3 : METHODES D'ALLOCATION DES COUTS

Dans un rapport d'études intitulé *Cost Allocation and Pricing* (Allocation des Coûts et Fixation des Prix) (CCNCO 1998a), le Bureau des Plaintes pour défaut de Neutralité Concurrentielle du Gouvernement Australien analyse trois approches d'allocation des coûts pour les agences appliquant le cadre de neutralité concurrentielle de l'Australie.

Coûts intégralement répartis

Selon la méthode du coût intégralement réparti ("méthode FDC"), les coûts totaux d'une agence ou entreprise sont imputés à toutes les productions commerciales et non commerciales. Les coûts directs sont imputés à leur production respective, tandis que les coûts indirects et communs sont imputés pour un montant moyen à toutes les productions. Ainsi, la structure du coût de revient pour chaque production inclura une proportion des coûts d'investissement directs, et de ceux qui servent indirectement à réaliser cette production. Ces derniers coûts peuvent inclure, par exemple, une proportion des coûts d'investissement des services généraux du siège de l'agence. (CCNCO 1998a, p.7)

Les coûts indirects peuvent être alloués sur la base d'une formule qui reflète, par exemple, le pourcentage d'effectif total participant à l'activité, ou la part de cette activité dans le budget total de l'entreprise. L'imputation des coûts par activité est une méthode plus sophistiquée d'allocation des coûts indirects, où les productions de l'agence sont liées aux activités entreprises pour les produire. Bien qu'elle puisse prendre des formes différentes, l'imputation des coûts par activité comprend habituellement :

- L'identification des coûts totaux ;
- L'identification de produits et groupes d'utilisateurs de l'agence ;
- L'identification de toutes les activités que l'agence accomplit pour produire les produits ;
- L'imputation des coûts totaux aux activités ; et
- L'identification des moteurs de coûts¹ qui relient les activités aux produits pour donner un coût par unité de produit. (Commission de la Productivité 2001, p.H.14)

L'imputation des coûts par activité est plus fortement consommatrice de données que d'autres méthodes d'imputation des coûts indirects. Les agences auront fréquemment besoin de nouveaux systèmes de gestion informatique des données et d'enquêtes internes régulières, ou de feuilles de temps, pour retracer les temps consacrés par le personnel à des activités particulières, et la contribution que ces activités apportent à la production de services particuliers. Bien que l'imputation des coûts par activité soit le mode d'imputation des coûts le plus précis, certains frais généraux resteront néanmoins à imputer au prorata, car il n'est pas possible d'identifier leur contribution à des productions particulières. Les salaires du président-directeur général de la société peuvent entrer dans cette catégorie.

La méthode du coût intégralement réparti est la plus appropriée lorsque les services dont les coûts sont ainsi chiffrés forment la majeure partie de la production de l'agence.

Coût marginal

Le coût marginal est le coût de production d'une unité additionnelle de produit ou service. Il inclura généralement des coûts directs qui varient avec la production, et quelques coûts indirects. Le coût marginal peut être mesuré à court terme ou à long terme. (CCNCO 1998a, p.9)

Le coût marginal à court terme ne couvre pas les coûts des capitaux immobilisés ni les coûts indirects que l'agence encourrait encore si elle ne produisait pas l'unité additionnelle de produit ou service. Théoriquement, les coûts marginaux à court terme donnent la meilleure indication du coût de production d'une unité additionnelle à une date déterminée. Cependant, la fixation des prix sur la base du coût marginal à court terme est problématique, particulièrement dans un régime de neutralité concurrentielle. Le coût marginal à court terme est difficile à mesurer et il est difficile de gérer la récupération des coûts fixes d'une manière qui n'entraîne pas des niveaux extrêmes de volatilité des prix.

Le coût marginal à long terme tente d'assurer l'allocation des coûts fixes et indirects. Il identifie le coût de fourniture d'une unité additionnelle de production à long terme, y compris les coûts d'investissement qui sont nécessaires afin de rendre cette production possible. Il exclut néanmoins les coûts indirects qui sont fixés à long terme, tels les frais généraux du siège et les coûts fixes d'infrastructure. Le coût marginal à long terme est toutefois complexe à mesurer. En raison de ces difficultés de mesure, des alternatives comme le coût différentiel et le coût évitable, sont souvent utilisées comme substitut du coût marginal.

Coût différentiel et coût évitable

En dépit de la pluralité de définitions du coût différentiel, ce coût se réfère en pratique à des différentiels importants de production et à une période de temps plus longue que le coût marginal à court terme. En d'autres termes, le coût différentiel est l'augmentation du coût total d'une entreprise imputable à la production d'un type de produit ou service particulier, et non pas seulement le coût de production de l'unité finale ou marginale de ce produit ou service. Le coût différentiel à long terme (LRIC) inclut des coûts d'exploitation et de maintenance, des coûts différentiels d'investissement (c'est-à-dire un retour sur les actifs additionnels exigés) et des coûts différentiels indirects. Le coût différentiel par unité est le coût du différentiel (ou bloc) de production divisé par le nombre d'unités additionnelles...

Le coût évitable est une autre mesure pratique du coût marginal. Il inclut tous les coûts qui seraient évités si une production n'était plus fournie par l'entité concernée. (CCNCO 1998a, p.10)

En pratique, le coût différentiel et le coût évitable sont généralement similaires, car les coûts liés à la décision de produire le produit seront similaires à ceux qui seraient évités si l'entreprise stoppait la production.

A la différence du coût intégralement réparti, le coût différentiel et le coût évitable à long terme excluent les coûts fixes indirects qui ne varient pas avec le niveau de production. La méthodologie du coût différentiel ou du coût évitable est cohérente avec un cadre de neutralité concurrentielle dans certaines situations. Certaines entreprises publiques ont une infrastructure fixe très importante, et les activités commerciales soumises à la neutralité concurrentielle ne sont qu'une petite partie des fonctions totales de l'entreprise. Il est fréquent que l'entreprise doive maintenir cette infrastructure, indépendamment du point de savoir si elle se livre à ces activités commerciales. Dans ces cas, il serait conforme à des principes de neutralité concurrentielle de fixer le prix de ces activités commerciales sur la base du coût différentiel ou du coût évitable à long terme.

NOTE

1. Les moteurs de coûts sont des facteurs qui affectent le niveau d'activité et donc les coûts exigés pour produire une unité de produit. Ils incluent, par exemple, le nombre de clients ou le niveau de complexité du service.

ANNEXE 4 : METHODES D'EVALUATION DES ACTIFS

Les entreprises publiques utilisent déjà un éventail de méthodes pour évaluer les actifs. (PC 2001, p.H.7)

Le coût historique évalue les actifs au coût initial d'acquisition par l'entreprise, y compris les coûts de financement et d'installation correspondants. L'évaluation historique peut être ajustée pour tenir compte de l'amortissement, lorsqu'un actif a une durée de vie limitée, en soustrayant l'amortissement cumulé. L'amortissement cumulé représente le montant du potentiel de service de l'actif qui a déjà été utilisé.

Le coût de reproduction évalue les actifs au coût actuel de reproduction de l'actif existant, essentiellement sous sa forme actuelle, en utilisant les spécifications de l'actif d'origine.

Le coût de remplacement évalue les actifs au coût actuel de remplacement de l'actif par un actif similaire qui peut fournir des services et une capacité équivalents.

Le coût de remplacement net d'amortissements ajuste le coût de remplacement pour tenir compte de la consommation de l'actif, en soustrayant l'amortissement cumulé.

Le coût de remplacement optimisé net d'amortissements évalue les actifs au coût de remplacement d'un actif 'optimisé', sous déduction de l'amortissement cumulé. Un actif 'optimisé' est un actif qui produit de la manière la plus efficiente un niveau spécifié de produit. Les effets d'inefficiences comme une capacité excédentaire, une duplication, une redondance et une mauvaise localisation, sont supprimés de l'évaluation.

La juste valeur de marché utilise le prix auquel l'actif se vendrait sur un marché ouvert concurrentiel, où l'acheteur et le vendeur seraient tous deux 'disposés à conclure la vente mais sans que ce soit sous la pression du temps'. Elle reflète la valeur d'un actif dans sa meilleure utilisation alternative.

La valeur actuelle nette utilise la valeur actuelle des cash flows prévisionnels générés par l'utilisation de l'actif pour évaluer l'actif. Elle implique d'estimer le revenu futur généré par un actif, puis d'actualiser ce flux de revenus à un taux de décote qui reflète les risques liés à la propriété de l'actif.

La valeur de dépossession (valeur intrinsèque) représente la perte que subirait l'agence si elle était privée du potentiel de service ou des avantages économiques futurs de l'actif. Si l'actif perdu par l'entreprise doit être remplacé, l'actif doit être évalué à sa valeur de marché, à son coût de remplacement ou à son coût de reproduction, selon les circonstances. Si l'actif n'est pas remplacé, il doit être évalué à sa valeur économique, qui est la plus élevée de la valeur actuelle nette ou de la juste valeur de marché de l'actif. Si l'actif est excédentaire par rapport aux besoins, il doit être évalué à sa juste valeur de marché.

La valeur de dépossession optimisée (valeur intrinsèque optimisée) est la plus faible du coût de remplacement optimisé net d'amortissements ou de la valeur économique de l'actif, étant précisé que la valeur économique de l'actif est la plus élevée de la valeur actuelle nette ou de la juste valeur de marché.

En Australie, le Steering Committee on National Performance Monitoring of Government Trading Enterprises (Comité de Direction australien sur le contrôle des performances nationales des entreprises commerciales publiques) a produit un cadre pour encourager l'uniformité d'évaluation des actifs immobilisés pour les entreprises commerciales publiques. Ce rapport a proposé l'utilisation d'une méthodologie se fondant sur la valeur de dépossession (valeur intrinsèque) car elle "fournit des informations plus pertinentes à la fois à propos du coût actuel de fourniture des produits et services et sur la

valeur actuelle des ressources déployées” (SCNPMGTE 1994, p.iii). Le Comité de Direction a produit le tableau suivant pour résumer l’approche qu’il propose d’adopter de l’évaluation des actifs (SCNPMGTE 1994, p.6)

Bases de Mesure à appliquer en vertu de ces Directives à des catégories particulières d'actifs corporels immobilisés

| Catégorie d'actif | <i>Dans le cas où le potentiel de service serait remplacé si l'entreprise commerciale publique était privée de l'actif</i> | <i>Dans le cas où le potentiel de service ne serait (ou ne pourrait) pas remplacé si l'entreprise commerciale publique était privée de l'actif</i> |
|---|--|--|
| <u>Actif détenu en vue d'une utilisation continue</u> | | |
| Terrains (y compris terrains appartenant à l'infrastructure) | <p><i>Le plus élevé du :</i> Prix d'achat actuel du marché, en tenant compte de la nature de la parcelle, des restrictions légales en matière d'utilisation, des opportunités et obstacles au développement inhérents à la parcelle de terrain spécifique, ou d'autres contraintes existant au titre de ce terrain, ou de tous attributs spéciaux que le terrain peut posséder (valeur d'usage) ; ou De la valeur de marché actuelle (prix de vente) de son utilisation alternative faisable et potentielle, en tenant compte des coûts de réalisation de ce potentiel</p> | Le plus élevé de la valeur actuelle nette ou de la valeur actuelle de marché (prix de vente) |
| Biens patrimoniaux | Prix d'achat actuel du marché, coût actuel de remplacement ou coût actuel de reproduction, du potentiel de service brut utilisé par l'entreprise commerciale publique si le potentiel de service était autrement acquis par l'entreprise commerciale publique | Le plus élevé de la valeur actuelle nette ou de la valeur actuelle de marché (prix de vente) |
| Actifs généraux - s'il existe un marché secondaire pour l'actif (actifs non spécialisés) | Prix d'achat actuel du marché du potentiel de service brut de l'actif existant – si des actifs neufs sont normalement acquis, les prix du neuf sont pertinents et si des actifs d'occasion sont normalement acquis, les prix de l'occasion sont pertinents | Le plus élevé de la valeur actuelle nette ou de la valeur actuelle de marché (prix de vente) |
| - s'il n'existe aucun marché secondaire pour l'actif (actifs spécialisés) | Le plus faible du coût actuel de remplacement ou du coût actuel de reproduction du potentiel de service brut utilisé, ou bénéfice économique futur de l'actif existant | Le plus élevé de la valeur actuelle nette ou de la valeur actuelle de marché (prix de vente) |
| <u>Actifs excédentaires</u> | | |
| Tous actifs de cette nature | Non applicable | Valeur actuelle de marché (prix de vente) |

ANNEXE 5 : DEFINITIONS HABITUELLES DU COUT MOYEN PONDERE DU CAPITAL

Le Ministère du Développement Économique de Nouvelle-Zélande a émis un avis sur le calcul du coût moyen pondéré du capital (WACC) pour le secteur de l'électricité. Cet avis notait ce qui suit :

Le WACC peut être défini de plusieurs manières différentes ...Le manuel n'impose pas la définition à utiliser mais, quelle que soit la formulation WACC utilisée, elle doit être compatible avec la formulation des cash flows à actualiser. Le WACC défini dans ce manuel l'a été dans la perspective d'un investisseur néo-zélandais. Il est présenté après imposition de l'investisseur, afin de refléter le régime d'imputation des dividendes en Nouvelle-Zélande, et est exprimé en termes nominaux (non réels) en ligne avec les FCF (Free Cash Flows). (Ministère du Développement Économique 2004)

Le manuel de Nouvelle-Zélande fournit la définition suivante et communément utilisée du WACC.

$$WACC = Re(E/V) + Rd(1-tc)(D/V)$$

Où:

- Re = coût des capitaux propres
- Rd = coût des capitaux d'emprunt
- E = valeur de marché des capitaux propres
- D = valeur de marché des capitaux d'emprunt
- V = D + E = valeur totale de l'entreprise
- tc = taux de l'impôt sur les sociétés sur les capitaux d'emprunt

Le gouvernement australien a spécifié la méthode suivante pour calculer le WACC pour les entreprises publiques australiennes soumises à la neutralité concurrentielle. (Commonwealth d'Australie 2004, pp.31-32)

$$WACC = Re(E/V) + Rd(D/V)$$

Re est le taux de rendement devant être dégagé sur les capitaux propres (taux sans risque plus prime de risque). Le taux de rendement sur les capitaux propres peut être déterminé en utilisant le modèle d'évaluation des actifs financiers (MEDAF). Le coût des capitaux propres pour le calcul du WACC est souvent déterminé par référence aux marchés financiers et/ou à des entreprises similaires de référence.

Rd est le taux de rendement devant être dégagé sur les capitaux d'emprunt (y compris toutes taxes pour assurer la neutralité des emprunts). Le taux de rendement devant être dégagé sur les capitaux d'emprunt (Rd) représente les coûts d'emprunt de l'entreprise, exprimés en pourcentage. Il reflète le taux de rendement exigé par le prêteur.

V est la valeur de marché des actifs totaux (c'est-à-dire capitaux d'emprunt plus capitaux propres).

E est la valeur de marché des capitaux propres.

D est la valeur de marché des capitaux d'emprunt.

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AUSTRALIA

1. Introduction

Australia has implemented a policy of competitive neutrality (CN) to address resource allocation distortions and competitive advantages that may accrue to significant government business activities due to their public ownership. The policy requires that government business activities operating in a market in which there are actual or potential competitors should not enjoy net competitive advantages over private sector competitors simply by virtue of their public sector ownership. Thus it encourages efficient competition in those markets where government businesses are operating.

CN policy and principles have an important role in Australia's public sector resource management framework. The Productivity Commission estimated that in 2001-02, 84 government trading enterprises (GTEs) in Australia controlled assets valued at more than A\$162 billion and generated A\$55 billion in revenue, in key areas of infrastructure - including electricity, water, urban transport, railways, ports and forests. Revenue from these GTEs, expressed as a proportion of GDP, was almost eight percent of GDP.

2. Introducing Competitive Neutrality Reforms

In Australia, the competitive neutrality reforms have been a natural extension of ongoing public sector reforms of the 1980s and early 1990s through which governments sought to address the significant budget deficits and debt build up of the 1970s. This was through stronger budgetary discipline and enhanced focus on the efficiency of the public sector, including winding back budget subsidies to inefficient government business enterprises and the adoption of commercialisation principles.

While these early reforms and restructuring were extensive, they were not always applied consistently. Some government businesses continued to have advantages over private competitors, including exemptions from tax, lower debt costs (as a result of either explicit or implicit government policy) and exemptions from regulatory requirements such as planning and environment laws.

In 1993, an Independent Committee of Inquiry into the National Competition Policy (NCP)(the Hilmer Review) acknowledged that moves to increase the efficiency of government businesses, through commercialisation and the introduction of competition, raised new issues, particularly where the businesses enjoyed net advantages over their private sector competitors.

While subjecting government businesses to the provisions of the *Trade Practices Act 1974* addressed in part the regulatory environment in which these businesses operated, the Hilmer Review acknowledged that this would not of itself address all concerns over the cost advantage and pricing policy of government businesses. Therefore, the Hilmer Review recommended a set of competitive neutrality principles be applied to government businesses.

These principles are embodied in Clause 3 of the 1995 *Competition Principles Agreement* (CPA) signed by all Australian governments. The CPA required adopting a corporatisation model, where appropriate. A possible approach to corporatisation was a model developed by an inter-governmental committee responsible for GTE performance monitoring. That framework included: clear and non-conflicting objectives; sufficient management responsibility, authority and autonomy; independent,

objective monitoring performance; and competitive neutrality measures¹. This consolidated and gave further impetus to the reform process.

The CPA also prescribed specific measures on taxation, debt guarantees, regulation and cost attribution for all significant business activities, to the extent that the benefits to be realised outweigh the costs. While these principles are uniform across the economy, each jurisdiction has been free to determine its own agenda for their implementation.

3. Competitive Neutrality Principles

Implementation of CN involves applying the following principles:

- Taxation neutrality requires that a government business is not advantaged by taxation exemptions or advantages not available to competitors.
- Debt neutrality requires that a government business is subject to similar borrowing costs to its competitors.
- Regulatory neutrality requires that a government business is not advantaged by operating in a different regulatory environment than its private sector competitors.
- Entities are required to earn a commercial rate of return sufficient to justify long term retention of assets in the business and to pay commercial dividends.
- Where an agency undertakes significant business activities as part of a broader range of functions it must also ensure that prices reflect full cost attribution for these activities in part, to ensure that public funds provided for non-business, non-profit activities are not used to subsidise business activities.

Any advantage of ownership is to be neutralised either by ensuring the government business faces exactly the same cost as the competitor, or by making an equivalent payment (at the federal level, to the Official Public Account). Where possible, CN is to be achieved by corporatisation of the entity to ensure the activity is operated within an appropriate commercial structure, and is subject to governance and accountability arrangements that cover CN concerns. CN does not cover situations where government businesses may have cost advantages from economies of scale or greater efficiency.

Guidance on the application of these principles to Australian Government businesses is provided by the *Australian Government Competitive Neutrality Guidelines for Managers*, released by the Treasury and the Department of Finance and Administration in February 2004.²

4 Scope of Competitive Neutrality Policy

All significant government business activities are subject to CN. At the federal level, this is all Government Business Enterprises (GBEs), Commonwealth companies, business units (whose primary objective is trading goods and services in the market to earn a commercial return), and other activities with a turnover of at least \$10 million per year.

CN also applies to market testing activities to ensure that the tender process does not provide an advantage to either public sector bids or baseline costings, and provide visible and auditable accountability arrangements. When conducting a tender process, government agencies must include a requirement for public sector bidders to declare their tenders compliant with CN principles. CN is applied by including all

costs, making notional adjustments in the areas of tax, regulatory and debt neutrality, and providing for a commercial pre-tax rate of return.

Other business activities are also subject to CN if a CN complaint against them is upheld. In addition, some other business activities are implementing CN as a best practice measure.

CN does not apply to the non-business, non-profit activities of publicly owned entities.

5. Non Commercial Service Obligations

Australia's NCP arrangements recognise that government business activities are sometimes required by Governments to provide services to the community which they would not undertake on a commercial basis (Community Service Obligations).

In applying competitive neutrality principles, Governments are not required to undertake a competitive process for the delivery of these community service obligations (CSOs) and are free to determine who should receive a CSO payment or subsidy, which should be transparent, appropriately costed and directly funded by government.

Without clear identification and implementation of CSOs, it can be difficult to determine whether the prices charged by a government business reflect full cost attribution or contain an element of subsidy (or penalty) due to government ownership. To that end, governments have recognised that it is preferable for CSOs to be clearly identified, funded from the Budget and reported by the government. This approach can also help to reduce resource allocation distortions, enhance community awareness of the CSOs and facilitate comparisons with other demands on public funds.

Case study: Australia Post

Australia Post (AP) is a self-funding GBE operating under the *Australian Postal Corporation Act 1989* (the Act). AP is a statutory corporation, which operates with a board and has commercial objectives supported by community service obligations.

Under the GBE Governance Arrangements, the Australian Government sets AP's strategic direction, and AP's Board is responsible for day-to-day management policies. The Act and the *Commonwealth Authorities and Companies Act 1997* give the Board a wide degree of control over the management of AP.

Similar to other GBEs AP is required to meet its CSOs in addition to its commercial objectives. The CSOs, as set out in s.27 of the Act, require that:

The corporation provide a letter service for both domestic and international letter traffic;

The service be available at a single uniform rate within Australia for standard letters;

The service be readily accessible to all Australians wherever they reside; and

The performance standards for the service reasonably meet the social, industrial and commercial needs of the community.

Certain services in relation to domestic and international mail, and the issuing of postage stamps, are reserved to Australia Post (s. 29 of the Act) to enable it to deliver CSOs. The reserved services are subject to exemptions in section 30 of the Act.

The cost of delivering CSOs in 2002-2003 was approximately \$90.5 million (Australia Post Annual Report 2002-2003). It is funded internally, by way of cross-subsidisation, through revenue generated from reserved services.

In November 2002, the Australian Government announced a small package of reform measures. Elements of the reform package affecting CSOs include:

expanded powers for the Australian Communications Authority to cost AP's CSOs and report on AP's quality of service and compliance and performance standards; and

the introduction of accounting transparency for AP to assure competitors that AP is not unfairly competing by cross subsidising its competitive services with revenues from its reserved services.

6. Legal Framework for CN Policy

In the main, CN is implemented by administrative arrangement rather than by legislation. At the federal level, the Australian Government Treasury has responsibility for CN policy.

Given the myriad circumstances, and dynamism surrounding the operating environment of government business activities, there appears to be little alternative to this approach. However, government business also operate in the broader legislative environment in respect of general laws (on taxation, for example).

7. Enforcement and monitoring

All Australian governments have established competitive neutrality complaints mechanisms, and these serve an important role in enhancing transparency and helping to ensure that a forum exists for private sector competitors to complain where they perceive that competitive neutrality principles are not being applied by governments.

The Australian Government Competitive Neutrality Complaints Office (AGCNCO) is an autonomous unit within the independent Productivity Commission, established to receive and investigate complaints, and advise the Treasurer on the application of competitive neutrality to Australian Government business activities. The AGCNCO also provides advice to public sector managers on the implementation of competitive neutrality policy, and publishes useful technical information on such issues as rate of return and cost allocation principles.

Any individual, organisation or government body may complain to the AGCNCO on the grounds that an Australian Government business activity has not been subject to or is not complying with competitive neutrality requirements, or that current competitive neutrality arrangements are not effective in removing a net competitive advantage. If mediation does not resolve the complaint, the AGCNCO may commence a formal investigation, and these are detailed on its website³.

Where the AGCNCO considers that competitive neutrality arrangements are not being followed, it may directly advise government business entities as to identified inadequacies and actions to improve compliance. If a suitable resolution to a complaint cannot be achieved in this manner the AGCNCO may recommend appropriate remedial action or that the Treasurer undertake a formal public inquiry into the matter.

The Australian Government and each State and Territory must report in its NCP Annual Report, *inter alia*, on compliance with competitive neutrality policy, including handling of complaints received. Such reports also provide examples of how provisions are being applied. At times, market evolution requires competitive neutrality arrangements to be revisited and updated.

The National Competition Council's (NCC's) assessment function – it makes recommendations to the Australian Government on the level of competition payments to the States and Territories – can also place pressure on the States and Territories to apply competitive neutrality principles. For example, following complaints by a private bus company in relation to government subsidies to Queensland Rail, the NCC

recommended, and the Australian Government imposed, a suspension of 10 per cent of Queensland's competition payment for failure to adequately address competitive neutrality concerns. This suspension was lifted and reimbursed when Queensland addressed the concern through finalising and releasing a comprehensive community service obligation framework for public transport in South East Queensland.

In addition, the Productivity Commission undertakes regular monitoring of the financial performance of government trading enterprises, and publishes its findings.⁴

8. Assessment of Competitive Neutrality Policy

As part of Australia's NCP reforms, CN arrangements are subject to periodic review.

In November 2000, the Council of Australian Governments (CoAG) made a number of changes to fine tune NCP, including to the assessment of CN compliance.

CN arrangements will be examined as part of the review of Australia's NCP by the Productivity Commission, which is due to report by January 2005.⁵ The review will inform a CoAG review of the NCP agreements and the NCC's assessment role by September 2005.

NOTES

1. Taskforce on Other Issues in the Reform of Government Trading Enterprises, 1991, *Characteristics of a Fully Corporatised Government Trading Enterprise*, Discussion Paper No 1.
2. Available at http://www.finance.gov.au/finframework/fc_2004_01.html.
3. <http://www.ccnco.gov.au>
4. Available at www.pc.gov.au.
5. Further information is available at <http://www.pc.gov.au/inquiry/ncp/index.html>.

CHINESE TAIPEI

1. Introduction

This paper presents Chinese Taipei's public sector's historic and current approaches to regulating market activities. The paper delineates the changes with respect to the scope and extent of Chinese Taipei's public sector involvement in the past half century, the government's commitment both to minimise its intervention in the market and to pursue a market-driven economy in face of an inevitable, ever-expanding global economy, the measures adopted to monitor and protect competitive neutrality between public and private market players, and the role the Fair Trade Commission plays in implementing this mandate.

2. Public sector and economic development

To be sure, the public sector has played an essential role in the implementation of the growth-oriented economic policy in Chinese Taipei. As far back as January 20, 1949, the State Enterprises Management Act was enacted, and it defines the purposes of establishing state-owned enterprises (SOEs) which comprise developing national capital, enhancing economic development, and improving the overall standard of living.

2.1 *Scope and extent of the public sector involvement*

First of all, in view of the fact that the private sector did not have the ability or was too risk-averse to invest in most businesses in the early stage of economic development throughout the 1950s, the government was committed to developing certain SOEs to provide all the necessary services not just for the inhabitants but also for industries. To cite a few examples, electricity and water were essential in people's daily life and crucial to industrial development, fertiliser was important for agriculture, petroleum was necessary for power generation, production, and transportation, the sugar industry was vital to the rural economy and for export, and machinery and shipbuilding were requisite to industries, the fisheries, shipping, national defence, and so on.

With the aim of providing all necessary services, besides constructing industries, or reconstructing those which had been destroyed during World War II, the government also took over financial institutions and was in control of industrial banks and commercial banks, not to mention being involved in various kinds of financial activities, such as property insurance, life insurance, and trust.

Furthermore, to take care of World War II veterans, the government authorised the Veterans Affairs Commission (the VAC) to set up numerous factories, ranging from those dealing in construction, printing, and paper production to those in LPG distribution, pharmaceuticals, and food production, among others.

Last but not least, to increase government revenue from the sale of luxury goods, the government set up the Tobacco and Liquor Monopoly Bureau in 1949 to monopolise the production and trading of products under its umbrella. The government body responsible for regulating the two product-types was the Treasury rather than the agricultural or industrial ministries.

2.2 *Change in the position of SOEs in regard to economic development*

In the 1950s, the most important economic activities were all conducted by the SOEs whose major tasks were to reconstruct war-ravaged industries. At that time, the net production of the SOEs made up over 50% of total net production in Chinese Taipei.

In the following decade, with the exportation of light industrial products starting to gradually generate economic growth, national income rose steadily and the net production of the SOEs slowly fell below 30% of the total net production. However, the need to build infrastructure for further economic growth and improve social welfare continued to underscore the crucial role of state capital and the SOEs on up through the 1970s.

From the late 1970s to the 1980s, Chinese Taipei redirected its economic policy by moving in a direction which adopted measures towards increasing domestic demand and promoting technology-oriented industries. In this stage, the average national income increased substantially, and no longer was there a shortage of private capital for investments. Little by little, the private sector was replacing the public sector as the major player in Chinese Taipei's economic development. During this period, the net production of the SOEs further slipped to around 15% of total net production.

2.3 *Competition policy*

During the late 1980s, Chinese Taipei caught up with the prevailing trends around the world and adopted competition policy as the path for new economic development. Since then, Chinese Taipei has solidly maintained the position that liberalisation, de-regulation, privatisation, and competition law are all fundamental components of the broadly defined term, "competition policy".

By that time, Chinese Taipei's economy had developed to such a degree that many of the functions normally held by state enterprises could be replaced by private-sector initiatives. Inefficiencies inherent in the operations of the state enterprises, in fact, had started to make them a burden to the state. To keep such inefficiently-operated enterprises alive would have cost the economy dearly in that it would have necessitated granting them a certain monopoly status or, perhaps even worse, injecting government funds into their operations to make up for their losses.

Under these circumstances, implementing measures toward privatisation was ultimately singled out by policy-makers as the only workable solution. The policy goals of privatisation included adjusting the role of government to one where it would be much less involved in the market, one where it would be building strong competition across all industries, and one where it would be actively encouraging the most effective reallocation of social resources.

In 1989, the Cabinet set up the Task Force for Promoting Privatisation of the SOEs to revise relevant laws and regulations, to deliberate appropriate approaches, and to review the implementation of programs aimed at privatisation. The Task Force soon submitted the first list of SOEs which were to be privatised so that the responsible ministries could set up agendas and implement steps to this common end.

The Statute for Privatising the State-Owned-Enterprises was then revised in 1991 to provide a more comprehensive framework to govern the process of privatisation and regulate the rights and obligations of relevant entities. The Statute required that the competent authorities consider all relevant factors and report to the Premier. Once it was deemed unnecessary, if not more productive, that a particular SOE be publicly owned, the privatisation program was put into effect.

In response to certain counter-reactions claiming that privatisation might well benefit large business groups rather than the general public, in 2000, the Cabinet restructured the Task Force into the Promoting

and Steering Committee for Promoting Privatisation of the SOEs which was comprised of ministers responsible for the relevant SOEs, the budget, and labour affairs as well as outside experts in financial, fiscal, and legal affairs.

Between January 1989 and September 2003, Chinese Taipei privatised 31 SOEs and yielded a total of approximately NT\$ 500 billion. The privatised SOEs included, among others, state-owned steel, petrochemical, civil engineering, maritime, industrial industries and commercial banks, plus property insurance companies. Seventeen small-scale enterprises or factories, most of which belonged to the VAC, had been shut down after considerable review. A number of SOEs still remain, but most are public utilities and large-scale enterprises in different fields, including electricity, water, petroleum, telecommunications, railway, postal, shipbuilding, sugar, wine, and tobacco, and are on the list slated for the next phase of the privatisation process.

From 1995 to 2003, mostly as a result of the privatisation process, the proportion of employees in SOEs as opposed to general government activities has fallen from 41.5% to 27.7%.

3. Applying the principles of competitive neutrality

In keeping with the term “competition neutrality policy” which is not typically used in Chinese Taipei, for the most part, the State Enterprises Management Act does provide a level playing field for both the public and private enterprises in their respective operations.

The State Enterprises Management Act clearly specifies that all SOEs shall be operated in such a manner befitting a business that they are able to support themselves, achieve continued development, and increase national income without incurring losses.

The rights and responsibilities of SOEs shall be the same as those of private enterprises in similar categories. Accordingly, SOEs shall follow ordinary business laws and regulations, such as the Corporate Act and the Fair Trade Act, as the private businesses do, in addition to individual laws which regulate specific sectors, such the Telecommunications Act, the Petroleum Management Act, and so on.

3.1 *Liberalisation vs. privatisation*

In formulating its privatisation policy, Chinese Taipei took the stand that the post-privatisation market structure of relevant SOEs shall not adversely affect competition, particularly in the public utilities sector. For fear of creating or strengthening dominant market players, right from the outset(?) Chinese Taipei adopted the principle that the privatisation of SOEs must be promoted in concert with market liberalisation.

Take the telecommunications sector as an example. In the past, the Directorate General of Telecommunications (the DGT) under the Ministry of Transport and Communications (the MOTC) monopolised all the businesses. To privatise this sector in light of the liberalisation process, in 1996, the government separated the DGT into two entities: first, with the new DGT remaining as the telecommunications regulator, and secondly, with the newly- created SOE Chunghwa Telecom Co. running telecommunications businesses, ranging from data communication, and mobile phones to fixed network.

The formerly monopolised telecommunications services were then liberalised in sequence: mobile phones, paging, and mobile data communications in 1997, and fixed communications network in 2001. By the end of 2002, there were 23.9 million mobile phone accounts, a penetration rate of 106.15%, and 8.59 million Internet users. The government then auctioned off 18% of the company’s stock share in September 2002 and still has plans to further privatise this company. In a word, Chunghwa Telecom has been facing a series of competition in all relevant markets ever since its establishment.

Another example can be seen in the petroleum products market. The SOE the Chinese Petroleum Corporation (the CPC) was initially the only body charged with exploring, producing, importing, refining, and marketing petroleum and natural gas. In June 1996, the government decided to permit the establishment of privately owned and operated petroleum refinery enterprises. This move gave these new firms with self-owned and self-operating refineries the right to produce, import, export, and market petroleum products. Until now, the full privatisation program for the CPC has yet to be finalised by the parliament.

3.2 *Universal service obligations*

Universal service obligations might well serve as a justification for a statutory monopoly in a liberalised sector. The postal service industry illustrates this well; the services used to be monopolised by the Directorate General of Posts (the DGP). On 1 January 2003, however, the DGP was restructured as the state-owned Chunghwa Post Co., under the Minister of Transportation and Communications' portfolio. The scope of service of Chunghwa Post includes mail delivery, postal savings, postal remittances, postal simple life insurance, philately and relevant commodities and postal capital operations.

Most mail delivery services provided by the former DGP had already been affected by new technologies and had been opened to competition, and given the advancement of electronic communications technology, by now traditional correspondence has largely been replaced by the Internet, phones, and faxes. Private couriers can collect and deliver bulk business documents and printed papers, while door-to-door delivery services introduced by convenience stores have split the postal parcel market. The only exception, i.e., that which has not been opened up, is the right to the delivery of letters, postcards, or any papers conveying a message as this is still exclusively granted to Chunghwa Post, in accordance with the Postal Act.

The rationale behind this statutory monopoly argues that empirical studies have demonstrated that competitors not charged with universal service obligations will run business only in the most profitable services and refuse to operate in the non-profitable areas. This cream-skimming behaviour significantly increases the costs of the universal service provider, cause unfair competition between the universal service provider and competitors, and thus harm social and economic welfare in general.

4. *Monitoring and enforcement*

Competition law is one element -- probably the most important one -- of all competition policy at a time when the economy is considerably liberalised and together, in unison, the private sector and private economic activities become the mainstream of the economy.

Along with other measures adopted to fulfil the goal of liberalisation and globalisation of the economy in such areas as trade liberalisation, de-regulation, and privatisation, Chinese Taipei enacted the Fair Trade Act in 1992 and set up the Fair Trade Commission to implement the Act. The Act applies to all business activities across Chinese Taipei, be they in the private or public domain.

For the enforcers of the competition law, the Fair Trade Commission, what is important is to monitor the operations of these recently liberalised or privatised SOEs in order to ensure that they do not abuse their residual monopoly power. The examples of the FTC's enforcement of the law on SOEs which are presented below clearly illustrate how the FTC works to provide a level playing field for public and private market players.

4.1 *Case I: The Chunghwa Telecommunications Co.*

Prior to the steps toward liberalisation in the telecommunications sector, the domestic telecommunications industry was monopolised by the former DGT. To prevent the incumbent Chunghwa Telecom from misusing its market power, thus hindering fair competition once the relevant market was open to competition, the Telecommunications Act requires that Type I telecommunications enterprises (facilities-based carriers) shall, in accordance with its operating items, establish separate accounting systems to calculate profits and losses and shall not use cross-subsidies. In other words, internal financing within the Type I telecommunications enterprises would be a violation of the Telecommunications Act as well as the anti-competitive provisions of the Fair Trade Act.

In September 1999, a complaint was filed with the FTC, alleging that, through its “099” services, the incumbent Chunghwa Telecom was providing a uniform rate of NT\$.06 per second for both local-099-local calls and local-099-mobile phone calls. In so doing, Chunghwa had increased the rate for local calls by a factor of nine from the original rate of NT\$1.7 per five minutes, and decreased the rate for local calls to mobile phones by 40 percent from the original rate of NT\$6 per minute. It was alleged that Chunghwa used the revenue generated from its monopoly business to subsidise the business that it had opened to compete with other private competitors.

Chunghwa submitted a rate proposal to the MOTC for approval before it introduced the “099” services. The MOTC approved a provisional rate --but only for a two-month period -- on the grounds that it had uncovered a number of concerns, including who has the right to set rates, whether it is acceptable to have two phases in a rate, whether or not cross-subsidisation had occurred, and whether discussions should be held with other competitors when future rate increases might directly affect them.

Although the FTC has always maintained a positive perspective with respect to all carriers’ introduction of new telecommunications technologies and new telecommunications services, it must exercise special vigilance against any carrier with multiple networks which make use of its monopoly to subsidise operations in open sectors, thereby strengthening its market clout improperly and allowing for other anti-competitive conditions to emerge. After its investigation and research, the FTC concluded that the “099” services did, indeed, cause serious competition concerns and made the following recommendations to the MOTC:

- Chunghwa’s “099” services may have been having the effect of obstructing fair competition by collecting telecommunications fees for local calls to local phones and fees for local calls to mobile telephones on an average pricing basis. The FTC, therefore, recommended a “de-averaging” method: Chunghwa should collect fees on the basis of its actual costs for each type of call;
- When Chunghwa connects “099” calls to the mobile telecommunications network, the mobile phone carrier should have the right to set and collect telecommunications fees in accordance with the relevant laws and regulations so as to maintain competition in the mobile telephone business; and
- Chunghwa should provide equal access to its “099” services to subscribers to other private mobile telephone carriers and avoid obstructing fair market competition by means of unequal treatment in the void of a legitimate reason.

Subsequently, in November 1999, the MOTC required that Chunghwa amend its “099” rate proposal to fit the FTC’s recommendations and thus solved the competition concerns.

4.2 *Case II: The Chinese Petroleum Co.*

The FTC found that the state-owned Chinese Petroleum Corporation (the CPC), the incumbent firm in the petroleum and liquefied petroleum gas markets, was unrightfully interfering in the liberalisation of the LPG market by engaging in discriminatory pricing against downstream LPG dealers that traded with other LPG importers.

Until the end of 1998, the CPC was the sole authorised producer and provider of LPG in Chinese Taipei. A total of nine dealers around the island had entered exclusive dealership agreements with the CPC to sell LPG for home-use. Previously, but in a consistent way, the CPC had been selling the product at the officially posted price to all dealers.

In early 1999, the LPG market was liberalised by the government to allow for competition from imports. Four companies, namely the CPC, Formosa Petrochemical Corp., the CPC's only competitor in the petroleum market at that time, and two other LPG dealers, were given permission by the Ministry of Economic Affairs to import LPG. However, because the costs of the imports were higher than production costs, around mid-1999, the CPC still held an 89.15% share of the LPG market, meaning that most LPG dealers still had to rely on the CPC.

Interfering with competition within the LPG market, the CPC began to exercise discriminatory treatment towards dealers who imported LPG by themselves or who traded with the Formosa Corp. Aware that other dealers' lacked all of the information, the CPC proceeded to take advantage of its superior position to gain access to LPG price information, the end result of which was that the CPC no longer provided all dealers LPG at a uniform price. The affected dealers soon lost their competitiveness in the market. In addition, in September 1999 the CPC then refused to renew its dealership agreement with any dealer who traded with the Formosa Corp.

The FTC expected that the introduction of competition into the previously monopolised LPG market would have increased the choice of products available to consumers and reduced prices, and thus, should have enhanced consumer welfare. As this case illustrates, the incumbent CPC took advantage of its dominant position in the LPG market to engage in price discrimination against dealers who still had to rely on supplies from the CPC, and further, it tried to exclude competitors from the market. Obviously, this seriously violated the Fair Trade Act. In the interests of promoting fair competition, and to force the CPC to cease such discriminatory practices, the FTC decided the CPC must pay an administrative fine of NT\$8 million.

Table 1
Privatised SOEs (1989 ~ 2003)

| Competent Authorities in the Central Government | |
|--|--|
| | <i>SOEs</i> |
| - Ministry of Economic Affairs | BES Engineering Co., China Petrochemical Co., China Steel Co., Steel Factory of Taiwan Machinery Co., Shipbuilding Factory of Taiwan Machinery Co., and Alloy Steel Factory of Taiwan Machinery Co., Taiwan Fertiliser Co., Chunghsing Paper Co., Taiwan Machinery Co. Transportation Division of Tang Eng Co., Steel Factory of Tang Eng Co., Road Vehicle Business Division of Tang Eng Co., Track Vehicle Business Division of Tang Eng Co., Agricultural and Industrial Enterprise Co. |
| - Ministry of Transportation and Communications | Yang Ming Marine Transport Co., Taiwan Motor Transport Co., Taiwan Railway Freight Co. |
| - Ministry of Finance | Chung Kuo Insurance Co., Farmers Bank of China, ChiaoTung Bank, Central Reinsurance Co. |
| - Veteran Affairs Commission | Liquefied Petroleum Gas Supply Division, Veteran Gas Plant, Gangshan Factory, Food Products Factory |
| - Government Information Office | Sing San Newspaper Co. |
| Local Governments | |
| - Taiwan Province | Chang-Hwa Bank, Hua-Nan Bank, First Bank, Taiwan Business Bank, Taiwan Fire & Marine Insurance Co., Taiwan Navigation Co., Taiwan Life Insurance Co., Taiwan Development & Trust Co. |
| - Taipei City | Taipei Bank |
| - Kaohsiung City | Kaohsiung Bank |

Source: The Council for Economic Planning and Development, 2003.

Table 2
SOEs Approved for Privatisation by June 2007

| Competent Authorities | <i>SOEs</i> |
|---|--|
| Ministry of Economic Affairs | Taiwan Power Co., Chinese Petroleum Co., Taiwan Salt Industrial Co., Aerospace Industrial Development Co., China Shipbuilding Co., Tang Eng Iron Works Co. |
| Ministry of Transportation and Communications | Chunghwa Telecom Co., Taiwan Railway Administration |
| Ministry of Finance | Taiwan Tobacco and Liquor Co. |
| Veteran Affairs Commission | Lung-Chi Chemical Plant, Veterans Pharmaceutical Plant, Plastics Works Plants, Food Products Factory, RSEA Engineering Co. |

Source: The Council for Economic Planning and Development, 2003.

FINLAND

1. Introduction

Reforms in the public sector were a feature of Finland's economic development in the 1990s. One significant element in these reforms was marketisation of the production organisations and operating environment in the public sector, and opening them up to competition. In many cases this has been accompanied by expansion of public sector production into areas ideal for, and already supplied by, private enterprise.

The scope of public sector production (including regulatory and business activities) in Finland's national economy can be seen from, for instance, the distribution of the employed labour force between different sectors: in 2003 the private sector employed 1.7 million people (72.2%), municipalities 507 000 people (21.4%) and the state 144 000 people (6.1%).

Marketisation of public sector production and opening it up to competition began in the late 1980s in the state sector as part of a general trend towards deregulation. In the municipal sector, this trend gained pace only a decade later. As regards municipal production in Finland, reforms in progress are increasingly exploiting markets and competition, and for municipalities markets and competition are means of developing the provision of welfare services and making them more efficient. Tendering for services and increased outsourcing have been features of the municipal sector in recent years.

Since the late 1980s most businesses of the *state* have been converted into state enterprises and then incorporated limited companies. Some incorporated state enterprises have been privatised. Only a very small part of the state's businesses are now run by state authorities.

However, there have been competition neutrality problems when state enterprises and state-owned companies compete against private sector companies. They have generally derived from expansion of business operations from monopoly sectors to competitive markets, and under-pricing due to cross-subsidisation and financing, tax and other advantages of state enterprises over private sector companies.

Attempts have been made to improve the transparency and competition neutrality of state business operations by means of competition policy. Recently, the competition neutrality and transparency of public sector businesses have been improved, especially by the new State Enterprise Act (2003) and a new government decision on the state's ownership policy (2004). Their effectiveness is assessed in Section 2.1.

In Finland the 444 *municipalities* have a vital role in providing welfare services. The municipalities are responsible for basic education, social services (such as children's day care, elderly care and services for the disabled), health care (basic health care, special health care and dental care services) and maintenance of physical infrastructure. The municipalities have self-administration and taxing power.¹ The business operations of municipalities, the trends to marketisation of them and related competition neutrality problems are considered in more detail in Section 2.2.

The FCA has intervened in the competition neutrality problems of public sector operations, especially through its *Government and the Markets project* in 1998-2001. As regards government and municipalities'

business operations, the project concentrated on methods of excluding competitors and the loss-making cross-subsidized supply of services by public bodies carrying out business that distort competition.

Through its advocacy, the FCA has also actively influenced legislation and regulations concerning distortion of competition and contributed to marketisation of government production and municipalities' production, and measures to improve their transparency in the market. Adoption of competition policy measures as regards competition neutrality problems in public sector production is reviewed in more detail in Section 3.

Section 4 includes an assessment of the current monitoring of competition neutrality problems and changes in it required.

2. Government and municipalities' market activities, and legislation and guidelines concerning competition neutrality

As regards business activities, competition legislation always applies to operations of the government and municipalities irrespective of whether these operations are unincorporated or incorporated (see competition policy, Section 3). Government and municipalities' market activities, and legislation and guidelines important in ensuring competition neutrality are reviewed below.

2.1 Government market activities

Government market activities can be divided into three segments: state-owned and associated companies; state enterprises; and government agencies undertaking business operations.

2.1.1 State-owned companies

In Finland, state-owned companies have traditionally played a crucial role in the national economy. State ownership began in the 1900s to meet economic and socio-political needs, and in the century just ended state-owned companies played a vital role in the industrialisation of Finland and development of the national economy. Nowadays the role of most state-owned companies has fundamentally changed, and most of them operate in an internationally competitive environment.

Since the early 1990s the Finnish state has partially or wholly privatised many companies, leaving the state with a minority or no shareholding in them. On the other hand, new state-owned companies have been established as operations of government agencies have been transferred to state enterprises and then been incorporated. The state is currently a shareholder in 46 major companies, of which 31 are state-owned companies with the state as a majority shareholder and 15 associated companies with the state as a significant minority shareholder. In 2002, the state-owned companies' turnover totalled 22.3 billion euros and the associated companies' turnover totalled 43.2 billion euros. These companies employ altogether over 270 000 people (about 11% of the employed labour force), the majority of them being employed by the associated companies, not the state-owned companies.

The state-owned companies in Finland have traditionally operated relatively independently. The management of state-owned companies and the authority of Parliament and the Council of State over their management are governed by the Act on State's Exercise of its Partnership Authority in Certain Limited Companies Engaging in Economic Activities, No 740/1991. The Ministry of Trade and Industry has general responsibility for outlining and developing the state's ownership policies, and various ministries are responsible for practical matters of the companies in their own sector.

The state's ownership policy conforms to the government programme and the new government decision of 19 February 2004 on the state's ownership policy. The decision outlines the importance of

state-owned companies, their business strategies and changes in their ownership and arrangements concerning ownership. The government decision can be regarded as the most significant guideline defining competition neutrality as regards the operations of state-owned companies.

In the government decision, the state-owned companies are divided into two categories: companies operating on market terms and companies with special functions. A company is defined as *operating on market terms* when it undertakes business operations in *a partially or wholly competitive operating environment and with a profit motive*. Companies operating on market terms are subdivided into companies of strategic importance to the state and companies whose importance to the state has fundamentally decreased and in which the state is primarily an investor.

Even though companies operating on market terms may be relevant to the strategic interests of their owner (the state), these companies operate according to normal business principles. However, for companies with special functions (such as special financing companies), social targets have been set by the government, and the policy objective set for them by their owner is to optimise their overall social and economic effects.

The government decision declares that whenever a company does business in an operating environment partially or wholly subject to competition, its owner must keep its direction of the company separate from other regulation and regulative tasks to ensure transparency of the company's finances and operations and that its owner, the state, does not distort its markets. The companies therefore operate according to clear business principles and with normal objectives as regards profitability and competitiveness, and they should be comparable to other companies in the sectors. When deciding on government support for companies operating on market terms, these companies are treated in the same way as other comparable companies. For instance, state guarantees are granted on the same terms as to other companies, and they do not have a special status or special rights in other respects.

The recent government decision clearly intends to handle the competition neutrality of the operations of state-owned companies and associated companies better than the previous government decision of 1999. The government decision states explicitly that companies operating on market terms and associated companies must operate under the same rules and conditions as their competitors. The state must not grant them any advantages that other companies cannot have, and state-owned companies must be in the same position as other companies. If the state sets special obligations on companies that operate partly on market terms, the compensation paid to them must be made public and correspond to costs.

Even though the new government decision on the state's ownership policy clarifies the conditions for competition neutrality of the operations of state-owned companies, in this respect there can still be said to be problems with the operations of state-owned companies. In particular, the division of state-owned companies into companies operating on market terms and companies with special functions can be problematic as regards competition neutrality: a company with special functions can have the obligation to provide a public service taken into consideration in, for instance, setting its profitability targets. On the other hand, if companies are divided into companies operating on market terms and companies with special functions, as stated in the government decision – in other words a state-owned company is defined as operating on market terms whenever it does business in a market partially or wholly subject to competition with a profit motive – competition neutrality problems with regard to companies with special functions will be minimized by the government decision. However, if a company defined as having special functions in fact also operates in an environment subject to competition, consideration may have to be given to amending the organisation and direction of the company to ensure competition neutrality.

2.1.2 *State enterprises*

A major change starting in 1989 created state enterprises out of many former government agencies. It is not anticipated that many further new state enterprises will now be created; the latest reform, at the beginning of 2004, was the separation of the regulatory and business activities of the Finnish Maritime Administration and the creation of two separate state enterprises to run the business activities (shipping and pilotage). The turnover of state enterprises in 2002 totalled about 2.3 billion euros and they employed about 12 000 people.

State enterprises are usually a transition vehicle before commercialisation into company form, and organisation-wise something between a government agency and a state-owned company. Most state enterprises have later been commercialised into state-owned companies, and some of them have also been privatised. It is considered that being a state enterprise is the best option for state operations that should be steered for socio-political or other reasons. If the operations of the company do not require such steering, a limited company would be a more flexible alternative.

State enterprises are created by government statute and are strategically steered by the government (Parliament, Council of State, ministries). The enterprises are, however, independently and commercially managed, and usually also operate in a competitive market. The basic aim is to produce products and services on market terms, adopting business principles.

A new State Enterprise Act (1185/2002) came into force in 2003. One aim of the act, among other things, is to ensure competition neutrality between state enterprises and private competitors. It is also intended to ensure that the mode of operation does not create an artificial competitive edge and thereby distort competition. According to the Act, regulatory functions and business activities are to be separated, and the activities of state enterprises are no longer to be funded by the state budget; the enterprises are to be self-funding. The state enterprises must fully cover their costs, including an appropriate return on capital. The separation of production from the government's regulatory objectives and procurement has promoted transparency in the market.

However, a state enterprise may have two types of task: business operations and economically unviable special obligations (such as a statutory obligation to provide services for which there would be no demand at market price and so a government subsidy is required, or a public sector administrative task). In order to finance the economically unviable tasks, the state can provide an appropriation in the state budget but, according to the State Enterprise Act, the economically unviable tasks shall be subject to separate accounting. Separate accounting aims to eliminate cross-subsidization. Any public sector administrative tasks should carefully be separated from the other activities of the state enterprise although this may prove challenging in practice.²

The new State Enterprise Act is generally considered a clear improvement as regards transparency and competition neutrality. However, still problematic from the competition neutrality viewpoint is that state enterprises are treated more favourably than other companies as regards income tax (state enterprises have no tax advantage in value added tax, asset transfer tax and property tax). The state and its enterprises, which include state enterprises, are exempt from income tax and pay municipality and Finnish church tax at a lower tax rate. For example, the average income tax rate of state enterprises in 2000 was some 11%, compared with 29% for corporations. The FCA has considered the distortion of competition due to the lower tax rate of state enterprises, for instance in its statement on the State Enterprise Act in 2002.

On the other hand, state enterprises have obligations that private sector companies do not have. State enterprises have generally been defined as public procurement entities under the Public Procurement Act

(1505/92), which imposes on them an obligation to put their own procurements out to tender as specified in this act.

In the FCA's view, some aspects of the position and organisation of the state enterprises still require both general and case-specific development. For instance, to clarify the position of Finnish Road Enterprises as regards competition, the FCA has proposed incorporation of this state enterprise – especially as Finnish Road Enterprises will from the beginning of 2005 operate effectively in full competition with other players in the sector³. For Civil Aviation Administration, which includes the sector's regulatory and business activities, the FCA has considered it desirable that these activities should be separated from each other to increase transparency and competition neutrality.⁴

2.1.3 State agencies' business operations

The importance of the business operations of state agencies has significantly decreased as most of the state's business operations have been transferred to state enterprises or incorporated since the late 1980s, as described above, and as most of the business operations on market terms have been transferred outside the scope of the state agencies. In 2002 the value of the marketable output of government offices and public sector services was about 0.7 billion euros (1 billion euros in 1998). Government marketable output includes publications, rental of offices and equipment, training and expertise services. In 2002 the individual government offices with the most marketable output were the Construction Establishment of Defence Administration, the Technical Research Centre of Finland and the National Research and Development Centre for Welfare and Health; universities and institutes of higher education are also significant producers of marketable output.

The Act on Criteria for Charges Payable to the State (150/1992) prescribes the criteria for commercial charges payable to the state authorities. Under 7 § of this Act, the prices of official services other than services under statutory requirements shall be decided on commercial criteria. This means that the prices of services shall be set so that they cover the costs of the services and the targets set for return on capital employed. Demand and competitors shall be taken into account in pricing official services, in addition to costs. The Act on Criteria for Charges Payable to the State also explicitly declares that if an authority in a dominant market position produces services, the pricing of the services shall take into account the provisions on abuse of dominant market position in the Act on Competition Restrictions.

Under the Act on Criteria for Charges Payable to the State, an appropriation can be included in the state budget for use in reducing the prices of services priced on commercial criteria: the appropriation can be used to cover the difference between the income from the services and special costs corresponding to them. In 2002 the appropriation totalled 22 million euros, which went especially to the National Technology agencies and institutions of higher education. Obviously, the appropriation can have problematic effects on competition neutrality. Problems relating to expansion of business operations and competition neutrality keep recurring in individual cases.⁵ In specific markets, such as marketable training services, government offices providing such services may thereby have a significant effect on markets.

2.2 Provision of municipal services

Municipalities' statutory services can in principle be provided in three ways: the municipality takes care of its duties within its own organisation; the services are provided in cooperation with other municipalities; or the municipality purchases the services from an outside provider, in other words a company or a third-sector service provider. In addition to these alternatives, an innovative way of providing services is through service vouchers, under which the municipality delegates the final choice of service provider to the end-users by giving them service vouchers⁶. In practice, most services are still provided for within the municipality's own organisation or jointly with other municipalities.

In 2002, the municipalities' purchases of services⁷ from the private sector totalled 837 million euros, which is 17% of municipalities' total purchases of services. In recent years purchases from the private sector have increased at an annual rate of 10 - 15%. The importance of purchases from the private sector varies a lot: private sector contractors account for most of municipalities' construction, but the private sector has a much smaller role in health and welfare. In 2000, for instance, municipalities spent 537 million euros on purchasing social welfare services from private sector service providers (companies and organisations), which is 10% of all social welfare service costs of municipalities, including monetary benefits. However, the proportion of services purchased has been increasing in recent years in health and welfare, too. In 1993, for example, purchased social welfare services of municipalities accounted for only 5% of the total social welfare costs.

In recent years there has clearly been increasing marketisation of municipal services. Marketisation can be implemented in the municipality's internal or external operating environment. As regards the internal environment, operating on market terms could mean introducing a procurer and provider system, or incorporating services as public sector enterprises and limited companies (see Sections 2.2.1 and 2.2.2). However, only through marketisation in the external operating environment – for example, through issuing vouchers for services – can the potential benefits of competition be offered directly to people using the services.

One of the things behind the increase in marketisation is the 1993 reform of the state subsidy system. There was a change from earmarked state subsidies for different tasks based on costs to calculated net expenses, which depend on figures for the municipality's population and operations. At the same time, the provisions concerning cooperation between municipalities were revised so that municipalities can organise cooperation more independently through agreements between municipalities. In particular, the increase in marketisation has been due in part to the need to make operations more efficient because of a shortage of resources and the increasing demand for services as the population ages, which have forced municipalities to assess alternative methods of providing services.

In addition to their statutory duties, municipalities may if they wish undertake other tasks. The Local Government Act permits municipalities to conduct business operations for the general benefit of their inhabitants. Such business operations might include water and energy utility services, road administration and port authority services. In practice, municipalities have also participated in businesses promoting tourism. A municipality engaging in or subsidizing operations that compete with private enterprises can be challenged under the Local Government Act at the administrative court⁸.

The increase in marketisation has brought with it competition neutrality problems in cases where the borderline between public sector and private sector operations is obscure. When a municipality's own operations are organised on market terms, its operations may expand into areas where previously there were only private sector operations. Because of their superior resources, public sector operations may disrupt a market. At the same time, a monopoly may remain in activities relating to municipal operations to the detriment of companies operating in the same sector. In the early 1990s the FCA considered issues analogous to this problem in cases involving many state-owned companies and state enterprises.

Neutrality problems relating to the operations of municipalities have been to the fore not only as matters concerning application of the Act on Competition Restrictions, but also in the ongoing stakeholder cooperation work between the FCA and, among others, the Association of Finnish Local and Regional Authorities. Increasing marketisation and possible neutrality problems relating to it have been taken into consideration in the guidelines of the Association of Finnish Local and Regional Authorities.

The Association of Finnish Local and Regional Authorities confirmed its own strategic guidelines for competition policy in June 2002. According to the guidelines, it is acceptable for municipalities to

participate in markets as a service provider or a shareholder in a private company when the municipality is deemed to be selling temporary overcapacity or compensating for shortages through the markets. Generating commercial profits, in other words engaging in commercial activities, is not consistent with the principles for municipal operations. It is acceptable for municipal commercial activities, such as provision of energy, water or sewage disposal utility services, to make a moderate profit on capital employed averaged over a long period of time. The Association of Finnish Local and Regional Authorities recommends that municipalities draw up service strategies outlining the principles for providing services in the long term.

2.2.1 *Municipal enterprises*

Marketisation has been implemented by municipalities by among other things reorganising functions within the municipality in a new way. The business units within the municipality can be arranged according to the degree of autonomy of their activities into the following progression:

Office -> net budgeted cost or profit unit -> enterprise -> company

A municipal enterprise is a municipality's means of organising its own operations according to commercial principles. The starting point for establishing a municipal enterprise is that it aims to be profitable in its operations through financing from sources external to the budget, mainly charges to customers. Investments should be covered from net cash flow at least over the long term. An enterprise is more flexible, faster in decision making and more independent in accounting than a municipal organisation. However, an enterprise is not an independent legal entity and not independent in keeping accounts; it is a public sector unit within a municipality's own organisation. An enterprise is often considered a transition vehicle because commercially an enterprise resembles a private sector company more than a profit centre of a municipality that covers its costs.

The same restrictions on operations apply to an enterprise as to other activities of a municipality: the primary aim of an enterprise must be the statutory service and other functions within the autonomy of a municipality, not making a profit. An enterprise could be organised to include cooperation with other municipalities. In some operations, such as water and electricity utility services, legislation requires separation of commercial activities.

Competition neutrality issues are highly relevant to municipal enterprises. One reason for forming an enterprise is said to be competition neutrality: because an enterprise may operate in an area where there are private sector providers, forming an enterprise is intended to increase transparency because, for example, it facilitates comparison of costs between the public and private sector. On the other hand, it also creates competition problems. If the line of operations of an enterprise are so defined, in addition to operating in compliance with statutory service obligations and in an environment partially protected from competition, it can also compete with companies operating in areas subject to totally free competition outside the scope of its own basic line of operations⁹.

From the point of view of competition neutrality, this is very problematic, because public sector units have many artificial competitive advantages that private sector commercial competitors do not have. For instance, an enterprise does not pay income tax and it often receives collateral needed for its commercial activities directly from the municipality. All in all, the fact that a municipality is in practice responsible for the commitments of the enterprise is apt to strengthen its strategic position relative to private sector competitors.

The competition situation of an enterprise relative to private sector competitors is weakened in that an enterprise cannot operate with the same flexibility as a limited company because of its hierarchical

decision-making system. In addition, in its public procurement a municipal authority must comply with the Public Procurement Act.

A unit operating in enterprise form would be more transparent than if the business activities were within the municipality's organisation. However, this has not been enough to eliminate suspicions of underpricing by the enterprise, for instance. On the other hand, municipal enterprises have been suspected of unreasonable pricing: municipalities have been suspected of exploiting the enterprise against consumers' interests, for example through the return on capital employed required.

Municipal enterprises are becoming a more and more common way to organise municipalities' own operations. They entail clear competition problems, as explained above. In contrast to state enterprises, there is no specific legislation on municipal enterprises; their operations are governed by the Local Government Act. There is justification for considering developing legislation in this respect.

2.2.2 Municipal limited company

A municipal limited company is a company under the authority of the municipality that does not differ as regards legislation from a private sector limited company. However, the Articles of Association of such a company often state that it is a non-profit company, so its aims are obviously different from a private sector limited company's.

Under civil law, a limited company is a legal entity separate from a municipality. It may be incorporated because the business operations are not independent enough under the municipality's administration. Incorporation can also be used to form a joint venture between municipalities.

There are about 1500 municipal limited companies. Most of them are municipal housing corporations. Municipalities are also involved in companies promoting tourism and regional development companies. Energy and water authorities of municipalities have also been incorporated.

Operations by limited companies are considered the more suitable, the more they are subject to competition. The competitive position of municipal companies relative to private sector companies then becomes more transparent. As regards competition neutrality, clearly as with state enterprises, a company's strategic position relative to private sector companies is strengthened when a municipality is a shareholder in the company.

When a municipality purchases services from a limited company that it owns, the question arises of whether the municipality can do so without a tendering process. A limited company that markets over 20% of its output is deemed to be a company carrying out business activities, and according to the Public Procurement Act, a municipality cannot purchase from it without a tendering process.

3. Competition policy – competition legislation, advocacy and competition neutrality

The Act on Competition Restrictions is applied to restraints on trade that public organisations such as the state and municipalities have caused in their commercial activities according to the same principles as for the operations of other businesses. Public authorities can be deemed business undertakings under the Act on Competition Restrictions.

Prohibited actions of public service providers under the scope of the Act on Competition Restrictions include artificially tying a monopoly product produced in business to a product subject to competition or underpricing through cross-subsidy to destroy competitors' operating prerequisites, and unreasonable pricing. In practice, for the Act to be applicable, the public service provided must have a dominant position¹⁰.

If a competition problem arose in a situation in which the public sector business did not have a dominant position, the FCA could previously apply the general provision in the Act on Competition Restrictions 9 §, *a provision that allowed the possibility of action beyond the specific prohibitions of the law*. However, 9 § was repealed on 1st May 2004 when the amendment of the Act on Competition Restrictions came in force in harmonizing the act with EU competition rules. Naturally, the amendment should not mean that the FCA's ability to intervene in, for instance, competition neutrality problems is weakened.

The focus of the work by the FCA to prevent and eliminate competition neutrality problems has for a long time been elsewhere than applying the Act on Competition Restrictions. According to the act governing the Finnish Competition Authority, in addition to applying the Act on Competition Restrictions, it is responsible among other things for proposing the repeal of provisions and regulations that restrict competition. Other tasks of the FCA are to monitor preparation of legislation relating to business operations, to issue statements on matters within the scope of its authority, to take initiatives to promote competition and to repeal provisions and regulations that restrict competition. Advocacy has been a significant means of advancing the FCA's aims by influencing neutrality problems to which the Act on Competition Restrictions cannot be applied¹¹.

An important priority has been the "Government and the Markets" project. This project considers the competition issues that arise as market methods are used to provide public services. Initially, the priority was on issues relating to the state's business operations on market terms. Introducing competition for local public sector services has since become a rapidly growing policy issue.

All in all, advocacy has become an organic part of the FCA's work. In deciding on competition neutrality issues, the FCA's aim is proactive actions, such as influencing work on legislation through working groups¹². Interactively influencing and cooperating with relevant interest groups has become significant. Advocacy can in some cases complement and deepen the work initiated through the Act on Competition Restrictions to facilitate a competition neutral operating environment.

3.1 Procurement legislation

In procurement, municipalities and other public entities must comply with the Public Procurement Act (1505/92) and decrees and regulations based on it. The Public Procurement Act aims to promote competition and ensure equal and impartial treatment of all competitors tendering. The legislation concerning public procurement does not impede a public organisation or a unit owned by one from participating in a tendering process alongside private sector businesses. However, comparability of tenders in public procurement requires that any financial subsidies from the buyer organisation are added to the prices offered (the Public Procurement Act does not in this respect require that other public subsidies that a buyer organisation has granted should be taken into account).

Procurement legislation is based on the EU procurement directives, which were amended in February 2004. The Ministry of Trade and Industry has set up a working group to prepare the total reform of the national procurement legislation required to implement and complement the new directives. The working group includes representatives from various ministries, municipalities and interest organisations. The FCA is also represented. The FCA's aim is to develop procurement procedures 1) *to ensure equal operating conditions for public sector entities, third-sector non-profit competitors and private sector companies*, 2) *to ensure openness and no discrimination in service procurement procedures, especially as regards new types of partnership and network*, 3) *to eliminate the effects of public subsidies*, 4) *to take the customer's point of view into account* 5) and to provide scope for market dynamics.

4. Review of the current status and changes needed in supervision of competition neutrality problems

Ensuring competition neutrality in public and private sector operations is currently an important topic in Finland, especially as regards local government. Marketisation of the state's business operations has progressed further, and in the state sector many measures have been implemented to increase the openness and transparency of public sector business operations and improve competition neutrality. In contrast, municipalities are in a transition period during which they are increasingly purchasing services from external service providers – and on the other hand themselves offering services in the same market as private sector companies.

The FCA considers marketisation of the municipal provision of services a predictable and understandable trend. There is significant potential for increasing efficiency in the provision of services through marketisation, but it is a complicated process in which serious mistakes could easily be made that would prevent the potential efficiency gains being realised. Market conditions and the requirements of municipal business operations must be clarified: in particular, the transparency and competition neutrality of municipal enterprises and limited companies must be made clearer – as has been done for state-owned companies and state enterprises. Also required is a clear view on the services provided by municipalities and their costs. As the Association of Finnish Local and Regional Authorities has stated, municipalities should draft service strategies outlining which services the municipality provides through its own organisation and which services it purchases from external service providers. Related to this, following amendment of the EU's procurement directive, procurement legislation in Finland is being amended so that among other things public sector and private sector competitors compete on equal terms and the effects of public subsidies in tendering are eliminated. It is also essential that provision of services is developed so as to comply appropriately and without distorting competition with the tendering obligations set out in the Public Procurement Act as regards important partnerships and networking.

There is still scope for improvement in the state's market activities. The state's ownership strategy for state-owned companies and ownership steering should be more precise in Finland. As regards the state's ownership strategy, the Ministry of Trade and Industry has announced that privatisation of state-owned companies should continue – the role of the state as owner in the current environment of globally competing companies is different from what it was a few decades ago when the state became an owner and began entrepreneurial activities in sectors that did not attract "market money". As regards the state's ownership steering for instance, the competition neutrality of state-owned companies with special functions requires further clarification in some respects. The competition neutrality of state enterprises still needs to be improved, despite the new State Enterprise Act, for example through abolishing the more favourable position of state enterprises with regard to income taxation. Significant competition neutrality problems may still occur in the provision of public services in individual markets, even though the value of government market activities is small in relation to the national economy.

In Finnish competition legislation the definition of a business is broad, and this act also applies to public sector commercial activities irrespective of the type of organisation. Competition legislation also provides good opportunities to intervene in problematic cases for reasons of competition neutrality. In practice, the FCA can intervene against unilateral methods of distorting competition by public entities undertaking business activities, primarily on the basis of the Act on Competition Restrictions 6 §, the prohibition against abusing a dominant market position. In practice, strong grounds are needed to intervene under the act when the commercial activities of public bodies distort competition, such as through underpricing due to cross-subsidy.

Competition advocacy also plays a vital role in the FCA's operations, and advocacy is used especially against distortion of competition due to market activities by the public sector. Complaints submitted to the

FCA by private sector businesses often support the advocacy. The working methods adopted in advocacy work have developed from traditional deregulation activities into interactively influencing and cooperating with interest groups, through which the FCA aims to affect legislative reforms and the operating methods of public sector units. Cooperation with interest groups has yielded indisputable benefits. Interest groups increasingly clearly understand the arguments and their basis, and this has undoubtedly helped to reduce competition neutrality problems due to public sector operations.

In its report published at the beginning of 2004, the Legislative Working Group for the Entrepreneurship Policy Programme set up by the government reviewed the importance of public sector business operations to business as a whole. The working group report states that in practice there is still uncertainty and lack of clarity as to the extent offices and institutions of the state and municipalities operate on market terms and at fair cost. This is also the FCA's view of the situation.

Future measures that the legislative working group has suggested include a review of legislation to apply to commercial activities of the state and municipalities in incorporated form, and a review of how to ensure that the state's commercial activities do not distort competition. The state administration productivity project will also assess which commercial activities of government offices and institutions could be incorporated and by what other means the competition neutrality of chargeable services provided by the state can be ensured. The legislative working group also thought it essential to clarify and specify the "outline strategies in principle" of the Entrepreneurship Policy Programme.

The so-called Transparency Directive¹³ in the European Union's supervision relating to state subsidy regulations is of importance in ensuring the competition neutrality of public sector and private sector business operations. In particular, the directive requires separate accounting when undertakings enjoy special or exclusive rights granted by a Member State, or are entrusted with the operation of a service of general economic interest and receive state aid in relation to such service, and when these companies also have other business activities on the market. The directive has been implemented into Finnish legislation but its importance is limited, because a significant proportion of publicly subsidised business operations remain below the threshold values (trade criterion and turnover limit) of the directive. The FCA has proposed that in addition to the EU and European Commission state subsidy supervision requirement, Finland should in its national legislation also take into consideration what is needed to ensure national competition neutrality.

Regulation of public sector business operations and competition neutrality problems relating to it continue to be crucial topics in Finnish competition policy. Through competition legislation and advocacy, there has been great success in making competition more effective and undoubtedly contributing to the beneficial development of general welfare. However, obviously there is still a threat of great distortion in competition in Finland that competition legislation does not cover. As regards marketisation of public services and ensuring competition neutrality, consideration should be given to drafting specific legislation to regulate public sector business operations. Such legislation should also include an efficient procedure for appeals and disputes, in which the FCA could have a significant regulatory role.

NOTES

1. Taxes account for over half of the municipalities' income, and income from sales (such as charges for water, waste disposal, energy and traffic services) for a quarter. In addition, the government contributes to the financing of the municipalities' extensive statutory tasks: state subsidies account for nearly a fifth of the municipalities' income.
2. A Government Order (TM 0302/18.6.2003) regulates the drafting of budget proposals and also the obligation to maintain separate accounting.
3. Previously, most road maintenance and construction work was done by a unit in Finnish Road Administration. The producer and the purchaser of the services were therefore divisions of the same government agency. Bids from private sector firms were invited in some pilot projects, but the private sector bidders complained to the FCA that the Road Administration's inside firm was winning contracts because of unfair cross-subsidization and predatory prices. In 2001, following the FCA's initiative, the operating unit, Finnish Road Enterprises, was separated from the Road Administration, which handles procurement, tendering and regulatory tasks. In the beginning of 2005, after a four-year transition period, all construction and maintenance of public roads will be subject to open public tender. An FCA representative is on the group appointed by the Ministry of Transport and Communications overseeing the implementation of the reform.
4. A working group appointed by the Ministry of Transport and Communications is currently clarifying the separation of regulatory tasks of the Civil Aviation Administration into a separate Civil Aviation Authority. The Act on State Enterprises in particular is deemed to require reorganisation of the Civil Aviation Administration.
5. In 2001 the Ministry of Labour proposed establishing a commercial temporary labour service to complement its employment agency function. The FCA advised that such a service should be set up in an entity that was independent of any other Ministry operation and put on the same footing as competing private enterprises. The FCA declared in its statement that with regard to competition neutrality, the ideal solution would be to incorporate the commercial temporary labour service into a limited company separate from the statutory functions of labour administration. In addition, the same operating conditions must be provided for state-owned companies as private sector companies to ensure transparency for all.
6. Municipalities had previously been using service vouchers to some extent, even though the related legislation came into force in 2004. In practice, this additional way of providing services mainly concerns some social welfare services.
7. The purchases of services for customers such as purchases of children's day care services from an external service provider are end-of-product-service purchases aimed at the inhabitant of the municipality.
8. The provisions in the Local Government Act on what type of operations a municipality can itself engage in are very broad. The difference between actual business operations and providing statutory municipal services may not necessarily be clear. However, the scope of municipal operations does not include commercial operations with a profit motive. Nevertheless, it is not prohibited to include business operations providing public services at a moderate target profit in the statutory tasks of the municipality, and when calculating the costs of a service, indirect costs can be calculated and included. Future investment requirements can also be taken into account. Courts of law have considered a great number of

cases to decide whether a municipality can itself engage in a particular business or not. The Supreme Administrative Court is the highest authority to decide on the matter.

9. In the case of the *Public Laboratory Enterprise of Pirkanmaa Hospital District*, the issue was its intention to expand its operations from a sector partly protected from competition to private sector laboratory markets. All operations of the laboratory established and owned by Pirkanmaa Hospital District were considered to be a business as defined in the Act on Competition Restrictions. The Public Laboratory Enterprise was also deemed to have a dominant position in its statutory operations in the service laboratory and central laboratory market. However, its conduct was not deemed an abuse of its dominant market position. The fundamental issue related to the intention of the enterprise to expand its operations strongly into private laboratory markets while the laboratory services required by the hospital district were excluded from competition. Even though under-pricing was not found, problematic from the competition point of view was that the Public Laboratory Enterprise had economies-of-scale advantages due to its protection from competition, which can distort competition. The protection was created by the laboratory transformed into an enterprise being part of a hospital district organisation. In the FCA's view, incorporating the laboratory operations into a company could clarify relations between the municipality as buyer and the public laboratory service as service provider.
10. The FCA investigated complaints that *Avena*, the state-owned grain storage capacity holder and grain trader, was abusing its dominant position by charging too much for cargo handling and storage services from its competitors, compared with the prices charged from a company belonging to the Avena Group (price squeeze). Avena changed its policies and lowered its prices during the investigation, so no formal enforcement action resulted. In response to the FCA's proposal in 2000, stockpiling of grain was opened to competition and the National Emergency Supply Agency issued a tender for grain traders to manage and store reserve supplies.

The Finnish Meteorological Institute (FMI), with a monopoly on producing and distributing basic weather radar data, also runs a commercial weather service. When a commercial competitor appeared in 1999 using the radar data that FMI transmitted to its Swedish counterpart, FMI responded by degrading the quality of the data it provided internationally. The FCA sought a fine against FMI for abuse of dominance and called on the Ministry of Transport and Communications to separate and incorporate FMI's commercial functions into a company. In early 2002, the Competition Council imposed a fine of EUR 20 000. The working group examining the structural issue concluded in 2001 that the weather service should be separated, although it did not agree with the FCA that weather services for civil aviation should also be spun off into the new entity.

11. It was complained that commercial *vocational training schools* unfairly subsidized competition from publicly funded institutes. The scope of this conflict was broad: hotel and restaurant services, computer training, driving, nature tourism, psychological testing, massage, environmental testing, flue gas measurement, building and construction, and hairdressing. The FCA recommended that the public entities set fees on a commercially viable basis for their programmes that compete with private sector offerings. The Ministry of Education, which supervises the institutes, endorsed this recommendation.

The *Slot Machine Association (RAY)* subsidizes social services, such as home health care for the elderly, that are provided by local government, often through contracts with non-profit organisations. These subsidies total EUR 350 million annually. Private sector providers of these services have complained that the subsidies give their competitors an unfair advantage (and they have lobbied for expanding the scope of subsidies to include private sector providers as well as the "third-sector" non-profit providers). The FCA has worked with the association, which is under the direction of Parliament, on a statement of principles to reduce the distortion of competition. The framework that FCA proposed for analysing subsidy distortions is now being applied to other topics, such as sports. The Ministry of Trade and Industry is trying to encourage the use of the slot machine funds on functions that do not compete with private firms, in part to avoid contravening EU rules about state aid.

12. One example from several working groups on which the FCA is represented is a working group set up by the Ministry of the Environment at the initiative of the FCA that is clarifying responsibility and competition issues in urban waste management. The development of the waste management sector has intensified competition in urban waste management and caused conflicts of interests between different players. The private sector waste management service providers have claimed that there is not neutrality between the private sector and public sector in this service with regard to competition policy. The role of municipalities in transporting urban waste and organising waste management should in their view be lessened. The aim of this working group is to clarify responsibility and competition issues in urban waste management to ensure waste management complies with the Waste Act and national targets for the waste scheme, and to ensure equal operating conditions for all competitors in the sector.
13. Commission Directive on the transparency of financial relations between Member States and public undertakings (80/723/EEC, as amended)

GERMANY

1. Introduction

The public sector's economic activities are diverse and take place at all administrative levels. Their overall economic significance can be seen from the number of employees in the public sector, the sector's turnover volumes and gross fixed asset investment in comparison to the overall economic data (cf. Annex 1). Since the 1990s there has been a tendency for privatisation. In Germany no policy of neutrality exists with regard to competition in the sense of a systematic and comprehensive examination of the normative context of the public sector's economic activities at all levels which could be compared to policies pursued by Australia, for example.

The Federation's participations, which also include participations in economically active companies, are managed decentrally by the respective competent Federal Ministries. The Federal Ministry of Finance fulfils central tasks of the Federation's participation and privatisation policy in its capacity as budget and property management agency under budgetary law. The Ministry formulates the regulatory framework for the decentralised management of participations, develops the Federation's privatisation policy and approves changes in the Federation's investments. Moreover, it publishes an annual report on participations which is open to the public. In the federal *Länder* and the communities management of participations is organised similarly.

The regulatory system for public sector companies originates from different legislative sources. Community law provisions, particularly competition, subsidy and public procurement law, also play a role just as constitutional and statutory norms of the Federation and the *Länder*. The municipal economic law laid down in the municipal codes of the individual federal *Länder* and the by-laws of decentralised public corporations is of particular practical relevance in this respect.

2. Preconditions and limits of public economic activity

2.1 *Constitutional law provisions governing entrepreneurial activity by the state*

In accordance with the German Basic Law the public sector may only pursue public purposes by its economic activities. As a consequence of the principle that the public sector must derive its income from taxes and duties ("Abgaben/Steuerstaatsprinzip") it may also, but not exclusively, become active with the intent to realise profits. Furthermore, as a rule public sector companies may only become active within the limits of the territory and scope for which the agencies which are responsible for them are competent. The Federation may only become active in such economic areas for which it is competent under the Basic Law. Otherwise the *Länder* are competent for fulfilling public sector tasks (Art. 30 of the Basic Law). However, communities are entitled to regulate all issues relating to the local community by their own authority within the framework of the law. Therefore, the Federation and the *Länder* cannot completely prohibit the municipalities from (among other things) engaging in economic activities. However, municipal companies are subject to narrow geographic limits as they may not become active outside their own municipal territory without a special legal authorisation. In individual cases private companies can take legal action to achieve a restriction of the public sector's economic activity by invoking their fundamental rights.

2.2 *Special provisions for the Federation and the Länder under the budget codes*

Art. 65 of the Federal Budget Code and the respective provisions of the *Länder* budget codes stipulate the conditions under which the public sector can become economically active and establish companies or acquire participations for this purpose. The Federation e.g. is inter alia required to have a significant interest in a direct participation, set limits to its obligation to make contributions and maintain an appropriate level of influence.

2.3 *Special provisions for the municipal authorities*

The municipal codes also often include provisions which are meant to control the municipal authorities' risks incurred by exercising economic activities, such as limitations on liability. Furthermore a municipal authority may generally only pursue economic activities if it can fulfil the public purpose in question at least just as well and economically successful as private companies. Most administrative court decisions, however, do not consider these norms to be protective of the rights of third parties which means that only in some *Länder* private competitors have the possibility to take legal action before an administrative court in order to enforce these norms. Moreover, in 2001 the Federal Supreme Court abandoned the previous case law on Art. 1 of the Unfair Competition Act (UWG, "Gesetz gegen Unlauteren Wettbewerb"). It thus no longer considers violations by municipal authorities or companies of the obligation to serve public purposes or the norms regulating the relationship between municipal and private enterprises as competitive practices which are contrary to good morals, which means that legal protection cannot be obtained under civil law.

3. *Different forms of public sector economic activities and the regulations governing them*

Generally the state and other administrative bodies have the freedom to choose how to exercise their administrative duties and can therefore perform their economic activities in either a public law or private law relationship. For example municipal utilities are operated in some cases as non-independent public companies ("Regiebetrieb", "Eigenbetrieb"), some as independent institutions under public law and some as private companies (GmbH or AG).

3.1 *Private-law forms of organisation*

The same provisions apply to companies organised under private law as to all other legal persons under private law; these are laid down in the Commercial Code and company law. Special reporting obligations only exist in the case of majority holdings of the Federation to the Federal Audit Office, which has a respective extended audit privilege, and special rights to obtain information under the Companies Act.

3.2 *Public-law forms of organisation*

However, public sector economic activities can also be wholly incorporated under public administration. In order to loosen the strict provisions of public budgetary law and to allow effective operation management, economic activities are mostly organised in the form of a non-independent public company ("Regiebetrieb", "Eigenbetrieb"). These companies have their own independent budgetary plan (profit plan and budget plan), a staffing schedule and their own accounting systems with cost prices, profit and loss accounts. However they do not have their own legal personality and often have only one administrative body, the director of the institution and his staff. The personnel consists of civil servants and employees of the public service, which means that the obligations under public service law must be observed. Theatres, museums, libraries, swimming pools or even municipal utilities are often organised in this way. Another alternative to this is the establishment of a public law institution, which in some cases are independent legal entities under public law. This legal form is increasingly being used as a form of

organisation. Since 1.1.2001, for example, the medical institutions of universities in North Rhine Westphalia can be changed into public law institutions to facilitate a stronger orientation to efficiency criteria and to afford them more independence and flexibility. At municipal level public companies in Berlin and Hamburg have already been changed to institutions. With the 1995 reform of the Municipal Code Bavaria offered its municipalities the possibility to set up companies as independent public law institutions (so-called municipal companies).

Companies in the public law legal form, except for legal entities under private law, are exempt from tax if they can be considered as public service undertakings. The incorporation association, primarily the incorporation legislator, decides whether an institution can be classified as a public service undertaking. Public institutions enjoy privileged treatment as regards judicial enforcement. Property which is indispensable for the fulfilment of public responsibilities or the sale of which is not in the public interest, is to be exempted from enforcement. Added to this is the fact that according to the current legal situation insolvency proceedings about the assets of public institutions involved in entrepreneurial activities are often not possible on account of *Länder* regulations.

4. Funding of public companies

The general prohibition of state subsidies under Art 87f. of the EC Treaty and the obligation to notify the European Commission of any state subsidies ensures the extensive control of the funding of state enterprises. For example, the guarantees (“Anstaltslast” and “Gewährträgerhaftung” – maintenance obligation and guarantee obligation) which the public sector undertakes for the municipal savings banks (“Sparkassen”) and the banks of the *Länder* (“Landesbanken”) were attacked in a complaint to the European Commission as inadmissible state aids. As a consequence of these proceedings the “Anstaltslast” will be abolished as from 19 July 2005 and replaced by a normal ownership status governed by market economy principles. The “Gewährträgerhaftung” will be completely abolished.

Furthermore, in accordance with Commission Directive 80/723/EEC transparency of financial relations between the public sector and companies financed by public funds must be ensured. This particularly affects measures in respect of e.g. the setting-off of operating losses, non-refundable grants or loans on privileged terms and financial advantages granted by forgoing profits or debt recovery. The Federation will also be obliged to make available to the Commission financial data such as e.g. annual reports and annual accounts of certain companies achieving high turnover volumes. Finally, as from 1 January 2002 the most recent amendment to the Directive on transparency includes an obligation on high-turnover companies which had been granted special or exclusive rights to maintain separate cost and results accounting for their individual business divisions so that possible cross-subsidising can be identified.

5. Award of Public Contracts

Finally, publicly owned enterprises are irrespective of their legal form generally also subject to award procedures under public procurement law which they have to observe when purchasing supplies, works and services.

5.1 Public contracts that exceed community law thresholds

The case of public contracts that according to EC Competition Law need to be put out for tender Europe-wide due to their cross-border dimension, publicly owned enterprises fall under the category of public contracting entities under Section 98 no.2 or under Section 98 no.4 of the ARC. As public contracting entities they have to apply the provisions on award procedures laid down in the amended fourth part of the ARC (section 97 ff) implementing respective EU directives. These provisions are laid down in

the award regulation which in turn is put into concrete terms by the so-called award rules (VOB/A, VOL/A and VOF). EU legislature has defined cross-border dimension in terms of certain thresholds. According to these provisions publicly owned enterprises are bound by the principles of award procedures applying to all public contracting entities; these principles stipulate competitive, transparent and non-discriminatory award procedures that observe the principle of equal treatment. Tenderers who participate in such award procedures are entitled to have the procedures examined in quasi-judicial proceedings by the independent Public Procurement Tribunals of the Federation and the *Länder*. As up to now, three federal Public Procurement Tribunals have been set up at the Bundeskartellamt. In addition, tenderers are entitled under secondary legal protection to sue public contracting entities for damages if they have suffered a loss through a violation of the public procurement provisions by the contracting entity.

5.2 Public contracts below community law thresholds

The obligation to apply public procurement law for public contracts below community law thresholds is laid down in Section 48 (1) of the Law on Basic Budgetary Rules (HGrG). According to this provision the Federation and the *Länder*, their special assets as well as legal persons under public law of the Federation and of the *Länder* are obliged to invite for public tenders before concluding supply or service contracts, unless the nature of the business transaction or special circumstances justify an exemption (see Section 30 of the Law on Basic Budgetary Rules). The applicable procedural provisions for public contracts below community thresholds derive directly from the award rules of the VOB/A and VOL/A. These are issued under Section 55 (2) of the Federal Budget Code (BHO) or under the respective budget codes of the *Länder* or the *Länder*-specific municipal budgetary provisions which are incorporated into budgetary administrative provisions. Consequently, public procurement law which is determined by budgetary provisions does not apply to enterprises operated by public authorities under private law. Here, usually the so-called "classical contracting entity" term is applied on which Section 48 of the Law on Basic Budgetary Rules is based. However, isolated public procurement provisions of some of the *Länder* oblige legal persons under public law to exercise their partnership rights in private-law companies, which they can directly or indirectly influence through majority share holding or otherwise, to ensure where legally possible that the provisions of the VOB/A and the VOL/A are applied (example: clause 5 (1) of the Saxon Public Procurement Law). In addition, some administrative provisions provide for privileges for companies operated by public authorities which as a consequence are not obliged to apply the public procurement law. In principle, public contracts below Community thresholds only provide for secondary legal protection (claims for damages) at civil courts.

5.3 In – house contract awards

Where the public sector awards contracts to its own companies, the awards can be regarded as so-called "In - house contract awards" which are not subject to general public procurement provisions.

6. Publicly owned enterprises and German competition law

German competition law generally applies also to the economic activities of the public sector, irrespective of the legal form chosen and the respective company objects. The decisive factor is whether the state enters into competition with private suppliers. The German Federal Bank and the Reconstruction Loan Corporation, however, are only bound by public procurement law due to the sovereign regulatory powers assigned to them.

The social insurance institutions are another special case. In 2001 an exemption area to competition law was created for the statutory health insurance funds. Initial doubts concerning the compatibility of this provision with EC law have been allayed in the meantime since the Court of Justice of the European

Communities on the basis of German preliminary decisions, has decided that health insurance associations are not companies under European competition law.

The majority of other competition exemption areas and provisions have been abolished in the course of liberalisation measures; those which still exist relate equally to publicly owned and private companies. Former monopolies are often subject to sector-specific regulation and control. In addition, due to their dominant position they are subject to rules of conduct under the ARC.

7. Increased privatisation resulting from the influence of European competition law

Since the 1990s the public sector has gradually withdrawn from many areas in which it used to be economically active. This privatisation movement results from the liberalisation of former monopoly markets on account of EU provisions. The aim of the liberalisation is to make companies more economically efficient and more competitive. It reflects a new understanding of state responsibility for the provision of public services according to which the state often merely assumes a steering function or bears diminished responsibility. Besides, the public sector gains additional revenue from these sales. In many cases the Federation has transformed special state assets into private law companies and subsequently let its shares fall below the majority threshold.

7.1 *The federal railways*

Until 1 January 1994 the Deutsche Bundesbahn and the Deutsche Reichsbahn were classified as special assets of the Federation under Article 87 (1) of the German Basic Law^{old}. They were managed by the Federation and had their own administrative body. The introduction of Articles 87e and 143e of the Basic Law provided for the management of the railway sector as a private law company. However, according to Art. 87e (4) of the Basic Law the Federation is still obliged to ensure that the interest of the general public is taken into consideration with regard to the extension and maintenance of railway networks and transportation prices. In addition, the Federation's possibilities to sell railroad companies are restricted; a majority of infrastructure enterprises must remain under the Federation's ownership. The federal railways themselves are not bound by the guarantee clause. As companies under private law their first obligation is to make profits. The railway sector is still in the initial stage of liberalisation. Though a right to non-discriminatory access to networks was stipulated in 1994, the Bundesbahn initially set prices that unduly hindered competitors. After the Bundeskartellamt had instituted prohibition proceedings the Bundesbahn introduced a new pricing system for access to railway lines with effect from 1 April 2001 that was compatible with competition law.

7.2 *Telekom (Telecommunication Services), Post (Postal Services) and Postbank (Post Office Savings Bank)*

The Deutsche Bundespost (German Federal Postal Services) was initially also part of the special assets of the Federation and was administered by the former Ministry of Posts and Telecommunications. With the postal reform I three publicly owned enterprises (the Deutsche Bundespost Postdienst, the Postbank and the Telekom) with partial legal capacity were created with effect from 1 January 1990. On 1 January 1995 formal privatisation of the three enterprises into joint stock companies was put into effect under the postal reform II. The constitutional basis for the privatisation were Article 143 b of the Basic Law (for the transformation itself) and Article 87 f of the Basic Law which stipulates that postal and telecommunications services are to be provided by successors of the Deutsche Bundespost and other providers. As is the case for the federal railways, the Basic Law also expects the successors of the Deutsche Bundespost to set up a competitive and profit-oriented management. The Basic Law does not state whether and to what extent shares of the three privatised companies are to remain in the possession of the Federation. It has become a minority partner of Deutsche Telekom AG after the AG's stock market

flotation, but it is still the majority shareholder of Deutsche Post AG. The Postbank has scheduled its stock market flotation for June 2004. In addition to the ex-ante regulation exercised by the Regulatory Authority for Telecommunications and Posts all three enterprises are subject to abuse control by the Bundeskartellamt. While Deutsche Post AG, for example, has an exclusive licence for handling letters up to 100 gr until the end of 2007, the competition authorities' view is that this does not include preparatory tasks such as the collection and sorting of mail. A refusal of Deutsche Post AG to pay for such services provided by competitors by granting discounts therefore constitutes an abusive conduct.

7.3 *Municipal Utilities*

A similar development is taking place in the municipal sector. Since the liberalisation of the energy sector in 1998, municipal utilities providing gas and electricity are often transformed into private law companies whose shares are, at least in part, sold to private enterprises. On 31 December 2003 the two most powerful German grid companies alone, RWE AG and E.ON AG, held about 60 majority stakes and about 200 minority stakes in German municipal utilities. 125 of these had only been purchased in the last three years. The Bundeskartellamt views the increasing vertical integration of energy markets critically. It has recently (September 2003) prohibited EAM Energie AG, which belongs to the E.ON group, from acquiring a 30 per cent share in the municipal utility of Eschwege, Stadtwerke Eschwege GmbH. A participation of the E.ON group would have resulted in securing sales markets on a long-term basis and would thus have resulted in further market foreclosure effects.

At the same time, an opposite trend can be observed at municipal level. Here, cities and municipalities develop new fields of activity by founding new municipal organisations and publicly owned enterprises such as in the fields of waste management and environment consulting or the maintenance of public gardens and parks.

HUNGARY

1. The role and weight of the government in the economy of Hungary

In 2003 the average **number of people employed in the budgetary sphere** was 819 thousand, about 30 % of all employees. In the sub-sectors of public administration, defence and compulsory social security a total of 321 thousand, in education a total of 236 thousand and in health and social/welfare services some 201 thousand people were employed.

The **government and its institutions contribute** some 17-20 % of **GDP** (with households, businesses, financial institutions and non-profit institutions assisting households contributing 20 %, 50 %, 3 % and less than 1 %, respectively).

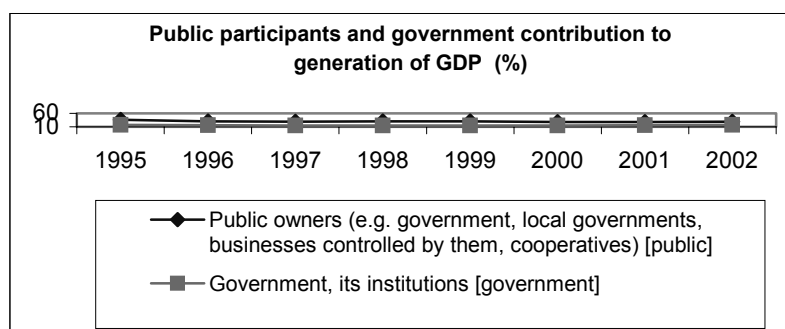
The various **groups of owners** (public/state and Hungarian/foreign private owners) **contributed to the generation of GDP** within the various sub-sectors, as follows:

| | | | | | | | (%) | |
|--|-------------|---|-------------------|---------|------------------|-------------------|---------|------------------|
| | | | | | | | 2001 | 2002 |
| Sector of the national economy | | | | | | | | |
| Share of sub-sector from the GDP in 2002 (%) | Sector code | | public controlled | foreign | national private | public controlled | foreign | national private |
| 3,7 | A-B | Agriculture, hunting, forestry and fishing | 9,6 | 3,8 | 86,6 | 10,2 | 4,7 | 85,1 |
| 26,1 | C-E | Mining; manufacturing; electricity | 15,4 | 49,3 | 35,3 | 16,9 | 49,1 | 34,0 |
| 5,1 | F | Construction | 1,1 | 8,9 | 90,0 | 1,2 | 5,6 | 93,2 |
| 11,4 | G | Wholesale and retail trade; repair of vehicles | 0,6 | 29,9 | 69,5 | 0,6 | 32,3 | 67,1 |
| 1,8 | H | Hotels and restaurants | 8,4 | 14,2 | 77,4 | 8,6 | 14,9 | 76,5 |
| 8,4 | I | Transport, storage, post and communications | 48,7 | 12,1 | 39,2 | 46,4 | 14,7 | 38,9 |
| 3,5 | J | Financial activities | 21,0 | 42,8 | 36,2 | 24,3 | 40,8 | 34,9 |
| 17,8 | K | Real estate, business services | 5,1 | 12,9 | 82,0 | 5,1 | 12,2 | 82,7 |
| 8,6 | L | Public administration., defence, compulsory social security | 100,0 | x | x | 100,0 | x | x |
| 4,9 | M | Education | 83,9 | 0,2 | 15,9 | 83,9 | 0,2 | 15,9 |
| 4,6 | N | Health and social carek | 67,8 | 1,0 | 31,2 | 70,7 | 0,9 | 28,4 |
| 3,4 | O | Other community, personal service activities | 28,3 | 4,1 | 67,6 | 31,7 | 6,1 | 62,2 |
| 100 | A-O | GDP | 27,4 | 22,1 | 50,5 | 29,1 | 21,9 | 49,0 |

Source: CSO

* assignment to groups of ownership according to majority ownership principle

Development of state contribution to GDP between 1995 and 2002



Source: CSO

Remark: 1995-1997: financial services sector not taken into account

The trend of the decline of the share of the public sector in GDP broke in 1998 as a result of the diminishing of the assets available for privatisation and the different policy adopted by the government which took office in 1998, in comparison to the policy pursued by the preceding government. The slight growth of the weight of the public sector was also a result of the growth of wages in the public sector in excess of the growth observed in the private sector: i.e. the reason does not lie in any growth of the business operations of the state.

Partly in line with the problems of the budget which has been short of funds - in contrast to the anti-privatisation attitude of the government in office between 1998 and 2002 - the sale of state-held assets has accelerated since 2002 (sale of minority shareholdings: the consolidated Postabank, Konzumbank, Dunaferri; sale of minority shareholding in MOL).

In 2004 the **expenditures of general government** (central budget, social security, extra budgetary funds) amount to approximately 48 % of the GDP HUF 20.5 thousand billion (about 80 billion Euros). This level of income redistribution places Hungary among the continent's welfare states.

The percentage of the business assets of the state is relatively low - the **state business property managed by the State Privatisation and Holding Company (ÁPV Rt.)** in relation to the central budget amounted on 31 December 2003 to HUF 648 billion (equalling about 3.3 % of GDP) and without the property to be kept in state ownership on a permanent basis it amounted to HUF 405 billion. At the same time there is no precise information on the other key component of the public assets, the assets held by local governments.

2. Designation of the range of state and local governmental assets

For the specification of the range of **permanent state property** Act XXXIX of 1995 on the Disposal of Business Assets in State Ownership **specifies four criteria**:

1. Provision of national public utility services (for example):

- Magyar Villamosművek Rt. (central power trust)
- Magyar Posta Rt. (the Hungarian post)
- Magyar Államvasutak Rt. (state railways)

2. Strategic importance from the aspect of the national economy (for example):

- Regional waterworks
- Power generators
- Gas supplying companies

3. Defence objective (for example)

- HM ARCOM Kommunikációtechnikai Rt. (communication technology company)
- HM ARZENÁL Elektromechanikai Rt. (electro-mechanical company)
- HM CURRUS Gödöllői Harcjármű technika Rt. (military vehicle technology)

4. Serving other special objectives (for example):

- Forest and game wardening,
- Research institutes involved in the production of fruits, ornamental plants, medicinal herbs,
- six smaller enterprises employing employees with disabilities
- some industrial ventures engaged in the production of Hungarian specialities.

The **business share of the state** varies widely in the above groups of assets, extending between 100 % and a single voting preferential share. The basic role is that the state ownership may not be below a share carrying 50 % of all votes plus one vote.

Ownership rights are exercised by the State Privatisation and Holding Company or the line minister concerned.

Another large category of public business assets comprises **companies operated by local governments**. The range of business operations of local governments is specified by the Act on Local Governments by setting the compulsory and voluntary tasks that may be carried out by municipal governments.

The mandatory tasks include the provision for healthy drinking water supplies, of street lighting, maintenance of local public roads and public cemeteries, kindergarten and primary school services, basic health and social/welfare services.

Depending on the demands of the local population and the available funding sources local governments **may provide for** - as local public services - municipal development and zoning tasks, the protection of manmade and natural environment, management of council flats, water management/drainage, local public transport services, sanitation services, local fire protection and local public safety. A municipal government may participate in local energy supplies, employment policy, child protection, public education, it may support artistic and sport activities and the development of a healthy mode of life.

Local governmental councils may set up local governmental institutions, business organisations or cooperatives for the performance of the above public services. In the areas of the operation of

municipalities and the ongoing supply of public utility and communal services local governments are operating business organisations as a typical arrangement.

As a consequence of the above considerations state and local governmental functions involve a number of areas where the public sector competes with private entities in the market. There are lots of examples of their presence limiting or distorting competition.

The plan of the state subsidy of Antenna Hungária Rt. under the pretence of shifting to *terrestrial* digital television operation is, for instance, a sign of the lack of a fully thought-out policy aiming at competition-neutral operation of state business property which is considered by cable service providers - with reference to the technology-neutrality of regulation - as a serious violation of equal conditions and opportunities in competition for digital television service provision may be operated via cable and satellite systems alike. Some cable operators have announced that in view of the 50-60 % of households supplied with cable services their involvement would enable faster and cheaper introduction of digital television operations. The debate between the government and market participants has not yet been close and the communication ministry has promised further consultations.

3. Competitively neutral regulation of enterprises under state and local governmental control

The government has recognised the importance of competitive neutrality in the regulation of state owned or state controlled enterprises however, for the time being there is no **governmental policy based on consistent principles** that would impose an obligation on state enterprises to adopt competitive behaviour as adopted by private businesses. The principles of competitive neutrality are impaired from time to time despite some statutory regulations already in effect. Initial steps have however been taken to ensure competitively neutral regulation of state/local government controlled enterprises.

One important and controllable requisite of competitively neutral behaviour is the separation of **costs** and **revenues** relating to the market and non-market activities of businesses operating under state control and the prevention of cross financing which is a practice distorting competition. This essential target is intended to be implemented by the Government Decree - No. 105/2003. (VII. 18.) - on the 'Transparency of the financial relationships between general government organs and public enterprises and the financial transparency within enterprises' which entered into force on 1 May 2004 - the day of Hungary's EU accession - as one of the implementing decrees of the Act on State Budget.

According to the provisions of the above decree an enterprise enjoying special or exclusive rights granted by the state or one that is providing services of general economic interests for which it receives state subsidy - providing it is performing other activities as well in addition to such services - is obliged to keep separated accounts. The obligation to keep separate accounts of costs is, of course, in effect only above a threshold figure specified in the decree. Accordingly, the scope of the Decree does not cover enterprises whose net sales revenues during the two business years preceding the year under review did not reach EUR 40 million. Nor do businesses that have been commissioned to provide services of general economic interests through a competitive bidding procedures for a specific period of time, need to observe the rules on the separation of the accounting of costs and revenues..

According to the Decree a **public enterprise** is obliged to separate in its internal accounts the subsidies originating from any organisation of the general government system (e.g. compensation for operational losses, capital injections, non-refundable subsidies, preferential loans and the refunding of certain financial burdens).

Public businesses keep separate accounts of *dividends* and financial advantages received in return for relinquishing such and on the relinquishing of the *expected returns* on state funds used.

Public enterprises stating annual net sales revenue figures equalling at least EUR 250 million in the manufacturing industry have to submit their annual accounts to the Minister of Finance.

Such reports have to cover the following:

- provision of own shares, own stakes, bonds providing subscription rights, with detailed conditions,
- non-repayable and repayable grants and financial assistance,
- loans extended to the reporting enterprise including technical loans concerning capital injections, specifying interest rates and any guarantees provided by the lender,
- dividends paid and retained profit,
- remission of the repayment any debt, loan, subsidy or of payment of taxes.

According to the Act on the Disposal of Business Assets held by the State where a sale transaction fails to be completed or if the conditions of sale are not favourable for a period ÁPV Rt. may conclude **asset management contracts** to ensure the utilisation of assets. The **goal** of asset management is to **retain the value of the assets** as specified in the contract and to **attain growth of the value of the assts through returns** (dividends, profit sharing). An asset management contract may also provide that the asset manager receives compensation only upon delivering the profit specified in the contract.

The lack of separation of regulation and service provision leads to the restriction of competition primarily in the case of territorial governments.

An investigation was launched against the council of a town's local government based on a report submitted to the Office of Economic Competition because the municipal government as the owner of public places did not grant permit to an enterprise intending to construct a cable television network whereby it hindered a new service provider in entering the market. The act - seemingly a decision by the authority - was motivated by the fact that a traditional serial system cable television network operator had been functioning in the town already and it happened to be a fully owned enterprise of the local government. The subscription fee charged by the operator limited liability company (Kft.) was set by the council and according to its decision the fees could not contain profits and in order to keep costs low the Kft. was not paying a charge for the use of public places.

In view of the circumstances the Competition Council declared in its decision that the presence of another enterprise in the given geographically defined market would be beneficial for the consumers for this would force market actors to participate in quality and price competition. The Competition Council pointed out that a price containing profit as well, set by a profit oriented enterprise, is not necessarily higher than a price covering costs only applied by a non-cost sensitive monopoly.

The decision against the council of the local government is all the more noteworthy for it stated that the ownership activities of the local government and its official administrative tasks must not be combined for they involve different legal relationships. The Competition Council did not impose a fee in this case but it obliged the local government in question to give a written response to the contract proposal submitted by the cable television service provider intending to enter the market, within a maximum of 30 days.

4. The most typical example of a case closed with a decision against a state enterprise in the practice of the application of the law by the Office of Economic Competition:

The Competition Council made a decision against **Magyar Posta Rt.** - the Hungarian Post Office - and imposed a fine of HUF 20 million on the national postal service provider. The Post Office abused its exclusive right in the delivery of mail consignments as a bidder in a public procurement tender, for owing to its monopoly position in this segment of the market the Post Office is the only entity that is capable of providing complex vertically integrated services in the market of the generation and delivery of consignments. Concluding a contract with a single partner is definitely advantageous for clients issuing large numbers of bills for consumers therefore the invitations for proposals in public procurement tenders call for complex services, i.e. they do not even permit the submission of bids for part services. This is why the behaviour of the Hungarian Post Office is crucial in relation to its competitors in the market of the generation of consignments for the chances of their entering the market depends largely on the offers submitted by the Post Office concerning delivery. In the case in question it was proven that the Post Office offered a discount on delivery - not justified by the saving of costs - to the client which was suitable for placing its competitors in the market of the generation of consignments in a competitively disadvantageous position and thereby for their forcing off the market since it failed to provide such discounts in its role as a sub-contractor. The Competition Council expressed the expectation to be met by a universal service provider enjoying exclusive rights that it has to provide access to the postal network constituting a basic requirement of the operation of other markets as well, for other enterprises operating in the competitive market, under equal conditions, as a matter of principle.

ISRAEL

Role of the State of Israel in business enterprises

Historically, the Government has been involved in nearly all sectors of the Israeli economy, particularly in defence-related businesses and monopolistic infrastructures. Before the privatisation process, ownership of industry in Israel was divided between the Government, the Histadrut- the General Federation of Labour ("the Histadrut") and the private sector, with the Government and the Histadrut owning prominent interests in heavy and basic industry. The Government has also participated in the economy through significant subsidisation of certain industries and products, and through financial support of private sector investments. In recent years, the Government has made significant progress towards the privatisation of State-owned enterprises and the reduction of its subsidisation of industry. At the same time After, the Histadrut has disposed of most of its commercial holdings.

As of December 31, 2002, there were 102 State-owned companies, 44 of which are business oriented enterprises. The remainder of the State-owned companies, such as funds established as vehicles for employee savings or educational institutes are not business oriented.

State-owned enterprises are divided, by law, into two categories: Government Companies and Mixed Companies. In addition to the state-owned companies the Government also involves in some sectors in the market through statutory authorities.

Government Companies, which exclude State-owned banks acquired pursuant to the Bank Shares Arrangement (see "Privatisation" below), are those in which the Government owns more than 50% of the voting shares and are subject to the provisions of the Israeli Government Companies Law-1975 and the regulations promulgated there under (the "GCL"), as well as the directives of the Government Companies Authority (see "Privatisation" below). The provisions of the GCL regulate the management and operations of Government Companies and the circumstances under and procedures by which the Government may sell shares in Government Companies or reorganise the Government Companies.

Mixed Companies are companies in which the State owns 50% or less of the voting shares. Under the GCL, Mixed Companies are not subject to the same degree of regulation as Government Companies. However, Mixed Companies do remain subject to certain limited provisions of the GCL, including the Government's appointment and qualification of certain directors and the Government's establishment of terms of employment.

Government Companies plays a significant role in the Israeli economy. In 2002, Government Companies accounted for 5.9% of total exports, although they employed only 2.34% of the Israeli workforce. These companies include several public service monopolies and a number of companies that either engage in activities considered crucial to Israeli national security or provide important services to the Government.

The Government has initiated a number of regulatory arrangements with the major Government Companies that are designed to increase competition in the markets in which these companies participate, and thus prepare them for privatisation. Nevertheless, the pace of privatisation may be affected by the need for further regulatory and structural reforms and formulation of policies that will define the post-

privatisation environment in which these companies will operate. The development and implementation of some of these policies and reforms may take a considerable period of time.

Privatisation. An essential element of the broader structural reforms initiated by the Government over the past several years to promote the growth of the private sector and to enhance competition is the Government's move towards privatising its business holdings. Privatisation efforts have included the full or partial sale of State-owned companies, banks and activities which were previously performed by the Government or statutory authorities. From 1986 through June 2003, 87 companies ceased to be Governmental Companies and the Government's proceeds from privatisation were approximately \$8.74 billion.

Privatisation of all State-owned enterprises, other than banks, is conducted by the Government Companies Authority. Pursuant to the Bank Shares Arrangement (as described below), the responsibility for privatisation of banks is in the hands of the Ministry of Finance through MI Holding, a wholly owned Government entity. MI Holding advises the Minister of Finance regarding bank privatisations and manages the process according to the Minister's instructions. The ministerial privatisation committee, consisting of the Minister of Finance, as chairman, a Minister in the Finance ministry, the Minister of Justice the Minister of Internal security and the Minister of Transportation (the "Privatisation Committee"), has the power to initiate the privatisation of any Government Company or Mixed Company without the consent of the minister directly responsible for such Government Company or Mixed Company, and to authorise preparatory measures necessary to effect such privatisation. The Government Companies Authority also has general authority relating to the supervision of Government Companies, including the right to convene board meetings and the authority to issue directives to Government Companies in relation to decisions of the Privatisation Committee.

In 1983, as a result of the collapse in the share prices of several large banking institutions on the TASE, the Government entered into an arrangement (the "Bank Shares Arrangement") with shareholders of banking institutions. Under the Bank Shares Arrangement, the State purchased shares from the banks' shareholders at the time of the crisis. As a result, the State gained a controlling stake in five of the six largest Israeli banks (although the State did not exercise any management control over these banks). The Government's ongoing privatisation program is intended to result in the sale of the State's controlling interest in these banks. Implementation of this program is ongoing as the Government continues to reduce its bank holdings through a variety of public and private transactions.

An internal committee in the Ministry of finance chaired by the Director General of the Finance Ministry is now analysing adequate necessary steps needed to be implemented in order to introduce more competitive markets in the capital market (including banks).

Table No. 1
Selected State-Owned Companies ¹
(at, or for the period ended, December 31, 2003)
(in millions of dollars, except percentages)

| | Percentage Direct and Indirect Ownership of Government | Total Assets | Long-Term Liabilities | Total Revenues |
|---|---|-------------------------|----------------------------------|---------------------------|
| Bezeq, the Israel Telecommunications Corp. Ltd..... | 49.1% | \$3,674 | \$1,118 | \$1,823 |
| Israel Electric Corporation Ltd. | 99.8 | 13,750 | 10,126 | 3,000 |
| Oil Refineries Ltd. | 74.0 | 1,741 | 519 | 3,214 |
| El Al Israel Airlines, Ltd..... | 82.1 | 1,499 | 954 | 1,168 |
| Israel Aircraft Industries, Ltd..... | 100.0 | 2,054 | 190 | 1,868 |

1. Based on consolidated and NIS-adjusted financial statements as of December 31 2003, according to Israeli generally accepted accounting principles. Amounts converted from NIS to dollars at the exchange rate on December 31, 2003 (\$1=NIS 4.379).

Source: Ministry of Finance; Government Companies Authority.

Set forth below are summary descriptions of the State-owned companies included in the above table. Also described below are specific steps planned or taken by the Government to prepare those companies and statutory authorities for privatisation or to reform their structure and operations.

Bezeq is the State-owned telecommunication corporation. Its operations are subject to regulatory arrangements by the Government, including tariff and structural supervision. Arrangements implemented since 1994 are designed to increase competition in the communications sector. International telephony services are provided by three main companies (of which one is a wholly owned subsidiary of Bezeq). Cellular services are provided by three main companies (of which one is 50% owned by Bezeq' and Bezeq has an option to exercise the reminder). In June 1999 Bezeq's exclusive right to supply fixed telecom services was terminated. Since the end of the year 2000 initial steps have been taken to implement competition in the supply of fixed telecom services and other internal communication services including inter alia competition from other communication companies involved in the cellular and cables services, this competitive development is expected to grow intensively. Between July 1997 and February 1998, the State sold a 21.4% interest in Bezeq in a sale to Merrill Lynch & Co. and a public offering in Israel, which raised a total of \$508.7 million and reduced the State's ownership level to 54.6% (fully diluted). Currently, the remaining shares are held by the public, of which approximately 17.75% is held by Zeevi Group. Bezeq's shares are traded on the TASE.

On August 27, 2000, the Privatisation Committee decided to privatise the majority of the State's remaining holdings in Bezeq by way of a private sale. The sale will include shares representing at least 50.01% of the fully diluted share capital of Bezeq. The Knesset Finance Committee approved this plan at its meeting on September 6, 2000, in accordance with the Government Companies Law. During November 2001, announcements were published in the media in Israel and abroad inviting interested parties to participate in the sale process. In March 2002, applications to the Government Companies Authority were submitted. While in 2003 the state reduced its share holding by two selling packages of 3.6% and 5.8%. the government's income was more then NIS 1 billion. As of November 2003 the state holds 49.1% of the shares. Due to the privatisation, Bezeq (with its subsidiaries) has become a mixed company and it is not subjected to the Israeli government company law as a government company.

On August 27, 2003 the Ministerial Privatisation Committee decided to amend the decision of the previous Ministerial Committee. The main amendment is that the private sale will be 30%-40% of the Company's share capital (fully diluted). As a result of the decision the Companies Authority directed the Company to prepare a prospectus. The Company worked on preparing a prospectus which is planned to be published during May 2004, based on the Company's statements as at December 31, 2003, and in the framework of which there will be a tender offer of the State's shares in the Company after which the State holdings should decline to 43.1% of the share capital, and thereafter the Authority intends to act to sell the core control in the Company.

Israel Electric Corporation Ltd. ("IEC") is a legal monopoly with responsibility for the entire Israeli electricity industry. Since 1992, IEC has been subject to tariff supervision that includes efficiency incentives. In March 1996, IEC's exclusive concession from the Government expired, the Electricity Industry Act was enacted, and an authority for the supervision of public electric utility services was established. The purpose of the electricity law is to regulate activity in the electricity industry for the benefit of the public, and to achieve reliability, availability, quality and efficiency, while guaranteeing cost minimization within a competitive market. The new law provides for a ten-year transition period, during which IEC has a license to transmit, distribute, supply and market electricity. According to the new law, the owner of a license for transmission or distribution functions will be required to purchase electricity from other generators of electricity, and to enable other licensed generators to use the same transmission and distribution channels to supply electricity to their customers. On January 1, 1998, IEC received licenses, valid until March 3, 2006, to produce electricity at each of its 63 generation units.

In August 1999 the government decided to act to implement structural changes in the electricity sector with a view to create conditions for the development of competition as exists in developed countries. For this purpose the Minister of Finance and the Minister of National Infrastructures appointed an inter-ministerial committee headed by the Director General of the Ministry of Finance and the Director General of the Ministry of National Infrastructures, and with the participation of the Government Companies Authority, the Electricity Administration in the Ministry of National Infrastructures, the Budget Division of the Ministry of Finance and the Ministry of Justice. The Committee was empowered to prepare a detailed proposal for the steps required to accomplish the structural change.

In recent years, the Government has made plans to open up the electricity industry to competition by setting rules for the entry of private electricity producers into co-generation of electricity and publishing a tender for generation.

The Government's goal is to achieve a decentralised competitive industry, divided into the following segments: generation, which the Government expects to be competitive; transmission, where the Government expects a natural monopoly to take hold; distribution, where the Government expects regional monopolies to take hold and supply.

IEC decided to purchase natural gas to be used in IEC's power stations. The natural gas power stations are expected to replace the oil-fired power stations currently operating together with the coal-fired power stations.

On March 2003 the Government decided to reform the electricity sector in accordance with the recommendations of the Committee and the amendment of the Electricity sector Law – 1996 (*"The Electricity Sector Law"*) accordingly. On May 29, 2003 the Parliament of Israel approved changes in the electricity sector law which was assigned, inter alia, to achieve decentralised competitive target structure of the electricity sector. More details about the company and structural changes in the electricity see below.

Oil Refineries Ltd. is the only oil refinery company in Israel. Oil Refineries operates in the framework of Government reforms that have linked fuel prices in Israel to fuel prices in the international market. Oil Refineries is entitled to sell its products strictly to wholesalers and to certain key customers. The Government is currently exploring various methods of increasing competition in the Israeli oil sector, including the allocation of the two refinery facilities to separate companies, one in Haifa and one in Ashdod, and the deregulation of tariffs and privatising those separated companies.

El Al Israel Airlines, Ltd. is the Israeli national air carrier. El Al operates in a competitive market especially competing with foreign airlines companies according to the "open sky" governmental policy. In 1995, El Al emerged from a reorganisation program under which it had operated since 1982 due to labour difficulties at that time. In July 2002, after cancelling a prior privatisation plan, the Ministerial Committee for Privatisation decided to privatise the State's holdings in the company in stages. In June 2003, the Government began the El Al privatisation process by offering 15% of El Al's shares on the TASE. The shares were bundled with two sets of options for the remaining 85% of the shares. One set of options is exercisable within the year. If all of these options are exercised, the public (together with El Al employees) would hold 51% of the shares of El Al and then El Al will be a mixed company. The second set of options are exercisable between 18 months and four years from the offering date. In addition, El Al employees were offered the opportunity to purchase shares and options for approximately 9% of El Al. As of June 22, 2003, the employees purchased approximately 2% of El Al's shares. The total amount raised through the initial offering (which did not include the exercising of options) was NIS 64 million, of which NIS 22.1 million went to El Al and the remainder went to the Government. Since a partial privatisation was carried out, El Al is still categorised as a government company, but if the options' sold to the public would be exercised the company would become a mixed company at the first stage and a fully privatised company at the end of the process.

Zim Israel Navigation Company Ltd. ("Zim") – Zim is the largest shipping company in Israel and most of its operations are in international shipping markets. On the eve of the sale in February 2004 its status was that of a mixed company with the State holding 48.6% of the Company's share capital. The Israel Corporation Ltd., which is a public company, held 48.9% of the share capital. In February 2003 the State sold the balance of its holdings to the Israel Corporation Ltd. In consideration for the shares the State received \$ 113 million.

Two other Government Companies, Israel Aircraft Industries, Ltd. and Israel Military Industries, Ltd., are, like other defence-related industries worldwide, in the process of undergoing major restructuring in response to changing market conditions. As part of the restructuring process, the number of employees of these companies has been reduced significantly, resulting in large severance pay expenditures by Israel Military Industries. The severance expenditures have had a negative effect on their recent operating results. In the Israel Military Industries privatisation steps were already been taken by selling some factories, and one subsidiary (Ashot Ashkelon Ltd.) is already in a privatising process. The government is analysing the privatisations steps in these two main defence companies.

Mekorot Water Co. Ltd. ("Mekorot") is the State-owned water company. It supplies approximately 65% of the water Israel consumes. Approximately 14% of Mekorot's income from supplying water is subsidised by the Government through payments intended to compensate Mekorot for the below-market tariffs charged mainly to agricultural and other consumers. In 1993, Mekorot and the Government agreed on an arrangement establishing efficiency incentives for the years 1993 through 1997 and securing Mekorot a normative return on equity, enabling it to raise capital in private capital markets rather than receiving subsidised loans from the Government. The Government and Mekorot continue to operate under this arrangement, which is extended every few months..

According to the plan to change the structure, on July 2, 2003 three new government companies were established: The new government company – “Mekorot Holdings Ltd.” which serves as a parent company which will manage the 3 subsidiaries: Mekorot Water Ltd., Mekorot National Carrier Ltd. and Mekorot Initiatives and Development Ltd. In addition, within three years an operations company will be established which will be a subsidiary of Mekorot Water.

The following are details of the companies and their operations:

Mekorot Holdings Ltd.: will supervise the management of the subsidiaries and determine business policies of each of the companies separately.

Mekorot Water Ltd.: will be the national water authority in accordance with the Water Law, and will be responsible for the operations of the water system, including production, water treatment, operation of the waste water treatment plants, and the establishment and renewal of water enterprises.

Mekorot Initiatives and Development Ltd.: will concentrate the business operations which are not in the field of the agreement. This Company will manage and activate various projects in the field of water and can cooperate with private entrepreneurs in projects such as the establishment and management of water and sewage infrastructures, waste water purification institutes and more.

Mekorot National Carrier Ltd: The Company will be the Properties Company jointly with the State of Israel (50% including surplus rights for the State) and the Holding Company (50%). The Company will have a leasehold on the properties of the National Carrier in accordance with the agreement which will be signed between the Government and the Company and will hold in trust the properties in Judea and Samaria, Gaza and the Golan Heights. The Company will strengthen, manage and develop all the National Carriers properties and the other Company assets according to agreements that will be signed between the Company and the National Water Authority (Mekorot Water Ltd.)

The Operating Company: After carrying out the structural change all the operations units of Mekorot Water and the Shaham will be consolidated into the operations division of Mekorot Water Ltd. Three years thereafter the operations division will be changed to a subsidiary of Mekorot Water. The operations division will carry out work only for Mekorot Water and will not be permitted to carry out work for other factors without the agreement of all the parties to the costs agreement.

Petroleum and Energy Infrastructures Ltd. (“PENIN”) provides infrastructure services for the petroleum industry, including acting as the sole provider of storage and transportation services for refined oil. PENIN’s subsidiaries plan, build, operate, and maintain systems and facilities for the transportation and distribution of petroleum products. The State controls the tariff rates of PENIN’s products and services. Through January 2001, PENIN operated under a concession from the Government. In January 2001, an agreement in principle was signed between the State and PENIN to govern PENIN’s activities after the end of the concession. Implementation of this agreement is currently under negotiation.

The establishment of the Israel Natural Gas Lines to Israel Ltd. The Israel Natural Gas project is a national project with considerable importance to the development of the energy sector and industry in particular and the Israeli economy in general.

The infrastructure for transporting National gas is a national monopoly as is customary in the world. The natural gas transport system should be spread over the length and breadth of Israel according to the approved plans. The Company was established in accordance with a Government decision of July 2003. The establishment of the Company should assist in reducing electricity costs and creating competition in the branch in view of the characteristics of the gas branch which require, inter alia, fairly low inputs and investments compared to the alternatives of electricity production.

The transfer of Israel Railways from the Ports and Railways Authority to a Government Company

In the framework of the Government's intention to develop the railways, in 1998 it was decided to develop the railway infrastructure in the country and therefore it was decided to establish the Railways Company. The Company was established in 1998 but in practice to date has been dormant.

In December 2002 the Ports and Railways Authority Law (Amendment No. 11) – 2002 was passed, according to which the railways will be separated from the Ports and Railways Authority ("PRA") and will change from a division in the PRA to a government company. In addition the land, movables and employees of the railways will be transferred to the new government company.

On July 1, 2003 the Israel Railways started operating as a Government company. In the framework it operating as a Government company, the Company should increase significantly the economy's investments in the development of the railway infrastructure which is likely to contribute to increasing the growth of the economy.

Additional structural changes determined in the Arrangement Law for 2004:

Converting the PWD – Public Works Department a supported unit of the Ministry of Transport to a Government Company

In August 2003 the Government took a decision to establish a company to replace PWD which operates as a supported unit of the Ministry of Transport.

The Government's above decision stipulates, inter alia, that the PWD will act as a management company and not an operative company and will engage in the planning, development, establishment and maintenance of inter urban roads in Israel.

At the beginning of January 2004 the Company's Board of Directors started operating.

The Ports Authority – transition to four Government companies

On September 15, 2003 a Government decision was taken regarding a change in the structure of the seaports, according to which it was decided to split the Ports Authority to: The Ports Authority which will be established in the Ministry of Transport and to 3 new government Companies which will be established and operate, each of them separately, the Haifa, Ashdod and Eilat ports respectively, and establish an additional government company which will hold and manage the ports' assets.

Since the Government's above decision the Companies Authority acts in the framework of an inter-ministerial team which includes the Ministries of Finance and Transport to carry out the structural change.

The object of the structural change is the creation of competition between the various ports which are an essential infrastructure for the development of the Israeli economy.

The reform in the postal services branch

In July 2002 the government took a decision for the reform of the postal services branch. The decision dealt, inter alia, with the conversion of the Postal Authority to a government company, the opening of the postal services branch to competition, and the decision to carry out legislative amendments required to implement the decision. The decision stipulated that an inter-ministerial implementation team

will be appointed with the participation of representatives from: the Government Companies Authority, the Ministry of Finance and the Ministry of Communications. After the decision an implementation team was appointed and has started operating. Representatives of the Postal Authority participated in the deliberations of the implementation team.

On the basis of the report's recommendation the team formulated a proposed decision for the Government. In August 2003 the Government approved in a detailed decision the reform in the postal services branch. In this decision the Government decided to convert the Postal Authority from a statutory authority to a government company, which will be set up for this purpose – The Israel Postal Services Company Ltd., which will start operating on January 1, 2004. In addition, it was decided to continue opening the postal branch to competition as of July 2005, in a gradual manner, while changing to a regime of licenses and permits in the branch and amendments to legislation in the Postal Authority Law – 1986, and the Postal Bank Law – 1951 for this purpose. The Government's decision directed the Government Companies Authority to formulate a proposed privatisation decision to the new company not later than September 1, 2004.

According to this decision the Company was regularly registered with the Registrar of Companies in November 2003.

The new company will engage in providing basic postal services (universal service) and providing other postal services (messenger services, express post, messenger services abroad, etc). In addition, the Company will engage in providing the postal bank services and additional financial services as it will be permitted to do.

For further details regarding the reform in the branch, see the detailed survey below.

Increasing transparency, proper disclosure and supplying reports and accountability, in financial reporting of the government corporations in general, and the monopolistic corporations in particular – the handling and promoting these subjects is an important means in its ability to carry out privatisation steps and structural changes to promote competition in government corporations which operate in branches that are not open to competition. In 2003 legislative amendments were approved which assisted. These amendments enabled the Authority to act to promote these interests. Thus for example, on February 24, 2004 the Director of the Authority issued a circular instructions to government corporations companies regarding personal declarations certifications of the Chairman of the Board of Directors, the Chief Executive Officer and Financial Manager on the correctness of the financial statements and the Board of Directors Report, and this on the basis of the lessons learnt in the US as a result of the giant scandals in companies such as Enron and WorldCom and others, scandals led to the legislation of the Sarbanes Oxley Law in 2002 and the lessons learnt from similar events and others which occurred in Israel. In addition on March 2, 2004 the Director of the Authority issued instructions regarding disclosure in financial statements in the field of production, transmission and distribution in the Israel Electric Corporation Ltd. and on March 14, 2004 the Authority's Director issued instructions regarding disclosures in the financial statements of the separate plants of the Haifa and Ashdod Refineries. In addition, in February 2004 the Director of the Authority issued disclosure instructions with regard to increasing transparency, proper disclosure and providing a report to government corporations, including and in connection with achieving national targets set for the companies and the branches in which they operate, including complying with government decisions to increase competition in the fields of their operations.

Review of the reforms in the electricity sector and the postal services branch in Israel

Preface

Many countries in the world over the past two decades have gone through structural reforms in their essential infrastructure branches with a view to increasing competition in these branches. The transition from a branch structure characterised by monopolistic controls with considerable government involvement in the branch's ownership, to a competitive and decentralised structure, without government's direct involvement in ownership, made clear that this was an essential condition for creating durable growth in these branches in particular and in the economy in general, and increase the benefit to consumers in the economy. These essential infrastructures branches include, inter alia, the following: Electricity, water, communications, seaports and more.

The State of Israel, as a country which wishes to be included among the developed countries in the world, strives to achieve structural reforms in various economic branches according to global trends.

The following are reviews of two reforms recently planned in the State of Israel which are in various stages of implementation: The reform in the electricity sector and the reform in the postal services branch.

The main object of these reforms is the creation of conditions for competition to develop in the branches for the benefit of all consumers in the economy, where the means for this is introducing structural changes in the branch while striving to reach a future efficient and competitive target structure, which will facilitate a reduction in consumer prices of and an improvement in the level of service. Implementing these structural changes will take a number of years and will be combined with a gradual privatisation process, the preparation of a deregulation model or changes in the existing regulation model, and encouraging the entry of private factors to invest in the branch. The secondary objects of the reforms have been defined according to the characteristics of the branch.

The following is a general outline for carrying out these reforms by the government of Israel:

- Taking a decision in principle by the government of its intention to carry out a reform in the branch and establishing an Inter-ministerial Committee to examine the subject and to prepare recommendations.
- Submitting a report from the Committee after this has been obtained with the assistance of an international consulting company specialising in preparation of the intended reform, which will include recommendations regarding the future structure of the branch and the methods of reaching it.
- A detailed decision of the government to reform the branch on the basis of the Committee's recommendations.
- Carrying out legislative amendments to create the main framework and conditions for a structural change in the branch.
- In the reform of the electricity sector – establishing an inter-ministerial team to implement the structural change.

Reform in the electricity sector in Israel

General

The electricity sector in Israel is characterised as a monopolistic branch under the sole control of the Israel Electric Corporation Limited (“**The Company**” or “**IEC**”) – a government company with almost total government ownership (99.85%). The Electric Company operates as a sole monopoly in all fields of the electricity chain (production, transmission, distribution and supply) and is defined as a provider of an essential service in accordance with the Electricity Sector Law – 1996. The Company operates on the basis of production licenses for its power stations and a consolidated license for transmission and distribution, whose validity will expire in March 2006.

Reform in the branch

In August 1999 the government decided to act to implement structural changes in the electricity sector with a view to create conditions for the development of competition as exists in developed countries. For this purpose the Minister of Finance and the Minister of National Infrastructures appointed an inter-ministerial committee (“**The Committee**”) headed by the Director General of the Ministry of Finance and the Director General of the Ministry of National Infrastructures, and with the participation of the Government Companies Authority, the Electricity Administration in the Ministry of National Infrastructures, the Budget Division of the Ministry of Finance and the Ministry of Justice. The Committee was empowered to prepare a detailed proposal for the steps required to accomplish the structural change.

In order to formulate the recommendations, the Committee was assisted by external consultants from the international “Deloitte Touche” Consulting Company. The consulting work was affected in a number of stages: In the first stage the consultant was requested to recommend the target structure suitable for the Israeli electricity sector, on the basis of analysing reforms in the electricity sectors in countries with similar characteristics to that of the Israeli economy and an analysis of the Israeli electricity sector. In the second stage the consultant was requested to recommend the stages and steps required to achieve the desirable target structure.

The objects of the Committee in determining the reform in the electricity sector were, inter alia:

- efficient production of electricity while ensuring the supply of the quantity of electricity required by the economy with high reliability and availability;
- a reduction in concentration in the branch;
- a reduction in government involvement in the branch;
- the creation of easy access to the electricity grid and electricity services to additional branches in the branch, apart from the IEC;
- designing competition in the various electricity segments;
- reduction in costs in the branch with the intention to increase benefits to consumers.

The Committee's main recommendations:

1. **Creating a future target structure** which is not concentrated and competitive in the electricity sector in which there will be a separation of the segments of the electricity chain (production, transmission, distribution and supply). Reaching the target structure will be effected gradually over a number of years. Attached hereto, as Appendix A, a diagram which describes the target structure.
2. **Creating an interim stage** – separation of the segments in the Electric Company, as an interim stage, with a view to create a basis to reach a future target structure and in order to facilitate competition in them. The separation of the sections will be effected by incorporating the operations in the electricity chain as subsidiaries of the Electric Company in the following manners: 1) Division into a number of generating companies (at least 3) which will have a competitive ability and financial stability; 2) Division into a number of companies with regional divisions which will be natural regional monopolies based on a division into the regions existing today in the IEC; 3) A separation of the transmission which is a national monopoly, to a subsidiary of the IEC while providing the possibility of limited holding of means of production in order to stabilise the frequency. In addition the Committee recommends the establishment of subsidiaries for fuel and for providing services and the establishment of power stations and grids. Attached hereto as Appendix B is a diagram which describes the possible structure in the interim stage.
3. **Reaching the target structure** - Reaching the target structure will be effected through privatising the subsidiaries.
4. **Encouraging the entry of private factors into the electricity sector** – In the field of production through organised rules for entering the market, and in the field of distribution through determining rules for providing distributing licenses.
5. **The structure of supervision over the electricity sector** – A consolidation of the regulation between the Ministry of National Infrastructures and the Authority for Public Services – Electricity.

Additional recommendations in the report dealt with the following subjects:

- Concentration – Preventing a stage in which the privatisation of subsidiaries of the Electric Company will result in branch concentration (the electricity sector) and inter branch (the economy), which is likely to be created as a result of concentrating such great economic power among a limited number of factors.
- Determining clear timetables to privatise the subsidiaries, so that as of 2012 the IEC will meet the target structure limitations.
- A transition from a concentrated structure to a decentralised structure should be done by the sale of the subsidiaries to private factors. This will result in the entry of capital into the branch and an improvement in financial stability and efficiency in the branch.
- Giving the Minister of Finance and the Minister of National Infrastructures ("the ministers") flexibility to change dates and rates of limitations in the maintenance of segments of production and distribution (will be explained below).

- Recommendation to act already today to incorporate the new production units of the IEC into the subsidiaries and their floatation on the stock exchange (a process which replaces debt with shareholders' equity which is likely to strengthen the financial stability of the Electric Company).
- The implementation of a free access model (TPA) in the electricity sector according to which direct contracts will exist between generation and distribution, while creating a mechanism for trading electricity as the recommended model for the future structure.

The recommendations of the Committee's report were prepared as a proposed decision of the Government. The Government decided in March 2003 to reform the electricity sector in accordance with the recommendations of the Committee and the amendment of the Electricity sector Law – 1996 (**"The Electricity Sector Law"**) accordingly. *This amendment to the Electricity Sector Law is intended to create conditions for the development of competition in the electricity sector while creating a target structure for the electricity sector.* According to this amendment the target structure of the electricity sector will be a decentralised structure in which there will be a separation between the segments of the electricity chain and this through legislative restrictions for providing licenses for operations in the segments of the electricity chain and a restriction on cross-holdings between the sections. Such legislative amendments, will create a reality in which the Electric Corporation, which is almost a total monopoly in all segments of electricity, will be forced to split its operations according to the electricity sectors, while shedding its holdings in the segment, through a privatisation process of the subsidiaries, a gradual process over a number of years up to the end of 2011.

The principle guiding the process, which was established in legislation, is a *gradual process, i.e. the creation of an interim period* in which the limitations of the holding of generation segments and the distribution can be changed by the ministers responsible (the Minister of Finance and the Minister of National Infrastructures), should a fear be created of any failure in the reform process, which is liable to harm the supply of electricity.

Principles of the reform as based in the amendment legislation

Target structure – according to the target structure no one factor will be permitted to hold more than 30% of the electricity generation capacity or not more than 20% of the level of distribution of the electricity sector. The holder of a license for transmission may hold up to 10% of the production capacity in the electricity sector. In addition, restrictions have been set for the cross-holdings between production and transmission sections. In the framework of the amendment to the legislation the Minister of Finance and the Minister of National Infrastructures were given the possibility to change the restrictions relating to the rates of holdings of the segments after consulting with the Government Companies Authority.

Interim period – Reaching of the target structure will be effected gradually while creating an interim period (from March 2006 until December 31, 2011) where the restrictions on the rate of holdings of the generation capacity and the level of division in the electricity sector are less stringent and increase gradually to a stricter level over the period. During the interim period the following restrictions will exist:

- It will not be possible to hold more than 40% of the generation capacity or 30% of the distribution level in the electricity sector *through one company*.
- As of January 1, 2008 it will not be possible to hold licenses for more than 70% of the generation capacity or the extent of distribution in the electricity sector.

- As of January 1, 2010 until December 31, 2011 it will not be possible to hold licenses for more than 50% of the level generation capacity or the level of distribution in the electricity sector.
- As from 2012 the restrictions set forth in the target structure will apply.

In the framework of the aforementioned amendment to the Electricity Sector Law, the Minister of Finance and the Minister of National Infrastructures have been given the authority to determine, during the interim period, the rate of implementation of the reform and its extent after consulting with the Government Companies Authority and the Public Services Authority – Electricity.

Appointing a team to implement the Electricity Sector Law

In order to implement the Electricity Sector Law, and due to its complexity, the Ministers of Finance and the Minister of National Infrastructure, in December 2003, appointed a team to implement the Electricity Sector Law (“**The Team**”), headed by the Director General of the Ministry of Finance and the Director General of the Ministry of National Infrastructure, in which the CEO of the Electric Company and the Director of the Governments Companies Authority are members.

This team was empowered to discuss all question connected with implementing the Law and submitting its recommendations to the Ministers.

The establishment of auxiliary teams to implement the Electricity Sector Law

In May 2004 the Director General of the Ministry of Finance and the Director General of the Ministry of National Infrastructure, who are the joint chairmen of the team, decided to appoint 7 dedicated auxiliary teams for handling each of the questions required in implementing the reform. It was determined, that the auxiliary teams will submit their recommendations to the team within defined time frames. The auxiliary teams include mainly representatives of the relevant government ministries (the Government Companies Authority, the Ministry of Finance, the Ministry of Justice, the Ministry of National Infrastructure and the Electricity Authority) and with the participation of the Electric Company in some of them.

According to the timetables the recommendations must be completed already in 2004 in order for it to be possible to start implementing the reform already in 2005. As stated above, the licenses of the Electric Corporation for the different sections expire in March 2006 and therefore it is necessary to complete the separation of the corporations in the company by that date.

The reform in the postal services branch in Israel

General

The Postal Services Authority was established by virtue of the Postal Services Authority Law – 1986 and it operates as a statutory corporation. Prior to its establishment postal services in Israel were provided through the Ministry of Communications. The Postal Services Authority provides today a range of postal services with an obligation to provide a universal service of services and provides the Postal Bank services (banking services, maintaining accounts, collecting payments and transferring funds, etc).

The postal services branch in Israel was partly opened in recent years to competition. The fields of parcels, messenger services and express mail (including international) are already open to competition. In addition, as of March 2003, according to a Government decision of August 2002, local and international post that have a price threshold 4.5 times the price of sending an ordinary letter, are open for competition. The field which has not yet been opened to competition is the field of local post – quantitative post and

ordinary post up to 1 kilogram, which is the main market sector in the market from the point of view of the number of postal items ("The reserved field") in which the Postal Authority has a monopoly.

Reform in the branch

In July 2002 the government took a decision to reform the postal branch **and open up the postal services to competition**. The decision dealt with, *inter alia*, changing the Postal Authority to a Government Company, and directing the factors in the government to the legislation required in order to implement the decision. The decision stipulates that an inter-ministerial implementation team will be appointed ("**the Team**") whose members will be representatives from: The Government Companies Authority, the Ministry of Finance and Ministry of Communications.

After taking the decision an implementation team was appointed and started operating. Representatives of the Postal Authority participated in the team's discussions.

The team was assisted by the international consulting company "McKinsey & Co." in order to formulate a deregulation model in the postal services branch. In the framework of its work McKinsey reviewed the reforms carried out in postal branches in various countries, analysed the postal branch in Israel and the financial condition of the Postal Authority, including a forecast of its operations, and prepared a forecast for the whole extent of total postal operations in Israel and the effects of implementing a competitive model on the Postal Authority. In addition, the team examined additional subjects such as: the company's capital structure, including the equity that the new company will have when it is setup, the question of transferring assets to the company, transferring liabilities, the company's objects, method of transferring the post office bank to the company, and more.

When formulating recommendations for the opening of the postal services field to competition, the team had before it the following objects:

- the essential need for continuing operations in the postal branch in Israel in an efficient manner while ensuring the supply of a universal service to the State of Israel's residents;
- promoting economic efficiency in the branch;
- reducing regulations and government involvement in postal services;
- improving the quality of service to the public;
- financial stability of the new postal company which will be established in order for it to achieve its objects;
- decline in prices in the branch.

The team formulated a report which had the recommendations of the reform in the postal services branch in Israel and the following are the main recommendations:

- the Postal Authority will be disbanded and in its place a new government corporation will be set up which will provide basic postal services (the universal service), a range of postal services and the Post Office Bank Services that the Postal Authority provided through the banking service.
- the statutory existence of the postal bank will be cancelled and its operations will be transferred the Postal Services Company which will operate it as a subsidiary.

- the gradual opening to competition of segments of the postal services branch, starting in July 2005 till July 2009 as detailed below.
- a transition to a regime of licenses or permits in the fields of postal services which will be open to competition.
- privatisation of the company in a process which will start in the last quarter of 2004. For this purpose the team decided that the transition of the Postal Authority from a statutory corporation to a government corporation is essential in order to start opening the postal services branch to competition and this as a first stage for privatisation in order that all the players in the branch will operate under equal conditions.

In addition, the team made the following recommendations:

- increasing tariffs of 12%: 10% for the payment of VAT which the company will be obligated to as a result of the transition from a statutory authority to a company, and an additional 2% at an average rate;
- gradual reduction of the payment of royalties to the State by the Postal Company due to opening the branch to competition;
- transfer of the Postal Authorities employees to the Postal Services Company, while safeguarding their rights;
- the structure of the capital of the Postal Services Company in its opening balance sheet will not be less than 25% of the total Company balance sheet – such a capital structure will facilitate the financial stability of the Company and the ability to realise the organisation's objects and debts in accordance with the Law;
- the Postal Services Company may provide additional services, including financial services without financial exposure on the basis of the existing infrastructures at its disposal.

On the basis of the report's recommendation the team formulated a proposed decision for the Government. In August 2003 the Government approved in a detailed decision the reform in the postal services branch. In this decision the Government decided to convert the Postal Authority from a statutory corporation to a government company, which will be set up for this purpose – The Israel Postal Services Company Ltd., which will start operating on January 1, 2004. In addition, it was decided to continue opening the postal services branch to competition as of July 2005, in a gradual manner, while changing to a regime of licenses and permits in the branch and amendments to legislation in the Postal Services Authority Law – 1986, and the Postal Bank Law – 1951 for this purpose. The Government's decision directed the Government Companies Authority to formulate a proposed privatisation decision to the new company not later than September 1, 2004.

The principles of the model to open the postal services branch to competition as based in the amendment to the Postal Law

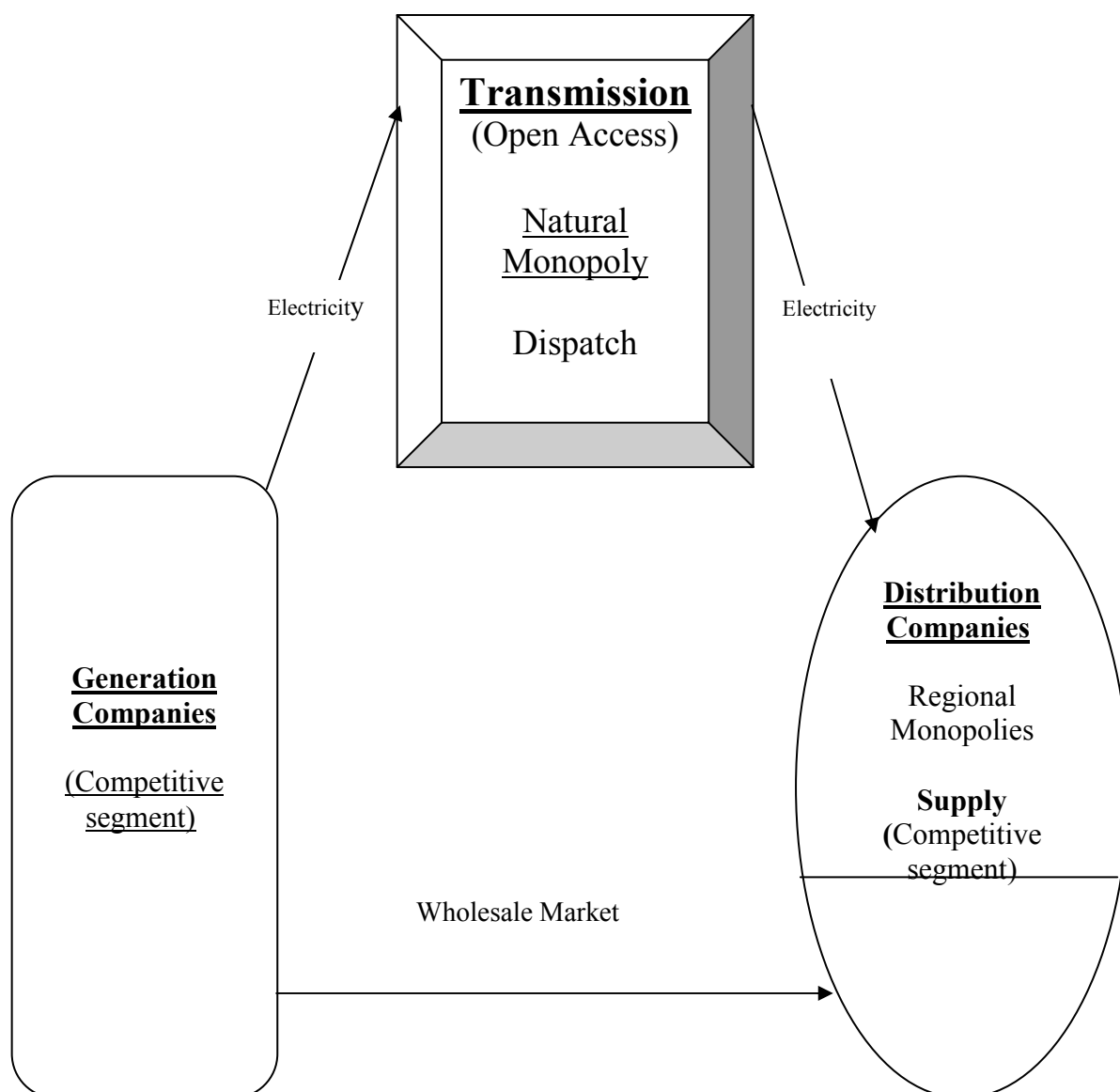
- not later than July 1, 2005, at least 20% but not more than 30% of the postal services in the reserved field will be opened for competition;
- as from July 1, 2007 the quantity postal services will be completely opened to competition;

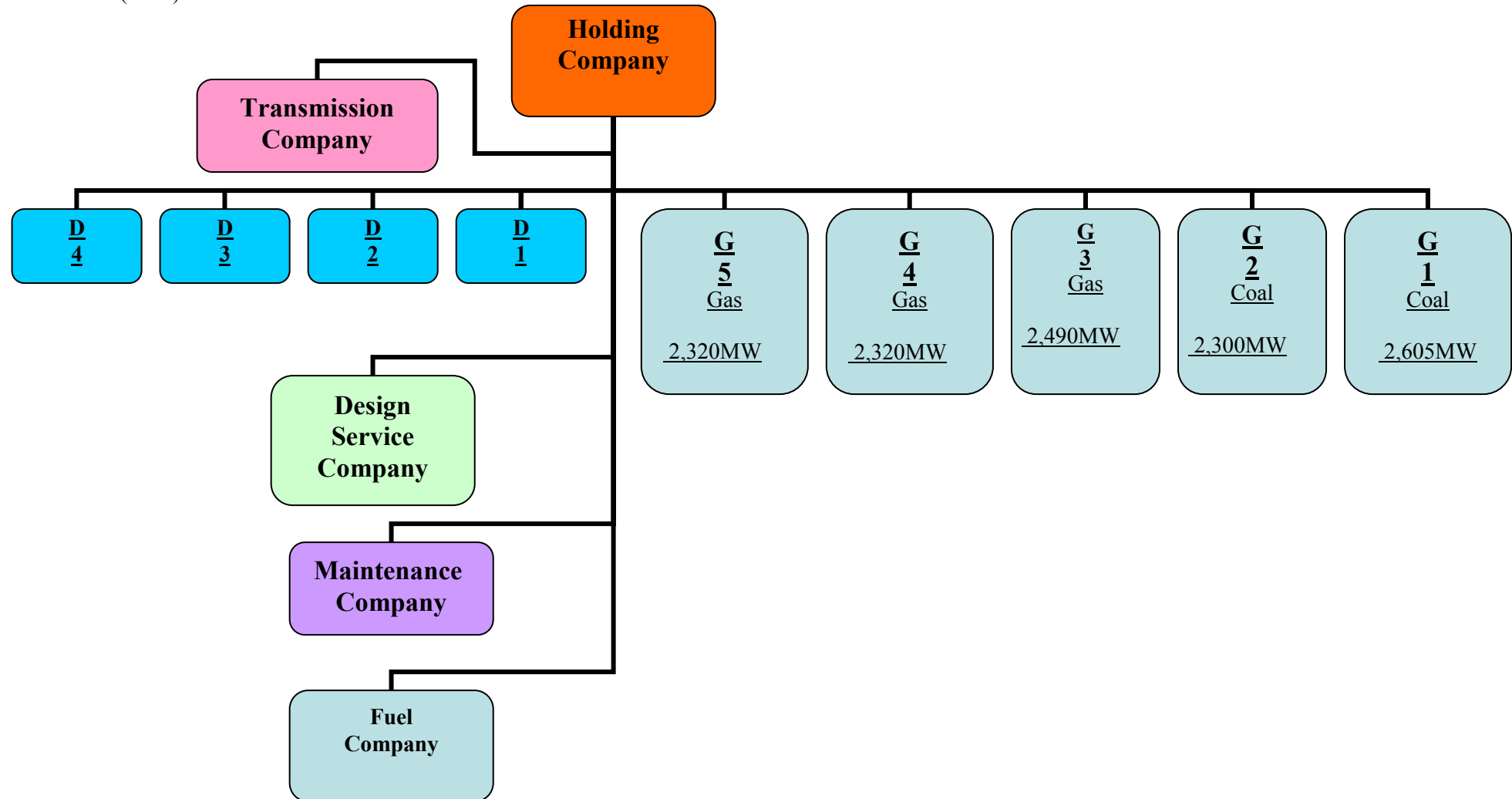
- if on July 1, 2009 the level of competition in the postal services market in the reserved field does not exceed 65% as of that date, at least but not more than 70% of the postal services in the reserved field will be opened for competition, this by reducing the minimum quantity of postal items required for sending quantity post;
- as of July 1, 2010 the Minister of Communications may expand the competition by way of providing additional general licenses to factors in the branch and permits and special licenses which will enable additional expansion of competition in the safeguarded field to other factors;
- in addition, the Ministers (the Minister of Finance and the Minister of Communications) were made responsible and have the Authority to defer the date of the second stage in opening the competition (as of July 2007) by a time frame which will not exceed six months and the extent of opening to competition on that date, if they see that there is a risk to the continuing provision of basic postal services in Israel as a result of the opening it to competition.

Regarding the transition of the postal bank to a new company an amendment to the Law dealing with performing the operations of the postal bank in a subsidiary company of the new postal company is being formulated at the present time, and this for the reason of corporate separation in order to protect the accounts of customers of the postal bank against creditors and attachments which are likely in the future to occur on the assets of the Postal Services Company, which are likely to arise due to the dual operations and from the point of view basing the ability to manage a bank account in Israel.

Appendix A

TARGET STRUCTURE OF THE ELECTRICITY SECTOR





KOREA

1. Introduction

Since the 1997 financial crisis, public restructuring has been carried out in Korea. As many public enterprises are privatised or under privatisation, the role of public sector has relatively decreased compared to the past but still explains the substantial part of the national economy. Therefore, introducing competition in the public sector can be seen as a precondition to enhance efficiency in the national economy. In addition, with the launch of local autonomy in early 1990s, business activities in local public companies and the third sector by local government have been on the rise.

All in all, business activities in Korea's public sector are mainly done by state-owned enterprises, which are key players in natural monopolies and network industries, local public enterprises and the third sector, which provide public service and enhance profitability in local government. Separate laws regulating each sector have principally controlled their activities while the competition law has been applied occasionally and complementarily. Though, in principle, competition law has been applied to the government's business activities including public enterprises, other legitimate activities following other laws and orders are excluded from the competition law application.

In order to enhance efficiency in this report, discussion on the state monopoly and complete privatised sector is left out, focusing on the public business activities competitive with private sectors from the point of competitive neutrality policy.

First, current situation and system of public sectors' business activities will be briefly touched upon. Then, focus on postal service, which can be seen as the public sector competing with private sector, followed by regulatory system in local public enterprises from the perspective of competitive neutrality policy. Finally, experience in competition law enforcement in public business activities will be introduced.

2. Scope of Business Activities by Public Sector in Korea

2.1 *Business activities in public sector regulated by central government*

2.1.1 *Business Area*

State Business: Railway, Postal Service

The government completely owns and manages postal service and railway transportation as the government bodies. The Korean National Railroad is a state monopoly in railway industry under the Ministry of Construction and Transportation. The Korea Post, which is in charge of postal service, is an organisation under the Ministry of Information and Communication. The Railway Act covers state monopoly on railway transportation service while the Postal Service Act on mail and postal service. However, the postal parcel service and the potables banking services, which are competing with private sectors, will be explained in the latter part.

- B. Public Enterprises: Minting and Security Printing, Energy Industry, Management of Infrastructure (road and airport), Water Resource Management, Distribution and Trade Support and etc.

Public enterprises under the government control consist of the one owned by the government and the others capitalised by the government. The government has more than 50% of shares in the government owned corporations (GOCs), subject to the Framework Act for GOCs. As there are similar restraints, which are also applied to the government bodies, they face limits in running a business. On the other hand, the government-invested corporations (GICs) are regarded to have more commercial characteristics, thereby enjoying more freedom in business management.

Business areas of these 19 public enterprises include minting and security printing, electric power, coal, oil, gas, district heating, trade support, road management, housing supply, water resource management, land management property appraisers, housing guarantee, agricultural and fishery trade, tourism promotion, airport construction and management and others. In most cases, they are monopolistic player in the market. In addition, most of goods and services are sold to the government.

2.1.2 Regulatory System

“The Monopoly Regulation and Fair Trade Act” is applied to all businesses in Korea. Even the national and local governments are subject to this act when they are involved in business activities.

However, the MRFTA allows the exceptions under Article 58 as follows, ‘This Act shall not apply to the acts of an Enterprise or Trade Association conducted in accordance with any Act or any decree to such Act. Therefore, regulated industries under the individual Act are exempted from the competition law application.

The Special Acts regulating the business activities of the central government include the Framework Act for GOCs and the Special Act on Privatisation. Per each industry, there are laws regulating industry and public enterprise concerned. For example, KEPCO is regulated under the Electronic Business Act, the Korea Electronic Power Corporation Act, the Act for the Restructuring of the Electricity Industry and the Framework Act for GOCs and the Special Act on Privatisation at the same time. In accordance with the statutes, competition law is not applied to any legitimate activities. However, in principle, they are subject to competition law application.

2.1 Public Business Activities Regulated by Local Government

2.1.1 Business Area

Business activities by local government aim to promote citizens’ welfare, done both directly and indirectly by local government. In Korea, they are taking following forms.

Direct management (Local Direct Management Company)

This type of business is directly administered and managed by local government. Waterworks, housing and land development business can be included in this type.

Indirect Management (Local Indirect Management Company)

Local Governments incorporate a firm and run a business, which include subway, healthcare and facilities management. Difference between local corporation and Management Corporation is that the latter

is run by the corporation completely capitalised by local government while the former is the corporation, which local government capitalises more than 50%.

The Third Sector

The third sector is a joint-stock corporation co-established and managed by both private and public sector. Local government makes capitalisation less than 50%. This includes tourism development, distribution centre, convention centre and trade company.

Profitable Business

There are two types of business concerned: first, a certain division under the local government directly manages the business by taking advantage of regional resources and public facilities to the extent not violating private economy in order to boost their income and promote public welfare; second, local government can entrust the business management and operation to the private sector. This type of businesses can be seen for efficient usage of public property, such as parking lot, usage of regional resources, such as development of drinking water, and development of tourism and rest park.

2.1.2 *Regulatory System*

Among business activities by local government, businesses, such as water, railway, car, local road, waterworks, housing, land development and healthcare, which surpass a certain size, should be subject to local public enterprise act. Other sectors and small size businesses are partially subject to the Act in accordance with the ordinance set by local government. Moreover, all businesses are subject to the relevant ordinance of local government.

3. Cases which public business activities are competing with private sector from the perspective of competitive neutrality policy

3.1 *Postal Service*

This report is to analyse postal packaging service and finance as a case which is run by the state.

3.1.1 *Postal Parcel Service*

Business Situation

Even though the packaging delivery is the basic service provided by postal service, the door-to-door parcel service is competing with private parcel service companies in accordance with 'the Special Act on Managing Postal Service Business'. As of 2003, the market share of the parcel service by the Korea Post accounts for 4.2% of overall parcel market, contributing to improved services through competition while not interrupting the growth of private parcel companies.

Current Situation of Competition Conditions

The advantages of the Korea Post in doing parcel service include cost reduction by using existing mail logistics network, integrated human resource management without distinguishing the staffs in commercial service (door-to-door parcel) and non-commercial service (mail), and exemption of value added tax.

On the other hand, the disadvantages include more costs in universal service and human resource management due to the difficulties in flexible management of staffs.

The legal amendment to levy value added tax to postal parcel service from 2005 was passed. As a result, institutional improvement in the issues of distorting competition conditions is seen. However, comprehensive evaluation over competition conditions is required from the perspective of competitive neutrality policy. For example, if the universal service has some negative impact on postal parcel service, efforts to eliminate any discriminatory factors are needed.

3.1.2 *.Potables Banking Service*

Business Situation

Based on ‘the Act on Postal Savings and Insurance’ and ‘the Act on Postal Insurance Special Accounting’, potables banking service provides nationwide savings and insurance service. As of 2003, postal savings command 5.8% of total savings across the nation while postal insurance accounts for 9.6%.

Current Situation of Competition Conditions

Potables banking service is included in the special accounting subject to ‘the Act on Corporate Budget Accounting’, which aims for effective management of the government business. Therefore, it is managed without the government support on the budget accounting. In addition, in handling the accounting, it is subject to the same corporate budget accounting to the private companies and under strict audit from the Board of Audit and Inspection and the National Assembly. Considering this, it is safe to say that the potable banking service is run under the fair competition environment.

The advantages as public organisation include usage of postal network and staffs across the nation, tax benefits, such as no savings premium and corporate tax, and guarantee of the government’s full payment of postal savings.

However, there are also some disadvantages: no loan service; compulsory deposition to ‘the public capital management fund’ by the government, which has relatively low profits; and other restraints on financial products, such as restraint on capital management, ceiling on the amount of taking out an insurance policy, and prohibition of managing annuity insurance.

From 2004, substantial efforts are being made to equalise the conditions for competition, such as the payment of savings premium.

3.2 *Business Activities of Local Government*

General characteristics, privileges and control of business activities of local government are to be analysed and evaluated from the perspective of competitive neutrality policy.

3.2.1 *Characteristics*

The entity to establish and manage local public enterprises is local government. Its business area is public profitable business to promote social welfare. It is based on self-support and managed as a local public enterprise special accounting, which is separated from the general budget. The principle of financial resource procurement is for beneficiary to take burden. By appointing the manager and endowing the business management rights, he or she is entrusted with the responsibility to manage the business.

3.2.2 *Privilege*

To facilitate the business, the local public enterprises have rights to impose the public to comply with expropriation of land. In addition, economic advantages are allowed as follows; free loaning and

transferring of installation and facilities of local government; tax exemption and subsidies; capital loan; and guarantee of private loan repayment. For example, local healthcare service is exempted from acquisition tax, registration tax, property tax, urban planning tax, public facilities tax and comprehensive land tax. In addition, it receives incentives of tariff reduction in importing medical equipments. The Urban Development Corporation also receives incentives for reduction in transfer income tax and special imposition tax.

3.2.3 *How to Control*

Principle to Ensure the Economic Activities of Private Sector to the Maximum Extent

Local public enterprises are obliged not to hamper fair and free economic environment or private contract economy. Its business areas are confined to the one, which is inevitable for the public, difficult for the private sector to participate, and requires comprehensive regional management. In addition, publicising of profits should be desirable.

Legal and Institutional Framework to Ensure Private Sector

In order to comply with the principle above, the Local Public Enterprise Act stipulates that local public enterprises should refer the review of validity and effects of business concerned to regional economy and social welfare to the research institutes, and form the deliberation committee. After the establishment, they are subject to the assessment of business management and orders to improve management by the Ministry of Government Administration and Home Affairs. In addition, they should take the audit of accounting and improvement order by the Board of Audit and Inspection.

Restraint on Profitable Business

First, consumer goods, which are under complete competition, cannot be the target for public business.

Second, businesses competing with private sector, which are quasi-public goods, are partially authorised. For example, in case of parking lot business, if there is sufficient supply by the private sector, public parking lot business needs to be stopped to facilitate the transportation flow.

Third, the business to buy and develop private resources is restrictively allowed only when there is high publicity. In case of pursuing the business focusing on profitability, such as department store, it is not allowed as the violation of private economic area. However, developing land and providing house at a lower price in order to improve the housing supply rate are permitted.

Fourth, high value added distribution business done by the second and third processing of existing regional resources are limitedly allowed. It is possible to sell the first processing of regional resources while the second and third processing is, in principle, excluded for the business as it contracts and violates the private economic activities. However, if private sector is not capable enough to process and sell the regional principal products, the public sector can take charge of it.

Fifth, businesses which are likely to create any incongruity or high environmental risks cannot be considered for public business.

Appointment Procedures for CEO and Management Executives

Except for the head of local direct management company, who is public official, the head of local public enterprises is appointed by the head of local government among the persons recommended by CEO

Recommendation Committee. The appointed CEO is ensured with the tenure and run a local public enterprise within his/her own discipline. The CEO Recommendation Committee consists of 2 persons recommended by the head of local government, 2 persons recommended by local council and 3 persons recommended by board of local public enterprises.

3.2.4 *Evaluation*

In terms of competition conditions, control method to maintain publicity serves as disadvantage to competition while the privilege such as support from the local government gives advantage to competition. Therefore, it is hard to exactly measure the net effects of local public enterprise regulatory system on competition.

However, for the business, which private competitors exist and the problem of distorting competition conditions by private competitors is raised, measures to equalise the competition conditions or institutional framework to review the privatisation of such local public enterprise need to be made.

4. Competition Law Enforcement in Public Sectors' Business Activities

Related to the equalisation of competition conditions discussed so far, the KFTC has continuously applied the competition law in the business activities done by both the national and local governments, thereby contributing to the improvement of regulations and systems concerned.

Unfair trade activities done by public enterprises can be mainly divided into two fields: first, the sector related to service provision; and second, the unfair transaction in procurement process, such as the purchase of raw material.

In case of the former, price, production volume and adhesion contract on supply are regulated under the relevant law. However, the activities surpassing the scope permitted under the relevant law and price abuse or control of output are regarded as the abusive behaviour of market dominant position under the MRFTA. Moreover, undue refusal and restraint of access to the essential facilities are also punished as the abusive behaviour of market dominant position.

The latter stems from the advantageous position of transaction for suppliers and consumers. Therefore, various unfair activities take place in purchasing raw materials or equipment, signing a contract of the construction, and placing an order of services. In addition, several public companies, which have many subsidiaries, are found to be involved in undue intra-group transaction and discriminatory transaction in purchasing prices and selling prices.

According to the research on unfair trade practices on local public enterprises, major types of legal violation include management intervention, coerced purchase, resale maintenance, unfair adhesion contract and restrictive competition system. In particular, in case of managing competition-restrictive regime, setting disadvantaged transaction conditions and excluding the entry to private companies under ordinance and rules of local government were found.

In response to unfair trade activities, the KFTC took corrective measures, such as the order to stop violation, imposition of surcharges and announcement of the fact of legal violation. Moreover, as to the management of competition-restrictive regime, the KFTC improved the system through the consultation with the local government and ministry concerned.

5. Conclusion

Competitive Neutrality Policy is significant in that it helps to prevent the distortion of competition conditions, boost efficiency in public business competing with private business, and to improve the conditions for privatisation.

In selecting the competitive neutrality policy, setting the service sector, which allows the government intervention, should be based on national consensus. In particular, in case of the field where there is competition between public and private sectors, the effective way of competitive neutrality policy should be adopted only after the goal to adjust publicity and profitability is established.

As a measure for introducing the competitive neutrality policy, deregulation or refining and adjusting regulation can be considered to equalise competition conditions between private and public sectors. However, the measure should be taken after the careful consideration of social and economic environment, and historical background of each nation. In this process, its social and political impact should be fully considered as well.

MEXICO

1. Introduction

In Mexico, the direct participation of the government in economic activities has decreased significantly over the last two decades, which has greatly benefited competition. However, there are important sectors where this intervention is still substantial and where relevant issues need to be addressed to properly promote competition and competitive neutrality.

The government has redefined its role as producer and regulator: it has divested many of its assets in favour of the private sector and has created several sector specific regulatory bodies. The privatisation and liberalisation process has taken place in parallel with the implementation of competition and regulatory frameworks aimed at modernising the public sector and improving transparency, legal certainty, as well as strengthening competition and creating a favourable environment for private participation.

However, State Owned Enterprises (SOEs) still maintain control over important industries. The most significant cases are the petroleum and electricity industries that remain reserved areas for the State. In both industries, however, their activities also include areas open to the private sector. Although competition legislation and sectoral regulations do not grant a preferential treatment to SOEs, their specific regulations and corporate governance often create unequal competition conditions compared to their private counterparts.

This document presents a general view of the scope of the government's commercial activities, analyses the competition and regulatory framework associated with SOEs and identifies some opportunities for public policies to promote competitive neutrality.

2. The scope of government commercial activities

The Constitution provides the general framework for government economic activities. Article 27 allocates exclusively to the State the central role of planning and managing *strategic areas* for national development, which cannot be delegated to the private sector. This Article defines the following sectors as strategic areas: postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy, electric power, and the functions of the central bank in producing coins and paper currency. Articles 25 and 28 establish that the State can participate in *priority areas* separately or jointly with the private sector, but maintaining direct regulatory control. The Constitution defines satellite communications and railroads as priority areas. Congress legislates both areas and can expand the lists by enacting secondary legislation.¹ However, in order to remove an area designated as strategic or priority is necessary to amend the Constitution (or the corresponding law for sectors defined as strategic or priority through secondary legislation).²

The Constitution also establishes that the State will have the entities required to efficiently administer strategic and priority activities.³ The Federal Government performs commercial activities through the so called *paraestatal* entities (SOEs). A SOE can be created by legislation or presidential decree with a specific objective that sets the boundaries for its economic activities. Additionally, SOEs' goals, priorities, and policies must be aligned to the *National Development Plan*, issued at the beginning of each presidential administration.

**Box 1. RECENT AMENDMENTS TO ALLOW PEMEX TO PARTICIPATE
IN ELECTRIC POWER GENERATION**

In March 2004, the Congress passed an amendment that authorises Pemex (Petróleos Mexicanos), the national petroleum monopoly, to establish co-generation plants for self supply and surplus sale to CFE (Comisión Federal de Electricidad), the national electricity SOE.

In strategic activities, SOEs must be structured as decentralised entities under the government's direct control. In priority areas, they also can be commercial entities with the government as their majority shareholder. Decentralised entities are governed by a board of directors that include officials from the Ministry of Finance and the corresponding sector's Ministry. On the other hand, commercial entities are governed in a manner similar to their private counterparts. SOEs can also acquire shares in private enterprises and act as any other shareholder. This kind of public-private joint ventures exist in activities related to priority and strategic areas. Examples include airlines and airport services, as well as natural gas transport and non-basic petrochemicals.

The information available on SOEs does not clearly separate commercial and non-commercial activities, but analysing them as a whole provides other useful information about their relative importance in the economy.

The participation of SOEs in the economy has decreased dramatically over the last two decades through a large process of privatisations and divestitures. In 1982, there were 1,155 SOEs that accounted for 4.4% of the labour force and 14% of the GDP. By 1990, the number of SOEs had dropped to 418 with 3.7% of the employment and 10.1% of the GDP.

These figures decreased even further during the 1990s, when the government continued to withdraw from many economic activities, including some that used to be in the list of strategic and priority areas. For example, in 1995, a Constitutional amendment moved railroads and satellite communications from strategic to priority areas. Also, in 1996, amendments in secondary legislation allowed private investment in natural gas transportation, storage, distribution and commercialisation. The privatisation process included ports, several airports, railroads and the satellite SOEs. In addition, some progress was made in allowing private participation in secondary petrochemicals and electric power generation.

In 2001 there were 205 SOEs accounting for 3.0% of GDP and 1.5% of employment. The three major SOEs: Pemex, CFE and LFC (Luz y Fuerza del Centro, the SOE that supplies electricity to the Mexico City metropolitan area), accounted for 2.9% of GDP, 0.62% of the national employment, and contributed with about 55.9% to the Federal Government's budgetary income. These figures show the importance of these three SOEs to the Federal Government and national economy.

At the end of 2003, about 80 out of the 210 existing SOEs performed commercial activities in the following areas:⁴ petroleum, electricity, transport, communications, postal services and the commercialisation of basic or mass consumption products. The rest carried out social programs in the following sectors: financial (development banks and public funds and trusts), health, housing, education, culture, food and a few others products and services.

Figure 1. SOEs share in GDP and employment

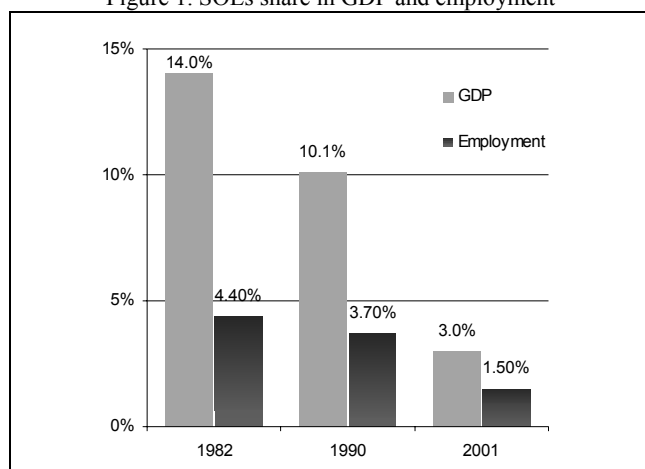
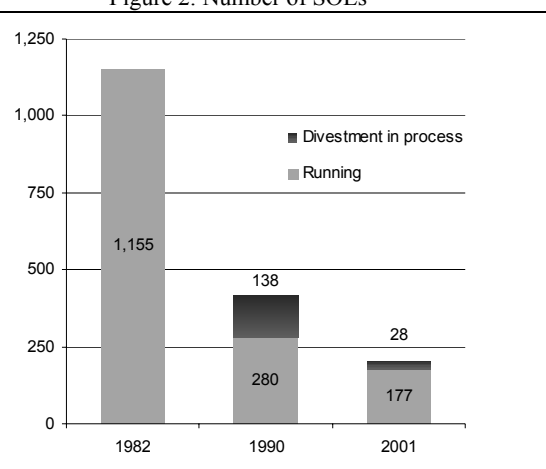


Figure 2. Number of SOEs



3. Competition legislation

The Federal Law of Economic Competition (FLEC) applies to all areas of economic activity within the Mexican territory, and makes no distinction between national and foreign, or state and private enterprises. Only strategic areas reserved for the State, labour unions, intellectual property rights and certain kinds of export cooperatives are not considered monopolies and therefore, are not prohibited by the FLEC. However, even state companies operating in strategic areas are compelled to refrain from anticompetitive behaviour carried out in different markets.

The FLEC's enforcement tools include merger control and investigation of harmful anticompetitive behaviour such as fixing prices, dividing markets, and unfairly excluding new competitors. Investigations can be initiated either *ex officio*, by request in the case of mergers, or by complaint in the case of anticompetitive practices.

At the international level, the competition chapters of Free Trade Agreements (FTAs) subscribed with the USA and Canada, Israel, Chile, and G3 (Venezuela and Colombia) include obligations regarding the conduct of monopolies and state enterprises. In general terms, FTAs require monopolies and state-owned enterprises to act based on commercial considerations within their territories and not to use their monopoly position to engage in anticompetitive practices in non-reserved markets in order to affect foreign enterprises.

Competition concerns and enforcement actions related to SOEs have been driven primarily by the need to prevent them from transferring of their market power in strategic areas (commonly in upstream markets) to related markets where competition is allowed (downstream markets). Examples of cases where the Federal Competition Commission (FCC) has enforced the FLEC against SOEs are summarised in Box 2.

Box 2. ENFORCING COMPETITION LEGISLATION AGAINST SOES

Relevant cases

- In 1995, the FCC conducted an investigation regarding Seat, a provider of ground complementary services in airports. Seat was a joint venture between ASA (a SOE in charge of providing airport services in all airports), and Aeromexico and Mexicana (the two major commercial airlines with State participation). ASA was sanctioned because it subscribed contracts that could lead to discrimination against Seat's competitors in areas such as airport charges, space allocation, the terms of service provision contracts, and the leasing of operational areas. In addition, the FCC ordered ASA to provide entry alternatives to Seat's competitors subject to technical, safety, and physical restrictions, but without losing sight of the economies inherent in operating integrated services; and to refrain from granting privileges to Aeromexico and Mexicana.
- In 1995, Pemex was sanctioned for applying a pricing policy for ethylene oxide and subscribing related supply contracts that led to a segmentation of the market and price discrimination. Pursuant to the FCC resolution, Pemex modified its pricing policy and contracts.
- In 2000, the FCC authorised the creation of Cintra as a holding company for the major air transport service providers, Aeromexico and Mexicana, both of them companies where the State had a significant participation. This merger was approved based on the failing firm defence. However, the merging parties were instructed to divest once financial viability was recovered.
- In 2001, the FCC analysed the San Fernando project, an investment plan between El Paso Energy International Company and Pemex to construct and operate a natural gas transportation pipeline in Tamaulipas. Based on the results from the overall assessment - of market concentration and efficiency gains (on the infrastructure's performance and securing natural gas supply to the electricity sector) - the FCC conditioned the project to guarantee open and non-discriminatory access and included an obligation for Pemex to divest its participation at the end of a 5-year period.
- In 2003, Pemex was sanctioned for imposing exclusivity clauses in franchising contracts for gasoline stations that prevented the commercialisation of lubricants different from Pemex's brands. Lubricants are not basic petrochemicals, therefore Pemex was subject to the FLEC as it was carrying out anticompetitive practices consisting on unduly deterring competing brands from the market by using its upstream market power (i.e. as the only wholesaler of gasoline in Mexico).
- In 2003, the FCC conditioned the creation of FICO, a public trust for the commercialisation of sugar produced by sugar mills that had recently been expropriated. Although expropriated mills all together had a large market share, the creation of FICO was considered necessary in order to prevent a decline in sugar production. The merger was authorised for a two-year period only, at the end of which FICO must be dissolved.

SOEs pose important challenges for competition policy, particularly regarding the design and coordination of government policies that could increase competition by promoting new entry, strengthening and adding procompetitive regulations, and promoting competition culture in liberalised markets. In this field, the FCC has supported privatisation and the opening to competition of some strategic activities such as generation and electricity distribution, and basic petrochemicals.

In order to level playing field for public-private competition, the FCC has been actively involved in applying competition policy according to principles of competitive neutrality. Two of the most efficient means of doing so is through the issuance of opinions about regulatory and legal amendments or government acts, and through seminars aimed at promoting a competition culture and that seek to build regulatory capacity that is favourable to competition. An important feature of the FCC's role in regulated sectors has been in identifying and opposing anti-competitive features of proposals that originate both in

Congress and in the executive branch, even when its intervention has not been required by statute nor has it been binding.

Box 3. ADVOCACY IN STRATEGIC AREAS

In 1999, the CFC advised that legislation to privatise electricity generation should include provisions assuring non-discriminatory access to transmission networks at regulated prices, allocating concessions through public auctions in which applicants would be vetted by the FCC, and requiring cost-based pricing of services to residential, commercial, and industrial customers to avoid distorting cross-subsidisation.

4. Sector specific regulations

Liberalisation and privatisation processes carried out in the last two decades included changes to regulatory schemes to encourage new entrants and competition, and to increase private participation. The main role of the government's participation in economic activities then shifted from ownership and management of operations to designing sectoral policy and regulation. Now, sectoral specific regulations exists in all strategic and priority areas, which establish specific regulators as well as structural and behavioural regulations.

Sector regulators exist in telecommunications (COFETEL), energy (CRE), and all financial activities (CNBV, CNSF and others). Institutional frameworks have provided sectoral regulators with autonomy from regulated agents. Nevertheless, not all sectoral regulators enjoy budgetary independence from the sector's Ministry, who is the policy maker and the party ultimately responsible for SOEs' contribution to the national and sectoral development plans. Thus, in order to alleviate risks to regulator's independence from policy directions -that also affect SOEs operations- full budgetary independence should be granted to them.

Regarding structural and behavioural regulations, common dispositions are ownership or accounting separation, open and non-discriminatory access provision to bottlenecks and scarce resources, and additional prices and quality regulation. Noteworthy features of this framework are regulatory arrangements to protect consumers from monopolistic pricing and subsidy regimes to ensure access to services for particular consumers.

In general terms, sectoral regulation relies more on behavioural rather than in structural controls. The use of cross ownership restrictions to obstruct the transmission of market power from non-competitive to competitive markets is limited. For example, in the case of SOEs with substantial market power in upstream (strategic or priority) markets, they face no or few impediments to enter competitive markets. As mentioned before, lack of an adequate cost allocation mechanism and the knowledge that the governments will backup their indebtedness allow SOEs to have deep pockets to invest and manage their total incomes discretionally among all their business lines, and to cross-subsidise their services.

In priority areas, sectoral regulations allow free determination of tariffs and prices, and flat interconnections and access controls. However, to prevent the exercise of market power, the regulator can impose additional price regulation, access controls, and other requirements on sector participants if the FCC finds an absence of effective competition in the relevant market (or, in telecommunications, the existence of an economic agent possessing substantial market power). In telecommunications, the price, information and quality regulations apply only to the agent with substantial market power.

Box 4. STRUCTURAL RESTRICTIONS ON PUBLIC-PRIVATE SECTOR COMPETITIONPetroleum and gas

Pemex has four subsidiaries: 1) Pemex Exploration and Production, responsible for the exploration, production of crude oil and natural gas; 2) Pemex Refining, responsible for refining oil and distributing oil products; 3) Pemex Gas and Basic Petrochemicals, responsible for processing, transporting and distributing natural and LP gas, as well as other basic petrochemicals; and 4) Pemex Petrochemicals, responsible for processing and distributing secondary petrochemicals.

Most activities undertaken by Pemex subsidiaries are in areas reserved to the State where they do not face competition in the domestic market. Nevertheless, there are some relevant areas open to the private sector. The most relevant are: 1) transportation, storage and distribution of oil products; 2) transportation, storage and distribution of natural gas (these activities were excluded from strategic areas in 1996); and 3) processing, transportation and distribution of secondary petrochemicals.

Pemex is not prevented by any legislation to participate in these areas. This fact, together with its tremendous market presence, have hindered the introduction of effective competition, specially in oil products and natural gas:

- In the case of gasoline distribution, stations are privately owned, but all of them operate under a Pemex franchise, which has also restricted competition. Also, competition through imports is non existent, because Pemex controls 100% of the imports.
- In the case of natural gas, Pemex is prevented to participate in its distribution, but not in its transportation and commercialisation. As consequence, private participation in imports is minimal and very reduced in transportation. On the other hand, private investment in distribution has been substantial since liberalisation in 1996.

Electricity

The CFE and LFC are the two vertically integrated companies that comprise the Mexican electricity industry. In 1992, amendments to sectoral legislation allowed limited private domestic investment in self-supply, cogeneration and small scale power production. However, these SOEs still hold the exclusive right to generate electricity for public service; thus, the private sector is not allowed to sell energy to end users. The sector's monopolistic conditions and the restrictions of the current legal framework have made private investment for self-supply unattractive and uncertain. Large consumers face the decision about whether to continue buying the final product (the electricity) from the CFE or to hire private enterprises to build and operate a self-supply generation plant. The CFE's discretionary power to modify tariff policy in the short run adds additional uncertainty to long-run investment projects and biases the opportunity cost in favour of maintaining purchase contracts. This situation, limits indirect public-private competition in the construction and operation of generation plants.

Ports

Port main facilities are managed by autonomous, self-financing Port Administration (APIs) where the government is the principal shareholder. Existing development plans aim to promote competition within ports, but competition between ports has not been facilitated.

Health services

In health services, SOEs are publicly funded and target benefits to specific social groups rather than to the general population. Differences in the level of tariffs and the way in which they are charged (i.e. fee-for-service or periodic payments for social or private insurances) locate public and private services in different markets. Additionally, there is no inter-hospital competition nor is there competition between professional medical care providers. The additional lack of effective monitoring on the performance of care centres and medical care providers means that there are few incentives to improve efficiency of service for the population in general.

Postal services

Postal services are a strategic area that includes the reception, transport and delivery of mail. SEPOMEX is the SOE in charge of providing mail universal service. Other activities such as courier and package delivery are outside this definition and can be provided by private economic agents that are not subject to special regulations. The Decree that created SEPOMEX allows it to provide parcel and courier services in competition: 1997 data showed that SEPOMEX's market share had been decreasing substantially but that it still remained the major participant, mainly because its coverage was broader in order to satisfy its universal postal service obligation. SEPOMEX has received transferences to maintain and increase its coverage for postal services that favour its activities as a parcel deliver.

5. Specific regulations for SOEs

In Mexico, SOEs are subject to heavy regulation that focuses more on procedures than on results, and have limited capabilities regarding key processes such as price setting, budgeting, and procurement management. The Finance Ministry and the Public Function Ministry control most of these decisions. The latter also authorises and/or closely supervises the SOEs' day-to-day management. Features relevant for competitive neutrality are briefly outlined below.

5.1 Taxes and federal duties

Practically all SOEs are subject to regular taxes (income, value added, assets, and others) applied to all Mexican corporations. Reduced exceptions and specific taxes or duties for SOEs are listed in the annual *Income Law*. The most important example from this list is Pemex who is exempted from income and assets taxes but is subject to special tax laws.⁵

Pemex and subsidiary entities are subject to the following duties and taxes: Hydrocarbon Extraction Duties, Hydrocarbon Income Tax, Special Tax on Production and Services (IEPS Tax), and the Value Added Tax (VAT). The IEPS tax on production and services charged to customers is a tax on the domestic sales of gasoline and diesel. The applicable rates mostly depend on product, producer's price, freight costs, commissions and the region in which the product is sold. The hydrocarbon income tax (52.3% at least) is higher than the income tax applied to all Mexican corporations (35%). In 2003, the sum of the hydrocarbons duties and taxes levied on Pemex equalled 61% of its annual sales revenues to third parties.

IEPS also has the effect of restricting competition between certain products such as that between gasoline and natural gas for automotive consumption, both produced by Pemex but commercialised by private agents; or between high fructose corn syrup and sugar, where a SOE recently acquired the majority production share through expropriation, for industrial consumption.

5.2 Debt management

Debt contracting of SOEs is highly regulated by the Ministry of Finance, for financial management, and the Ministry of Public Function, for administrative liability purposes. The Federal Revenue Law, passed each year by Congress, establishes the amount and allocation of the authorised federal budget and net indebtedness for each governmental unit that year.

The requirements for indebtedness authorisation depend on the origins of the financial resources. In the case of domestic resources, authorisation depends on their own boards⁶ and must be notified to the Finance Ministry. To obtain foreign resources, SOEs need the authorisation of the Finance Ministry from the beginning of primary negotiations. Authorisation is generally granted when debt is necessary and aimed at fulfilling approved government programmes and goals.

Debt liabilities are time limited to a one-year period (i.e. they cannot be charged to previous or subsequent federal budget), unless the Finance Ministry authorises this on an exceptional basis and subjects it to additional regulations, including annual renegotiations and more complex approval and oversight mechanisms. Additionally, SOEs are unable to guarantee debt with their own assets and are legally exempted from any judicial measure for non-payment.

Under the current legal framework, the Federal Government backs up SOE's debt. This support implies that debt liabilities would never result in SOE's bankruptcy nor payment suspension. As an economic agent, the Federal Government uses its reputation to obtain favourable lending conditions not directly related to the SOE's performance or financial capacity. This framework may introduce significant disadvantages for private parties that compete with SOEs in non strategic areas.

Box 5. LIABILITIES RELATED TO INVESTMENT IN INFRASTRUCTURE

In 1996, the government created PIDIREGAS (Projects with a Deferred Impact on Public Expenditure Recording) as an effort to attract private sector involvement in the execution and financing of highly productive public infrastructure projects, primarily in the petroleum and electricity sector.

This scheme has allowed the public sector to carry out public investment projects, while deferring their impact on its fiscal accounts until after the project is completed. In order to obtain congressional approval, projects must be highly strategic and profitable (i.e. returns must more than cover future debt service costs). From the pool of authorised projects (past and present), a private enterprise executes a new or existing project, having obtained the contracts through an open public bidding process. The FCC has participated in evaluating competition conditions in the CFE's calls for tender but has not done the same for Pemex.

5.3 *Subsidies and Transferences*

SOEs can temporally receive non-reimbursable subsidies and transferences from the federal budget for priority facilities and services.⁷ Subsidies are assigned to specific social groups or activities through a government entity to promote priority areas, such as those that provide users or final consumers preferential prices and tariffs. Transfers are awarded to cover SOEs' operational and capital costs associated with maintaining their statutory provision of goods and services. Thus, financial aid allows SOEs to cover any operational deficits they incurred while supplying goods and services, and guarantees their financial viability.

Conditions for the allocation, management and oversight of subsidies and transferences is similar to those applicable to debt (i.e. they follow budgetary laws on an annual basis), and the Finance Ministry must authorise any modification. In 2001, 20.3% of the federal budget was assigned to subsidies and transferences and 31.4% of this figure corresponded to SOEs.

An SOE must follow additional rulings when seeking financial aid including: adopting mechanisms to identify how to adjust or terminate it; justifying its social and economic benefits; looking for alternative financing sources, in coordination with other government bodies, to avoid duplicity; complying with sectoral policies and development programmes; continuing to align itself with specific and explicit targets; finally, aid is time limited to the fiscal year.

5.4 *Price controls*

Products provided by SOEs are subject to price and tariff controls, which are established by the Finance Ministry, considering the opinion of the Ministry of Economics and the corresponding SOE. Price policies could follow several economic and social goals: infrastructure maintenance and expansion,

subsidies to low-income consumers, improvements in the coverage and quality of the services or goods, etc.

5.5 *Procurement and contracting*

Specific federal legislation⁸ and chapters included in international treaties regulate government's procurement, contracting processes, price analysis and assessment, contract modifications, guarantee management, contractual penalties, traffic and management operations, and warehouse control. According to this regulatory framework, all public entities are subject to practically the same dispositions on contracting.

The framework also establishes that contracts must be allocated through public auctions, where the most important selection criteria are technical sufficiency and price. Only by exemption,⁹ and pursuant to the State's best interest, public entities could allocate contracts first through a restricted invitation contest or direct assignation.

In principle, all public contracting must be subscribed with domestic suppliers. International public bidding is allowed when: a) an international treaty compels this or the contract is attached to an international government loan; b) there is no domestic supply or it is insufficient; or, e) there is clear evidence of significant price and efficiency gains. Advertising public procurements internationally has strengthened competition for public contracts. Additionally, international contracts must guarantee a minimum of national employment and inputs, hence it promotes the participation of national enterprises,¹⁰ particularly small and medium ones.

Box 6. INITIATIVE TO AMEND THE PUBLIC PROCUREMENT AND CONTRACTING LEGISLATION

In 2004, the FCC reviewed a bill to amend the existing laws on this matter. One proposal that raised competition concerns was an item that sought to favour small and medium firms (either public or private) over other suppliers, even if these were better qualified. The FCC has pointed out that this measure does not guarantee convenient contracting terms for government entities, and that discrimination based on company size does not respond to economic concerns, and negatively affect a public entity's efficiency. In addition, the FCC has suggested that a way to make social and efficiency goals compatible in the legislation, could be to allow public entities to favour small and medium firms over their competitors if they offered similar conditions (i.e. equivalent qualifications).

5.6 *Accountancy and cost allocation*

SOEs have the obligation to carry out their accounting following general standards and specific rules enacted by the Finance Ministry, which are not always suitable for all market situations.¹¹ The cost of service delivery is recorded as the sum of the applicable direct costs plus an allocated proportion of indirect costs. However, vertical and horizontal integration complicate the task of determining which costs will be included or considered for each service, thus, cost based pricing is difficult.

Only in a few cases, sector regulations establish standard accounting methods for both SOEs and private firms; for example, the natural gas, LP gas and air transport sectors.

5.7 *Information Transparency Obligations*

The Transparency and Information Access Law imposes information disclosure duties for SOEs, not comparable to those faced by their private counterparts. The information obligations include the following:

services offered; budgetary allocation and spending, including subsidies; contracts and contracting terms for acquisitions, leasing, service provision, and public works.

These disclosure duties can have diverse effects on their performance, for instance, public access to valuable commercial information is likely to result in a general loss of SOEs' bargaining position compared with a private enterprise, even for those that do not have substantial market power. For example, public entities that contract public works must show the price and a description of the contracted work, this information can be used to set a parameter for futures bids in a public bidding or to lower the cost of collusion for potential participants in a bid.

**Box 7. BID RIGGING IN PUBLIC AUCTIONS CALLED
BY PUBLIC MEDICAL INSTITUTIONS**

In 2002 and 2003, the FCC sanctioned Juama and GPP, two chemical providers, for bid rigging in auctions called by the ISSSTE (Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado, the social service institute for civil servants) and IMSS (Instituto Mexicano del Seguro Social, the social service institute for formally employed persons) between 1997 to 2001, to acquire x-ray material and chemicals used in the development process.

On these investigations, Juama and GPP argued that the information provided by IMSS included a reference price that made their offers coincide in many occasions. Moreover, the IMSS is compelled to publish the minimum price offered by past auction winners. Nevertheless, this information does not establish reference prices nor the Institute's willingness to pay for in a subsequent bid, nor does it constitute a reference price.

5.8 Bankruptcy

The bankruptcy legislation regulates the bankruptcy process for commercial enterprises. This law does not apply to SOEs that are not structured as commercial entities (e.g. decentralised bodies and public trusts structured as such): their liquidation can only be carried out through an administrative decision.

There is little experience about bankruptcy of public commercial entities, since they are eligible for financial aid to cover their operative deficits each year, guaranteeing them financial viability in priority areas. In terms of competitive neutrality, this poses a major disadvantage to private companies that participate in the same markets.

However, the most common way for SOEs to go out of business is by liquidation, not bankruptcy. According to the SOEs Law, they become eligible for liquidation or merger when they no longer fulfil the aim for which they were created, or if it becomes convenient from a national economic or public interest viewpoint. Therefore, both processes –bankruptcy and liquidation- depend on an administrative decision, and are not strictly related to the SOEs financial viability.

In the case of decentralised bodies, an aspect that places significant problems to them is that the liquidation process must follow the same procedure used for their creation. In practice, the liquidation of SOEs created by executive decree would entail less political restraints than those created by legislation.

5.9 Advantages and disadvantages for SOEs

The legislation applicable to SOEs serves different purposes and confers different advantages and disadvantages for them. The final outcome are situations that contravene, or have the potential to contravene the competitive neutrality condition.

The main examples of conditions that provide advantages for SOEs are the following. First, their position in the reserved markets benefits their participation in competitive markets. Second, the federal government's unlimited backup allows SOEs to contract debt in terms that are more favourable than for their private counterparts for equivalent projects. Third, financial aid to sustain or expand the coverage of social activities could indirectly benefit their position in competitive markets. Fourth, price and tariff controls and subsidies for social activities, as well as a lack of suitable performance reporting and cost allocation methods could lead, in turn, to cross-subsidization.

On the other hand, disadvantages conditions for SOEs are: price and line of business controls that delay timely adjustments to market conditions; budgetary constraints imposed by the government upon SOEs may lead to excessive indebtedness and the corresponding financial costs; and uncompetitive procurement derived from regulations.

6. Final remarks

The participation of SOEs in the Mexican economy has dropped dramatically over last two decades, which has greatly favoured the creation of a more competitive market environment and enhanced the efficient functioning of markets.

However, State monopolies still control key areas of the economy, which continue to impose inefficiencies in the rest of the economy. The two most significant cases are Pemex in the oil industry, and the CFE and LFC in the electricity sector.

Furthermore, in many instances SOEs extend their activities beyond the strategic areas, and coexist and compete with the private sector. Although competition legislation and sector specific regulations do not provide any exceptions or favourable treatments to these enterprises when they participate in non strategic areas, SOEs' specific regulations and corporate governance rules may distort competition. SOEs are managed as conglomerates and do not separated activities in strategic areas from those in non strategic areas. Additionally, their regulations and corporate governance rules do not impose any requirement regarding the stand alone performance of these activities. Therefore, SOEs may have significant advantages over private actors in these non strategic markets.

The FCC has aggressively pursued its mandate contained in the FLEC and has continually challenged anticompetitive conducts by the SOEs. However, in order to truly attain competitive neutrality, it is necessary for SOEs to face similar forces as their private counterparts regarding their economic performance on a stand alone basis, which lies beyond the reach of competition legislation.

To enhance efficiency and promote competitive neutrality the State needs to reform its role as a producer and implement a regulatory framework for SOEs that enhances their response to market forces. Some steps forward can be taken, using the current framework, to instil competition in protected industries, and liberalise rigid SOE control. Internal competition can be incorporated through horizontal and vertical separation and a more performance-based regulation. This structural measure could also pave the way for future public-private competition.

NOTES

1. Article 73 of the Constitution.
2. A constitutional amendment requires an approval by at least two thirds of Congress and by the majority of the states' legislatures (Article 135 of the Constitution).
3. Article 90 of the Constitution. In addition, SOEs are regulated by a specific law (SOEs' Law) that determines the structures that these entities can adopt and the extent of control that the federal government can exercise.
4. Based on available information, commercial SOEs were classified as such based on the nature of their activities and structures.
5. Some Pemex's subsidiaries are subject to the income tax but do not generate significant amount.
6. The SOEs Law establishes that a seat in every board corresponds to a Finance Ministry's representative.
7. In particular, Article 28 of the Constitution states that subsidies may be granted to priority activities if they are temporary, do not affect public finances substantially, and are subject to governmental oversight and evaluation.
8. The Procurement, Leasing and Services of the Public Sector Law, and the Public Works Law.
9. Exceptions to the use of public bidding include cases related to few transactions, exclusive rights (e.g. patents); emergency economic measures; those that guarantee the provision of an endangered social service or are required to keep social order; military or national security matters; cases where transactions are time sensitive or where there are confidentiality constraints or public interest concerns; or when the call for tender for a public bidding process is declared deserted twice.
10. The Ministry of the Economy is authorised to monitor all aspects of a government contract execution related to the minimum level of domestic goods involved in the contract.
11. Rules include account lists to facilitate consolidation, revision and monitoring of the entire public sector's accounting.

NETHERLANDS

Ensuring fair competition by public bodies engaged in commercial activities

1. Focus of the 'market and government'-problem

The relationship between the public and the private sector has been a topic of debate for some years. In the Netherlands, the production and supply of goods and the provision of services is in principle left to private companies which are engaged in free and fair competition.

Sometimes, however, markets do not function as they should. This can jeopardise vital public interests. When this happens, the government may consider intervening. Key reasons for government intervention include the need to improve efficiency by removing the causes of market failure or by ensuring a politically acceptable distribution of income. However, before the government intervenes in the market process, public interests must first be clearly defined. Public interests are social interests for which the government assumes responsibility. Once a public interest has been defined, the government must decide which regulatory instrument is likely to protect it as effectively and efficiently as possible.

The issue of 'market and government' is a key part of the debate concerning the relationship between the public and private sectors. However, it does not include a definition of public interests. That is the responsibility of democratically elected governments. Nor does it define the arguments which dictate which regulatory instruments to apply.

In the Netherlands, the notion of 'market and government' is solely about preventing unfair competition in situations where the government acts in an open market as an entrepreneur or where companies with a public mandate enjoy a privileged position on the commercial market by virtue of their status. The Dutch government is currently preparing a Bill setting out rules of conduct. The aim of these rules is to remove the competitive distortions that lead to unfair competition.

2. The “market and government” problem

2.1 *Introduction*

During the 1980s, the Dutch government was faced with a very high public financing deficit. The resulting reorganisation of public finances led among other things to substantial cutbacks in the funding of government agencies and state-funded institutions. Many of these organisations responded by turning to the market in an effort to make up their revenue shortfalls. This led to positive effects for some organisations. They became more cost-conscious and also sometimes managed to achieve a degree of synergy between these commercial activities and their public mandates. However, they failed to fully appreciate that public organisations operating in the private sphere can have unfair advantages over their commercial competitors. This can in turn distort competition. The growing frequency with which public sector players were becoming active on the market led to a growing number of complaints from business and industry.

2.2 *Public bodies as entrepreneurs*

There are two types of risk associated with public bodies engaged in commercial activities. The first is the risk of unfair competition. The second is the risk of administrative discontinuity and lack of reliability.

2.2.1 *Risk of unfair competition*

Unfair competition can arise when a public body markets goods or services using the competitive advantages it has obtained through its public function. Unfair competitive advantages can include:

- benefiting from the government's image;
- the fact that the government effectively cannot go bankrupt;
- the possibility of cross-subsidisation between the goods and services which the organisation is marketing to third parties in its commercial capacity and the collective funding it is given to carry out its public mandate;
- the fact that the government can provide selective information concerning state-funded commercial entities;
- the ability to use information obtained through a public mandate for commercial gain.

Finally, government agencies or public bodies can also use their public status to give their own public companies an unfair competitive advantage. Examples include using information obtained through their public mandate or the ability to underwrite operating losses.

If a public body with a commercial mandate operates more efficiently than private enterprises without making use of the aforementioned competitive advantages, prosperity will increase. This is because the government will be helping to boost the efficiency of the market concerned. However, if public bodies exploit these unfair advantages then this is more likely to disrupt the smooth functioning of markets. This could in turn reduce prosperity on two fronts. To begin with, efficient private enterprises could lose market share or be forced to suspend certain activities. This would put further pressure on the innovative capacity of the market. Secondly, the tax-payer may have to foot the bill for maintaining inefficient public bodies which act as entrepreneurs.

2.2.2 *Risk of lack of administrative continuity and transparency*

Another risk attached to the commercial activities of public bodies is that of administrative discontinuity. Such situations could result in complex structures which reduce transparency and obscure responsibilities. The public responsibilities of such bodies could also be compromised by the fact that their commercial activities place a disproportionate burden on the resources and capacities available to them. After all, if a public body engages in commercial activities it will inevitably incur commercial risks. This could have adverse financial consequences for that body. These financial consequences could affect the satisfactory performance of its public tasks.

2.3 *Enterprises with a privileged market position*

As well as leading to competitive distortion, commercial activities by public bodies can also generate inequalities on a market if the government affords certain companies a privileged position on that market.

This can occur if they are made responsible for certain public tasks (special or exclusive rights) or are compensated for carrying out their public mandate. 'Compensation' can involve the payment of financial or other resources to cover the costs of performing public responsibilities. These resources, in the form of surplus profit obtained by or pursuant to their special or exclusive rights, or in the form of extra compensation, can then be used on other, open markets. This can lead to competitive distortion on these markets, which could in turn force otherwise efficient enterprises out of business, with a resulting loss of economic prosperity.

2.4 *Scope of public sector involvement in economic activities*

Public bodies sell approximately 16,000 goods and services each year. These activities generate a substantial income. For example, the annual revenue generated by the economic activities of provinces, municipalities and polder boards totals roughly € 2.5 billion per annum. Research has shown that around € 730 million of this total involves a high risk of cross-subsidisation due to the fact that there is no legal or organisational divide between these economic activities and other activities engaged in by the same public bodies. The risk of function overlap is a risk for approximately € 1.25 billion of this turnover.

Public bodies also operate commercially through (financial) participating interests in companies. Central government, the provinces, municipalities and water boards hold a total of approximately 1,900 participating interests in companies. In 2000, the total turnover of all these enterprises was estimated at approximately € 25 billion.

2.5 *Size of enterprises with a privileged market position*

Enterprises to which the government has transferred certain public tasks can generate significant amounts of revenue. The General Chamber of Audit has calculated that legal entities with a statutory public mandate generate some € 109 billion in turnover. The non-profit sector accounts for more than 12% of total employment. These non-profit enterprises give a good indication of the size of semi-public enterprises with a privileged market position.

2.6 *Complaints from the private sector*

Approximately 250 complaints have been submitted to the Ministry of Economic Affairs from private enterprises since 1998. These complaints are wide-ranging. They include reports of municipal services tendering at below cost price for the collection of industrial waste (cross-subsidisation using revenue from tied customers), products and services sold at below cost price by sheltered workshops, provincial and municipal engineering consultancies and provincial and municipal archive services, and garden maintenance for private entities by municipalities and the leasing of conference and meeting venues, recreational and sports facilities also tendered at below-cost price. The Dutch Competition Authority (NMa) has received approximately 100 such complaints since 1998.

At first sight, the number of complaints would seem to be relatively low. However, it should be remembered that companies tend to think twice before submitting a complaint against the government, since they are aware that they are also dependant on that government in other ways. So the number of complaints submitted merely represents the tip of the iceberg. This reluctance to make a complaint is in some ways similar to the hesitation shown by enterprises in submitting complaints concerning tendering procedures that have not been correctly applied. Here, too, there is often an element of restraint due to a dependency relationship with the public body concerned, which entrepreneurs are unwilling to jeopardise.

3. No real solution to the 'market and government'-problem

3.1 Introduction

At the end of 1995, the then government appointed a working group to study the 'market and government'-problem and to put forward possible solutions. In early 1997 the working group proposed a framework for tackling the issue. This framework effectively consisted of a system of prohibitions. Public bodies would in future be prevented from engaging in subsidiary (secondary) commercial activities, except in a few instances.

In September 1999, the Socio-Economic Council (SER) advised the government of the need for a statutory regulation on the subject. Unlike the working group, the SER felt that a blanket ban on commercial activities by public bodies would be too draconian. It therefore suggested a variant which would allow commercial activities, provided there was a statutory basis for doing so.

In 1999 the government indicated that it would use the SER recommendation as a basis for the introduction of a Market and Government Bill (see chapter 4). The government agreed with the 'market and government'-working group and the SER that the existing instruments did not adequately address the problems relating to public bodies engaged in commercial activities (see sections 3.2 – 3.6).

3.2 Instructions

Based on the report compiled by the 'market and government' working group, the prime minister introduced a series of internal, binding rules for central government institutions: *Instructions for the performance of market activities by central government organisations* (which took effect on 1 July 1998). The basic premise underlying these Instructions is that market activities can only be performed if they have been entrusted to a public body by or pursuant to a statutory regulation or if they are based on international commitments. Permissible market activities are in principle covered by the government's rules of conduct. These rules of conduct include an integrated cost allocation, a profit increment and a corporation tax and sales tax increment. A study has shown that these Instructions operate relatively satisfactorily when applied to central government organisations.

However, the prime minister cannot by definition apply this code to other levels of government since he does not have the authority to bind them to this policy. Yet private enterprises at regional and local level can also be confronted by public bodies that engage in commercial activities and hence enjoy benefits denied to the private sector. The Instructions drawn up for central government cannot by definition be used to solve this problem. Moreover, due to their nature, they cannot in principle afford rights to third parties, nor are they enforceable in respect of these parties.

3.3 Civil Code

In some cases, the Civil Code may provide a solution to perceived anti-competitive behaviour by the government in a commercial capacity. This could include in the first place, assessing behaviour against the general principles of good governance. However, such appraisals do not provide an adequate or long-term solution to the problems of commercial enterprise by public bodies. It is not clear in advance, either to local and regional authorities or to private enterprises, which standards the government should apply. The principles of good governance only offer very general guidelines for government conduct and can only clarify retrospectively whether or not the government has been guilty of unfair competition. This could result in lengthy and costly legal procedures.

Under certain circumstances, the Civil Code can also be used to define specific commercial practices as unlawful. This could occur if certain rules that apply to private enterprises were to be waived for public

or semi-public bodies. Exploiting the specific benefits enjoyed by public bodies could also constitute unlawful behaviour.

3.4 *Competition Act*

The main provisions in the Competition Act that are relevant to this issue are the ban on anti-competitive agreements, the ban on the abuse of positions of economic dominance and (ex ante) merger controls. These Articles also apply to public bodies engaged in economic activities. However, in its current form, the Competition Act cannot provide a structural solution to the specific problem of public bodies engaged in commercial activities. Only under certain conditions could the Competition Act therefore be used to curb certain activities. One such instance would be if a public body were to deliberately exploit a position of economic dominance which it has acquired on a particular market in order to squeeze another operator out of the market, for example by offering goods or services far below its own marginal costs. However, this is not likely to occur very often. It will also be very difficult to prove.

3.5 *State aid*

The term 'state aid' is defined as the selective granting of certain privileges to enterprises in a particular sector. This aid includes not just support from central government but all the support provided by regional and local governments and public enterprises. The Netherlands does not have a specific regulation governing state aid. The only applicable rules are EU regulations. Because EU regulations governing state aid relate to situations involving interstate effects and are primarily geared to tackling effects that occur on the internal market, they are not suitable for addressing competitive distortion on national or regional markets. Moreover, by no means all public bodies engaged in commercial activities are in receipt of state aid. Nor is it clear in advance under what circumstances using public funds for own commercial activities can be regarded as state aid.

4. *The first Market and Government Bill*

4.1 *Content of the Bill*

The first Market and Government Bill was presented to the Second Chamber in October 2001. The purpose of the Market and Government Bill was to introduce enforceable regulations governing the market activities of public bodies and the commercial behaviour of public bodies and (semi)public enterprises which have been afforded a privileged market position.

4.1.1 *Market entry*

The Bill proposed a series of rules governing the market entry of public bodies. These rules were to apply whenever a public body was considering engaging in market activities. A formal basis was required to justify these market activities. Public bodies could also enter a market via a participating interest in a public enterprise. The need for a formal basis therefore also applied to the establishment of, or participation in, state-owned companies. In each case, public bodies would only be allowed to enter the market once the pros and cons had been explicitly weighed up. This included assessing the likely impact of entry on the market itself and on the interests of private enterprises. The rules of entry would be enforced through the ability to submit objections and appeals against decisions.

4.1.2 Market behaviour

The Bill also proposed a series of regulations governing the commercial behaviour of public bodies, research institutes and enterprises with exclusive or special rights. These rules of conduct were designed to help private enterprises to counter the (potential) negative effects of market activities by public organisations. Accounting regulations were also proposed to support the code of conduct. The NMa was to be responsible for enforcing the code of conduct.

4.2 Criticism of the Bill

The Market and Government Bill was criticised in various quarters. Broadly speaking, the following criticisms were made:

- Lack of clarity concerning its scope, partly due to confusion about the term ‘market activities’.
- Dissatisfaction concerning the heavy restrictions placed on the autonomy of governments and the high associated administrative and management costs.
- The risk of ‘over-legalising’ public administration.

Due to all criticism, in February 2004 the current government formulates an alternative approach to resolve the 'market and government'-problem. In April 2004 the government withdrew the Market and Government Bill.

5. The alternative approach: the second Market and Government Bill

5.1 Aim and scope of the alternative approach

The alternative approach is designed to lead to a *second* Market and Government Bill prescribing rules of conduct for governments engaging in economic activities and for enterprises whose status affords them a privileged market position. The rules of conduct will be part of the Competition Act. The NMa will supervise its enforcement.

The aim of the alternative approach is to equalise as far as possible competitive relations between public bodies engaged in commercial activities and enterprises in a privileged market position on the one hand and (other) private enterprises on the other.

Broadly speaking, there are two target groups:

- public bodies engaged in economic activities or which are active on the commercial market via a public enterprise. The definition of ‘economic activities’ is derived from competition law;
- enterprises in a privileged market position.

5.2 *Rules of conduct governing public bodies*

5.2.1 *Ban on cross-subsidisation*

The first rule of conduct states that public bodies must set prices for economic activities in such a way that these combined economic activities are at the very least cost-effective. This means that all costs must be on-charged. It is not necessary for each activity to be individually cost-effective, since the costs of different activities can be offset internally (by analogy with the private sector). There is consequently no reason to limit public bodies in this regard. Cross-subsidisation *between* economic activities will therefore continue to be permitted.

The term 'costs' includes not just salary and personnel costs and the direct costs of equipment, but also the costs of means of production. 'Means of production' also includes capital. If this is borrowed capital, then these costs are directly and clearly attributable. These financing costs must be wholly on-charged. In order to create a level playing field with private enterprises, public bodies must also take into account their equity financing. A percentage based on the effective yield from government loans has been chosen as an appropriate level of compensation to cover commercial risks.

Under certain circumstances, the mandatory on-charging of all costs could compromise the organisation's performance of its public mandate. After all, the ability to offer goods and services at below cost price could be the reason why the public body is engaging in economic activities in the first place. It may, for example, enable a wider distribution of the good or service in question, which may accord with the organisation's public mandate. It has therefore been decided that in situations where the ban on cross-subsidisation hinders the performance of the organisation's public mandate, it will be waived.

5.2.2 *Ban on the exclusive use of data*

The second rule of conduct relates to the use and supply of data. The ability to use information to which others do not have access is often of great value in the ability to operate on a commercial market. One unfair competitive advantage in this regard is the use of data by public bodies, since in order to exercise their public mandate, these organisations gather information which is or may not be available to third parties in that form. These can include personal files. They can also take the form of more factual files such as geological data on mineral resources.

Data covered by a confidentiality clause may not be used for the performance of economic activities. If this ban is not applicable, then a public body may only use data obtained by virtue of its administrative authority for economic activities if that data (in a processed or unprocessed form) is also available to third parties under similar conditions.

This ties in with the Directive on the re-use of public sector information (Directive 2003/98/EEC, Official Journal L 345/90). The aim of this Directive is to create an overall framework for conditions governing the re-use of public documents. Such documents must be made available for re-use in a fair, balanced and non-discriminatory way.

5.2.3 *Ban on combining segregated tasks*

The third rule of conduct is a ban on combining segregated tasks. In other words, tasks and competencies relating to economic activities and the performance of administrative tasks that are to some extent related to these activities should not be carried out within the same part of the organisation. Private enterprises have frequently complained about this. After all, the fact that a public body engages in economic activities for which it is also the grant-issuing authority can give potential customers the

impression that the body in question is of exceptional quality and reliability. Other market players cannot match such a competitive advantage, no matter how reliable they are or how good their product is.

5.2.4 Ban on preferential treatment for public enterprises

The fourth rule of conduct prohibits public bodies from giving preferential treatment to public enterprises. This makes it possible to limit potential competitive distortion by such public enterprises. The ban covers all forms of preferential treatment. In particular, public enterprises are prohibited from using the name and trademark of the public body, to avoid confusion concerning the origin of goods and services.

Tax regulations also play a role in equalising competitive relations between public enterprises and commercial players. These measures are considered in conjunction with the alternative strategy, but do not form part of them.

5.3 Rules of conduct governing enterprises with a privileged market position

Enterprises with a privileged market position are covered by two codes of conduct.

5.3.1 Ban on cross-subsidisation

The first rule of conduct is a ban on cross-subsidisation between activities arising from the special position enjoyed by the enterprise and the other activities these enterprises engage in on the market.

5.3.2 Ban on the exclusive use of data

The second rule of conduct is a ban on the exclusive use of data which the enterprise has obtained by virtue of the rights it has been afforded or the tasks with which it has been invested. This provision is virtually identical to the rule of conduct governing public databases managed by public bodies.

5.4 The alternative approach as a response to criticisms

The alternative approach satisfies the criticisms of the first Market and Government Bill cited in the previous chapter:

- The scope of the regulations is now clearer. The alternative approach seeks to tie in with the existing definitions and terms applied by the Competition Act, for example the definitions of 'enterprise' and 'economic activity'.
- The proposed obligation on public bodies to demonstrate that engaging in market activities is the most appropriate way to protect public interests will be withdrawn. This will substantially reduce administrative costs for governments.
- The risk of 'over-legalising' public administration is strongly reduced: the proposed requirements relating to decision-making to perform market activities will be withdrawn.

6. Evolution of thinking on public sector activity in the commercial sphere

The basic premises on which thinking about public sector activity on the commercial market is based have not changed much over the past decade. The need to avoid unfair competition by public bodies has never been questioned. The various solutions put forward, however, have changed.

To begin with, the alternative approach does not in any way regulate the market entry of public sector bodies. The decision of whether or not to enter the market is entirely up to the (democratically elected) public body itself.

Secondly, the scope of the 'market and government'-problem has widened. The 'market and government'-working group, for example, looked mainly at secondary commercial activities carried out alongside the public mandate. The recommendations of the SER and the first Market and Government Bill did not make provision for this restriction. Both stated that private enterprises could be adversely affected by any market activities, regardless of whether they were a primary or a secondary activity. The alternative approach broadens this scope slightly further, in that it relates to all economic activities rather than to market activities alone. The main difference between the two is that market activities involve competition with third parties. In the case of economic activities, the competition aspect is irrelevant.

7. Conclusion

The 'market and government'-problem has its origins in the 1980s, when many public bodies responded to government cutbacks by turning to the market. This led to competitive distortion. The current state of public finances is fairly similar to that of the early 1980s. We are again on the verge of a major retrenchment of the state budget. It is therefore quite possible that public bodies may seek to offset part of their loss of income by engaging in commercial activities. This will again present a risk of competitive distortion. The rules of conduct on which the alternative approach is based are designed to ensure that history does not repeat itself.

The purpose of the rules of conduct on which the alternative approach is based is to equalise as far as possible competitive relations between public bodies engaging in commercial activities and enterprises afforded a privileged market position on the one hand, and (other) private enterprises on the other. These regulations will, wherever possible, help to remove potential competitive distortions caused by unfair competitive advantages. This will strengthen the position of private enterprises and increase their commercial scope, thereby boosting the innovative capacity of the Dutch economy. After all, a level playing field between public bodies and private enterprises is in principle the best way to increase prosperity.

NEW ZEALAND

Introduction

This paper outlines New Zealand's response to the invitation to make a written contribution to the June roundtable on regulating market activities by the public sector. The paper summarises New Zealand's public sector reforms and briefly discusses measures adopted to provide for competitive neutrality between public and private service providers. The remainder of the paper looks at the interface between New Zealand's competition law and the public sector.

1. New Zealand public sector reforms

1.1 *Period 1984 – 1999*

It was decided in the 1980s that certain areas of the economy should no longer be subject to the shelter and protection of regulation, including many parts of the public sector. This aimed to increase the standard of living of New Zealanders as a whole, in the face of increased competition both within markets in New Zealand and from overseas. It was recognised that if the government wanted to have a public sector capable of producing high quality advice, and that manages its own affairs on a basis comparable with the private sector, then major changes in the nature of public sector administration would be needed. From 1984-1994, a range of public sector reform was fairly rapidly implemented.

The purpose of the reforms was to significantly improve the performance of the public sector. This was done firstly by removing any functions that the government considered should no longer be functions of the state, or that could be carried out better elsewhere. Secondly, the reforms aimed to ensure that agencies that should still carry out public functions are run in a way that encourages them to produce outputs as efficiently and as effectively as possible.¹

Key elements of the reform process have included:²

- The corporatisation and, as appropriate, privatisation of government trading enterprises;
- Departmental restructuring to rationalise the functions and shape of the core Public Service, particularly by separating policy advice, service delivery and regulatory functions, and related to this the separation of the roles of funder, provider and purchaser;
- Some of the service delivery functions have been moved to a group of non-departmental agencies known as Crown entities;
- Decentralisation of departmental management with chief executives responsible for decision-making with respect to human resources and the selection and purchase of inputs;
- An increased use of contracts (e.g. performance agreements between Ministers and departmental chief executives, purchase agreements between Ministers and departments, contracts between funders and purchasers and between purchasers and providers); and

- A change in the basis of State sector financial management through the introduction of accrual accounting, from a focus on inputs to a focus on outputs and outcomes.

Through these reforms the limits of government activity were redefined. The provision of contestable services by government was opened up to competition, in some cases being outsourced, transferred to a new form of entity such as a State owned enterprise (SOE), or transferred to the private sector altogether. Accompanying this reform was a shift from industry-specific regulation to generic competition and fair trading regulation, which did not discriminate between entities. These reforms were based on the principles of competitive neutrality for public and private service providers.

The reforms have been highly successful in improving the efficiency and performance of the public sector.

1.2 *Structure of government business activities*

3. There are broadly four types of institutions within the state sector that can undertake commercial activities.

- Government departments – these mainly relate to policy advice and maintaining the machinery of government, including standard setting and purchasing. However, government departments also carry out core governmental functions such as police, justice, corrections, customs, national parks, defence and social welfare. Typically they deal with government issues and objectives that are complex and difficult to specify and measure, or may need to be changed frequently. Close Ministerial oversight of performance is therefore necessary to ensure government objectives are met.
- Non-company Crown entities - There are also a wide variety of non-company Crown entities, which may engage in trade to varying degrees. These entities generally do not have a profit objective. They carry out activities for which the public requires confidence regarding independence from government for decision-making, or require specialist skills or abilities to undertake specific functions. Such entities may have exclusive or privileged rights in some of the markets in which they operate. Examples of these entities include the Accident Compensation Corporation (which is the sole provider of accident insurance), the Public Trust Office (which is a trustee corporation and Crown entity offering legal and financial services to New Zealanders) and District Health Boards and Tertiary Education Institutions.
- Crown-owned companies – There are also a range of Crown-owned companies, which are generally specialised in their activities and most have a mix of public policy and commercial objectives. Such companies are subject to the generic Companies Act 1993, but also have specific legislation outlining additional accountability arrangements and legal authorities. Examples of companies within this category include Crown research institutes (Crown-owned companies that undertake scientific research for the benefit of New Zealand) and Radio New Zealand.
- State owned enterprises (SOEs) which are subject to the State-Owned Enterprises Act and are expected to function very much like and in competition with private business enterprises. SOEs are charged with achieving a commercial return on the government's equity investment. They account for approximately 90% of the Crown's total equity in Crown companies and for virtually all of their dividends. Several SOEs have been divested, such that by the mid-1990s New Zealand was one of the leading privatisers. There are currently 17 SOEs operating in the media, agricultural services, postal, land management and energy sectors.

There are also a small number of companies in which the Crown has a majority or minority ownership interest, but which are commercially orientated. For example, the government has an ownership interest in the national carrier Air New Zealand (a private sector company).

Regional and local government is similarly structured with an institutional separation of contestable and non-contestable services. The main regional or local government trading enterprises are a subset of council-owned organisations and are companies also subject to the Local Government Act.

1.3 Measures of government business activity

Any measures of the extent and type of government business activity by the Crown and Crown corporations is subject to definitional difficulties. For example, one indicator of business activity is the extent of government procurement. In 1999-2000, 40 government departments spent \$1.867 million on goods and services. Crown-owned entities, including health and education entities but not SOEs, spent a further \$3.5 billion on goods and services.

Another measure focuses on government organisations that compete with the private sector as commercial enterprises. The net worth of SOEs, Crown entities and Air New Zealand limited for the year ended 2003 was \$33.454 million. Assets owned by these bodies totalled \$35.454 million.³

1.4 Post 1999

Since 1999, privatisation of State assets has ceased and there has been a reassessment of accountability arrangements to deliver the government's goals. This shift in focus has not been articulated in a clear and consistent way, but it is implicit in a number of more recent government decisions.⁴

For example, Television New Zealand (TVNZ) is the country's principal free to air television broadcaster. Until recently, TVNZ was an SOE and operated as a commercial business. The government's focus was on generating maximum revenue that, in turn, saw TVNZ take a very commercial approach to program content. Many New Zealanders saw this as an abandonment of the role of a public broadcaster.

In 2003, the government introduced a broadcasting charter requiring TVNZ, among other things, "to feature programming along all genres that informs, entertains and educates New Zealand audiences" and "to feature programming that serves the varied interests and informational needs and age groups within New Zealand society, including tastes and interests not generally catered for by other national television broadcasters". There is also a strong emphasis on participation of Māori and the presence of a significant Māori voice.

TVNZ has been shifted from an SOE to a Crown-owned company. The impact of these changes on TVNZ and its ability to reconcile commercial imperatives with its charter obligations are still to be assessed.

However this shift in focus does not translate to a reversal of the past public sector reforms, which are widely regarded as being successful. The Crown Company Monitoring and Audit Unit (CCMAU) charged with oversight of Crown entities is continuing to explore means for greater non-financial accountability of these bodies in a complex and changing environment.

2. Applying Competitive Neutrality Principles

New Zealand does not have a formal policy of competitive neutrality, but the public sector reforms outlined were strongly based on competitive neutrality principles. In practice, at a legislative and SOE

policy level, there is strict adherence to the principle and SOEs compete on a neutral basis with the private sector.

The following is a brief discussion of some of the elements of these reforms.

2.1 *Separation of commercial and regulatory functions*

The government's regulatory role is separated from its shareholder responsibilities. CCMAU is established as the government's adviser on ownership issues and this agency sits apart from other policy advice departments.

While the Government is aware of the effect of regulation on its ownership interests in SOEs, regulatory policy is driven by efficiency considerations for the economy as a whole. Regulations are developed typically on a generic or sectoral basis and apply to companies irrespective of ownership. SOEs must conform to the regulatory powers and laws established by the Government in the same manner as the private sector.

If the Government wishes an SOE to undertake a function which is non-commercial, the SOE Act provides that it can instruct the SOE to do so, but must make a payment to the SOE reflecting the cost of that service.

2.2 *Government procurement*

New Zealand has adopted a government procurement policy that ensures open and effective competition in the supply of goods and services to the public sector. The government has set out its expectations in a handbook, "Government procurement in New Zealand", which is available on the Ministry of Economic Development website (www.med.govt.nz).

The principles outlined in this handbook are consistent with the 1999 APEC Non-Binding Principles on Government Procurement, relating to transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. They provide that public bodies are free to choose their supplier, without favour to any Crown-owned providers.

2.3 *Commercial management*

Crown companies are also subject to the generic Companies Act, which requires each board, among other things, to:

- Prepare annual accounts and submit them to annual shareholders' meetings;
- Comply with solvency requirements;
- Comply with directors' duties;
- Hold annual general meetings;
- Present special resolutions to shareholders when necessary (for example, a resolution for the approval of "major transactions")
- Manage the company's business affairs.

However, Ministers recognise that SOEs do not face some of the capital market disciplines that publicly listed companies face (e.g. they are not subject to take-over). For this reason Ministers are keen to:

- Control the scale and scope of SOE activities as a strategic level so as to avoid the inappropriate diversion of management attention from core activities into areas where there is less expertise. To this end, core business is defined in Statement of Corporate Intents (which are publicly available) and develops over time through a process of negotiation between SOE boards and shareholders. Of critical importance are the matters that SOE boards need to consult or seek shareholder approval over. Proposals by SOEs to expand their business are considered on the merits of the individual business cases.
- Place appropriate financial disciplines on SOEs by ensuring that they have an appropriate capital structure that is consistent with value maximisation. For example, if debt and dividend levels are too low then this can encourage diversification and investment into areas with low rates of return. Conversely, if debt levels are too high, then this can mean that necessary and value adding investment in the business may not be made. Shareholders periodically review the balance sheets of SOEs to determine whether their capital structures are appropriate.
- Improve SOE shareholder relationships by improving director appointment processes, clarifying commercial performance expectations (i.e. earnings at least meet WACC), and encouraging performance pay through using such tools as Economic Value Added benchmarks. In particular, experience has shown that appointing boards of directors with the appropriate skills and experience needed is critical to the success of SOEs.

The government has also specifically defined its commercial expectations relating to its ownership interest in SOEs. The key elements of this ownership policy require SOEs to:

- achieve a rate of return greater than the estimated risk-adjusted cost of capital, i.e. shareholder value is being created;
- maintain an appropriate capital structure, consistent with commercial best practice and their anticipated capital requirements;
- only borrow from the private sector and such borrowing is not implicitly or explicitly guaranteed;
- have a dividend policy that facilitates the return of free cash flows and the maintenance of an appropriate capital structure;
- maintain a realistic commercial valuation of the Company; and
- ensure scope of business is well defined, and management focus is consistent with that definition.

This ownership policy explicitly excludes Ministers from being involved in SOE commercial operations. The government has no involvement in pricing, employment numbers or terms, and product design, production and means of production. These elements are designed to ensure that SOEs are commercially orientated and compete on a level playing field with private enterprises.

CCMAU is established to manage the Crown's ownership interest in these entities and ensure appropriate accountability. SOE performance targets are transparent, public and set ex-ante with regular reporting and accountability for performance against them. Monitoring includes independent audit,

Parliamentary Select Committee oversight, and monitoring agencies (e.g. Ombudsman, Commissioner for the Environment) that advise Ministers about performance.

2.4 Financial reporting

Public sector accountability was strengthened with the implementation of the Public Finance Act 1989 and the Financial Reporting Act 1993, which require central and local government to adopt full accrual accounting and comply with generally accepted accounting standards. Accounting rules are made by a Crown entity independent of Ministers, which adds to the integrity and credibility of the regime.

These measures have greatly improved the quality of financial reporting and have enabled transparent costing of goods and services in comparison with the private sector.

2.4.1 Taxes

State owned enterprises, Crown research institutes and council-controlled organisations (that are companies, or have trade activities) are subject to income tax in the same manner as private trading enterprises.

Other income derived public authorities and local authorities may be exempt from tax. A public authority is defined as “an instrument of the Executive Government of New Zealand”. The main test for determining whether a Crown owned company or a Crown entity is an instrument of the Executive Government is that of control (i.e. the nature and degree of control exercised over the body by Ministers and other central government agencies). Another, less prominent, test focuses on the function of the body. In some cases, the legislation establishing a Crown-owned company or Crown-entity will deem the organisation to be a public authority to avoid doubt about its tax status.

State owned enterprises, Crown research institutes and council-controlled organisations (that are companies, or have trade activities) are also subject to goods and services tax (GST). Public authorities and local authorities are subject to GST on deemed supplies. Public authorities are deemed to supply goods and services where any amount is brought to charge by as revenue from the Crown for the supply of outputs. Local authorities are deemed to supply goods and services to persons who are liable to pay rates, or to persons who are required to make a contribution that is a condition of a resource consent.

2.5 Cost of capital

Crown companies, including SOEs, are required to pay a cost of capital, which is calculated to minimise distortions with private sector financing. A detailed discussion of how this cost is calculated is contained in a handbook – “Estimating the Cost of Capital for Crown Entities and State-Owned Enterprises” (October 1997), which is available on the Treasury website. Borrowing is from the private sector at market rates.

Government departments are also subject to a capital charge.

2.6 Further information

Further information regarding management of Crown companies and SOEs is available on the CCMAU and Treasury websites – www.treasury.govt.nz and www.ccmau.govt.nz.

3. Application of Competition Law to Government Business Activities

A competitively neutral environment requires that government agencies should not enjoy competitive advantages over the private sector simply by virtue of being government-owned. One aspect of competitive neutrality is ensuring that the regulatory environment is neutral. This includes trade practices law.

The Commerce Act 1986 (“the Act”) is the central pillar of New Zealand’s competition legislation. Its purpose is to promote competition in markets for the long-term benefit of consumers in New Zealand. The Commerce Act furthers competitive neutrality principles by making sure that competition law applies to the Crown just as it does to private sector entities. Essentially the law is the same for all those who are in trade, whether they are government organisations or not. This is one of the major strengths of the Act.

The Act’s application to the public sector is discussed below.

3.1 *Application to Crown engaging in trade*

The starting point for the Commerce Act’s application to the public sector is section 5, which says the Act “shall bind the Crown insofar as it engages in trade.” If the Crown is engaged in trade for certain activities, then it is subject to the Commerce Act in relation to those activities. The Crown is regarded as all government and quasi-government bodies other than Crown Corporations.

Section 5 is further elucidated by legislation and case law. “Trade” is defined in the Act as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services, or to the disposition or acquisition of any interest in land. The Courts have interpreted the phrase “engaged in trade” has meaning “carrying on trade”. This means the Crown must be doing more than just carrying out activities that affect trade, to invoke the application of the Act.⁵

The trading functions of the Crown will be subject to the Act; its administrative and regulatory functions will not. Generally, however, Crown Corporations (instruments of the Crown that are engaged in trade) carry out trading activities of the Crown. Any Crown Corporation is subject to the Act under section 6. Unlike the Crown itself, when a Crown Corporation is engaged in trade its whole sphere of activity becomes subject to the Act, not just its trading activities.

The Crown is subject to almost all the same penalties as private sector organisations, including third party damages actions and other Court orders. The only penalty to which the Crown is not subject is a pecuniary penalty payable to itself, which is clearly ineffective.

Examples of Commerce Act proceedings against the Crown:

Glaxo New Zealand Ltd v Attorney General (1990) 3 TCLR 703:

The Minister of Health had a statutory power to fix the level of pharmaceutical subsidies. Glaxo developed an antibiotic. The Minister determined that the subsidy would only be available for antibiotics supplied to consumers through a hospital pharmacy. The effect of the decision was to severely limit sales. Glaxo brought proceedings under the Commerce Act, on the basis that the Minister was engaging in trade and breached one of the restricted trade practice decisions under that Act. The action was struck out by the High Court on the basis that the Act only applies when the Minister engages in trade. Here, she was not. This decision was upheld by the Court of Appeal, who said that while this decision had commercial effects, the activity itself is merely the exercise of regulatory functions that are directed toward improving social welfare. The Commerce Act can only apply to the commercial functions of the Crown, not regulatory functions.

Proposed alliance between Air New Zealand Ltd and Qantas Airways Ltd (Commerce Commission Decision 511):

On 9 December 2002 the Commerce Commission received two interdependent applications from Air New Zealand and Qantas. Air New Zealand is approximately 80% owned by the New Zealand government. The government did not intervene in the Commission's decision, and made it clear that if the merger was to proceed then it would have to meet all the usual competition and regulatory criteria. The Commission declined to grant authorisation as the detriments clearly outweighed the benefits.

3.2 Exemption for specifically authorised trading activities

Section 43 has the effect of removing from the jurisdiction of the Act any act, matter or thing that is specifically authorised by any enactment, or Order in Council made under any Act.

An enactment or Order in Council that provides for an activity in general terms, notwithstanding that it is subject to approval by a higher body, does not provide specific authorisation. An act, matter or thing is specifically authorised if there was a statutory authorisation of the very act in question; or it is one of a class of authorised acts, the preponderant majority of which would contravene the Act if not authorised.⁶ In order to qualify for the exemption, the enactment has to be particular about the nature and limits of the act, matter or thing that is being authorised.

The strict application of the section 43 exemption from the Act means that Parliament will have to consciously make a decision on public policy grounds that an act will not be covered by the Commerce Act. Almost all central government trading activity is subject to the Act, with the exclusion of a limited number of mainly purchasing arrangements.

Example: *Injury Prevention, Rehabilitation, and Compensation Act 2001, section 305 - Joint purchase arrangements for emergency transport services.*

Parliament has specifically authorised the Ministry of Health and District Health Boards to collaborate to jointly purchase emergency transport services. This exemption deals with a concern that separate purchasing of emergency ambulance services for accident victims as opposed to emergency transport for disability or illness patients may have resulted in co-ordination problems and poor service.

3.3 *Local government*

The Commerce Act applies to local government because sections 27, 30 and 36 of the Act (which make certain anti-competitive practices illegal) prohibit any “person” from undertaking them. “Person” is defined in section 2 of the Act as including a local authority. As local authorities have become increasingly involved in trade over the last several years, the Act has had an increasing impact on them.

Local government cannot invoke the section 43 exemption for its trading activities if it passes bylaws that cover the activity in question; the Commerce Act applies to it notwithstanding such bylaws. Statutes such as the Local Government Act 1974, the Resource Management Act 1991 and the Health Act 1956 also apply to local authorities. The Commerce Commission has taken the view that these and other statutes are unlikely to provide local authorities with specific authorisation for its trading activities under s 43. They are therefore still subject to the Commerce Act.

Local authority trading enterprises provide a wide range of services, including parks and recreation, public transport, water, and waste disposal. Two examples of proceedings by the Commerce Commission involving local authority trading enterprises are outlined below.

Red Bus Ltd and Leopard Coachlines Ltd (Decision 467).

Red Bus is a wholly owned subsidiary of Christchurch City Holdings Limited, which is a Local Authority Trading Entity owned by the Christchurch City Council. Red Bus and Leopard both operate various bus routes in the Christchurch and surrounding areas under contracts granted by Environment Canterbury, the Canterbury Regional Council. Red Bus sought clearance to merge Leopard’s urban bus route business with its own existing business. The Commerce Commission declined the application as it could not be satisfied that the acquisition would not lead to a substantial lessening of competition within the market for the rights to operate scheduled, subsidised bus passenger services in Christchurch and Timaru.

Port Nelson Ltd v Commerce Commission [1994] 3 NZLR 435:

Port Nelson was owned in two 50% shares held by the Nelson City Council and the Tasman District Council, both territorial authorities. The Commerce Commission successfully brought proceedings against Port Nelson in relation to its provision of harbour services. The Court of Appeal found that Port Nelson had breached the Commerce Act: there was a contract, arrangement or understanding that substantially lessened competition, and Port Nelson had been misusing its dominant position in the market.

3.4 *Sections 2(7) and (7A): interconnected bodies corporate*

Under section 2(7), any two bodies corporate are to be treated as interconnected if one of them is a body corporate and the other is its subsidiary, or both of them are subsidiaries of the same body corporate. Company A will be a subsidiary of company B if company B controls the composition of company A’s board of directors, or holds more than half of the nominal value of its share capital; or if company A is a subsidiary of another subsidiary of company B. If two entities are interconnected, they are treated as a

sing entity under the Act for the purposes of the prohibitions against anticompetitive arrangements. These means interconnected entities are able to make arrangements between each other, such as in respect to price, that would otherwise be anti-competitive under the Act.

However, under s 2(7A), no body corporate is to be regarded as a subsidiary of the Crown. This means that Crown organisations cannot make arrangements between themselves with impunity under the Act. An exception to this is publicly owned health and disability organisations and their subsidiaries, which in some cases would be considered interconnected bodies corporate. State owned enterprises and other Crown organisations engaged in trade are subject to the Act and may be liable if they make anti-competitive arrangements with each other.

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| For example: There are three major electricity generators that operate as SOEs - Mighty River Power, Meridian Energy and Genesis Power. They are in competition with each other, and are not interconnected by reason of being subsidiaries of the Crown. They therefore cannot make anti-competitive arrangements between them despite being commonly owned by the Crown. |
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NOTES

1. OECD 1999 *Government Reform: Of Roles and Functions of Government and Public Administration – New Zealand* at www.oecd.org/puma/country/newzland.htm#Reports, p 4.
2. OECD, above, p 5.
3. Financial Statements of the Government of New Zealand for the Year ended 30 June 2003.
4. Turn of the Century Change in New Zealand's Public Enterprises, Peter McKinlay, 2001.
5. *Glaxo New Zealand Ltd v Attorney-General* (1990) 3 TCLR 694, adopting the Commerce Commission's decision in *Re NZ Medical Assn* (1988) 7 NZAR 407.
6. *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158.

SWEDEN

1. Summary and conclusions

4. This contribution contains a description of Sweden's experience of problems relating to competition between public and private actors. It includes references to the directives on procurement and transparency applicable within the European Union. Key findings related to this paper are:

- Distortion of competition by public sector operators is an important problem in that it hampers economic growth in the long term.
- General competition legislation can only remedy these competition problems to a limited extent.
- Strict enforcement of existing regulations and additional solutions must be sought.
- Effective enforcement is held back by conflicting interests.
- It is essential to address these issues. Failure to do so may lead to well-fare losses, e.g. reduced confidence in public institutions and increased risk premiums for private operators.

5. In our view, the importance of this topic merits a follow-up of this round-table. We therefore invite the Competition Committee to consider including it on the work program of the Committee.

2. Introduction

6. Problems arising from competitive business activities pursued by actors within the public sector have been discussed in Sweden for a number of years. Previously, the focus of this debate has been on problems relating to publicly owned companies. Necessary legislative reform, however, chiefly concerns problems relating to actors such as municipalities, county councils and national agencies. Over a period of many years, Sweden has developed a central administration characterised by relatively small ministries and large independent authorities. Municipalities enjoy a very high degree of independence. In Sweden, public actors of this kind – alongside their exercising of public authority – also pursue competitive business activities to a relatively great extent.

7. This problem is accentuated by the fact that the public sector constitutes a very large part of the Swedish economy. According to estimations made in the year 2000, Sweden had the lowest level of population employed in the private sector in the entire European Union, amounting to only 68 % compared to the EU average of 76 %. Measured as a share of employment, the public sector thus amounted to 32 % of the Swedish economy.

8. As long as public authorities pursuing market activities have the possibility to obtain benefits on the basis of unclear regulation of their activities on the market, this will inevitably lead to distorted competition. A distortion of this kind will, in turn, negatively effect economic growth in the long term. The ultimate remedy of this problem would be that such an authority ceases to pursue business activities on well functioning markets.

3. Areas affected by distorted competition

3.1 *Problems related to competence*

9. There are several different situations in which problems relating to a distorted competition can arise. One such situation is when public actors have a statutory right – but usually no obligation – to pursue competitive operations. Such operations include commissioned courses provided by universities and upper secondary schools and municipally owned hotels, holiday villages, camping sites and ski slopes. Other examples are the letting of offices and other property.

10. Another situation includes public actors that pursue competitive operations on the grounds that they are related to the agency's primary activities. Examples include hospitals with restaurant facilities and public baths with gym or sun bed facilities. Consultancy services are also operations of a related nature.

It may also be a question of surplus sales of capacities developed for internal purposes. Examples include transport, cleaning, laboratory or carwash services. Quite often, sales of this kind lack legal support, but the provisions are unclear and it is difficult to challenge the validity of such activities in court, irrespective of whether they are carried out under municipal or state management.

3.2 *Problems related to a specific position on the market*

11. One situation that can be especially problematic is if parts of activities protected by a monopoly involve an exercise of public authority that can be used to gain advantages in the competitive market. A typical example is the municipal rescue services (the fire-brigade services), which have the authority to order the purchase of certain fire-control equipment at the same time as they are selling such equipment in competition with private retailers. In addition to this, it is the municipal rescue services which approve the installing of all fire-control equipments, including that of their competitors.

12. A similar situation occurs when a public actor has sole access to an essential facility and alongside this is involved in a later stage of production. This means that competitors in this later stage are dependent on purchasing services from the same public actor with whom they are in competition. Areas where this poses a problem include map production and production of digital nautical charts.

13. Compared to private actors, public actors operating on the open market also have the benefit, in principle, of not having to take into account financial risks when pursuing business operations. In addition, a public actor also benefits from a certain degree of goodwill, since a large portion of the general public might perceive its products as being approved by a public authority and therefore being of a better quality than competing services.

14. Other situations where inherent competition problems arise are in connection with public procurement, where in-house units are permitted to participate in competition together with private tenderers. The in-house unit may, for example, be favoured by that the procurement process is cancelled to its benefit. Decisions to cancel procurements cannot be contested in court. Problems may also arise when public actors, as a means of labour market policy measures, offer subsidised goods or services on the open market.

3.3 *Problems related to the legislative framework*

15. Competition problems can also be the result of a specific legislation. The Local Government Act includes restrictions on pricing methods. Unless stated otherwise, the municipality cannot set a higher price than one corresponding to the costs connected with the provision of certain goods or services. The

distorting effect this principle may have on the market is similar to that of predatory pricing. However, no exceptions from this general principle are made for goods or services sold on open markets.

16. Furthermore, legislation regulating local government activities on competitive markets provides little room for private actors to address competition problems through the legal system. Although any citizen of a municipality can challenge the legality of a decision taken by that municipality, there are no effective sanctions to ensure enforcement of any subsequent court rulings (with the exception of rulings relating to health care issues). Also, the legality of decisions by municipal companies cannot be tried in court.

17. Even though a municipal decision affects a company, it can only challenge the legality of the decision if it owns property in the municipality. Moreover, the time limit for an appeal of a decision by a municipality is three weeks and it may be difficult to evaluate the effect of the decision within that time limit. The latter difficulty is accentuated by the fact that many decisions that affect the market are in fact not taken by the municipal council. In some cases, the municipal body decides to pursue certain activities in competition with private actors. Since no official decision has been made, such actions cannot be tried in court.

4. The National Commission on Equal Terms for the Public and Private Sectors

18. Existing legislation, such as the Swedish Competition Act and legislation relating to the regulation of local governments, has in practice proven to be insufficient to remedy distortions in competition when public actors operate under more favourable conditions than the private business sector.

19. In light of this problem, the National Commission on Equal Terms for the Public and Private Sectors (hereinafter referred to as the Commission on Equal Terms) was established by the Government in 1998. It was composed of representatives of both the public and private sectors and had two main responsibilities. The first one was to examine individual cases brought to its attention and to try to resolve the underlying competition conflicts. Its second task was to try to achieve consensus between representatives of the private and public sectors on the formulation of basic long-term guidelines for this area. The Commission on Equal Terms ended its work on December 31, 2003.

20. In its report to the Government, the Commission on Equal Terms provides a number of guidelines as to how public competitive operations should be run to ensure as fair competition as possible. In short, the Commission on Equal Terms considered that all competitive operations by public actors should be clearly defined in terms of accounting and be instructed to meet the economic objective of achieving at least full coverage of costs. The objective should be clearly set out in guidelines or other suitable form of policy document for the operations in question. A clarification of the economic objective should state that competitive operations will be reviewed upon failure to fulfil the objective. Transparency is necessary if alleged cases of distorted competition are to be examined. The general public should therefore have the opportunity to read or receive relevant information about specific competitive operations.

21. Since the Commission on Equal Terms had no judicial powers, its opinions were of an advisory nature. Experiences have been varied as regards to whether public actors have followed its recommendations or not. The recommendations have clearly had some impact in those cases where the public actor simply sought an impartial opinion. However, lack of enforcement power seems to have led to that, in many cases, public actors have not followed the recommendations at all.

5. The scope of competitive neutrality policies

22. Although there is no all-embracing legislative framework, several acts regulate competition between public and private actors in one way or another. The Competition Act is modelled on Articles 81 and 82 EC, prohibiting anti-competitive co-operation and abuse of a dominant position (it also includes merger control). The Competition Act includes restrictions which can affect public actors, such as abuse of a dominant market position through predatory pricing.

23. Governmental instructions impose certain restrictions on central government authorities, particularly on pricing methods. On the local level, the Local Government Act imposes restrictions on municipalities and county councils. The latter includes regulations concerning the limitation of the authority's competence, i.e. the kind of goods or services it may and may not provide. According to the general rule of municipal competence, municipalities and county councils are only allowed to pursue business activities if the purpose of this is to provide facilities or services of a general interest to its citizens. In addition, municipalities and county councils are prohibited to pursue business activities outside of their respective geographical area. The Local Government Act also includes restrictions on pricing methods.

24. In some sectors, specific legislation is helpful in clarifying competition issues. However, these acts only concern a few of all the markets in which both public and private actors operate.

25. Almost all public procurement is regulated by the Public Procurement Act, which is based on EC legislation. It is designed to ensure that procuring units operate in a way that does not distort competition. The Public Procurement Act is, however, primarily targeted at public actors as buyers rather than sellers. The new EC public procurement directive stipulates that Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a contract does not cause any distortion of competition in relation to private tenderers.

26. The EC Transparency Directive states that undertakings that pursue operations protected against competition, alongside other commercial operations, are required to provide separate accounts for these two areas. The directive also stipulates that financial relations between public authorities and public undertakings should be shown clearly in so-called open accounts. Furthermore, it contains instructions regarding information to be sent to the European Commission each year regarding public manufacturing undertakings. The pending implementation of this directive into Swedish legislation may provide the Competition Authority with a helpful tool in reducing problems associated with competitive business activities pursued by public actors.

6. Applying Competitive Neutrality Principles

27. Sweden has enacted few specific regulations with the aim of governing market activities pursued by the public sector. However, there are several policy documents addressing such activities. In the Government Bill *Competition Policy for Innovation and Diversity*, several commitments to strengthen competition and consumer interest are made. The general guideline for the current competition policy is that a larger part of the overall economy should be exposed to competition.

28. It is furthermore stated that it is urgent to determine the opportunities for opening up new areas for competition where monopolies currently exist or where regulations eliminate competition between those who are providing different public utility services. In areas where the establishment of competing entities for various reasons is not possible, models containing elements of competition mechanisms should be examined and further developed. Public procurement is an area where a government authority often is the only buyer on the market. It is important to take into consideration that such markets are in the making

and that promoting and safeguarding well functioning markets are key elements in the effort to increase the part of the economy open to competition.

29. In the Government *Public Administration Bill* of 1998, and in other policy documents, goals and guidelines for the central governmental sector are stated. An essential commitment in these documents is that tasks that should be performed by the state are to be more clearly defined. Tasks not part of the state's core mission are to be gradually reduced, formed into separate companies or acquired by market actors. The underlying principle behind this statement is that business activities pursued on the open market should normally not take place within the form of a government agency.

30. In addition, all commissions to government authorities are to be re-evaluated with the purpose of increasing efficiency in how the state operates. The intention is to achieve a clarification as to the division of responsibilities between governmental authorities and other parties. To a certain extent, efficiency problems can be related to the fact that government authorities sometimes are not appropriately organised or to overlapping assignments.

7. Monitoring and enforcement

7.1 *Monitoring the existing legislative framework*

31. The Swedish Competition Authority has the competence to enforce the Competition Act in all sectors of the economy. The Public Procurement Act is chiefly applied by the administrative courts. In addition, the National Board for Public Procurement, an independent public agency under the Ministry of Finance, is responsible for observance of the Public Procurement Act. The Local Government Act is applied by the administrative courts.

7.2 *Enforcement of competition legislation*

32. While the competition rules, in principle, apply to all entities carrying out economic and commercial activities – whether private or public – in practice they have proven difficult to apply when bodies such as municipally-owned entities rely upon public finances to squeeze out competitors through pricing below costs. The reason being that it is difficult to establish dominance in most cases relating to municipally-owned entities. In addition, restrictions on competition can also be a direct and intended effect of other legislation, in which case the Competition Act is not applicable.

33. In view of the fact that the Competition Act cannot be effectively applied to business activities pursued by municipalities, county councils and government authorities, such cases are very few. Since the Competition Act was introduced in 1993, the Authority has only pursued cases against government actors in two cases. In both cases a municipality was considered to have abused a dominant market position by connecting two markets – of which the municipality was the dominant actor on one – through the sales terms for the services in question. One case concerned sun bed facilities in a municipal bath; the other concerned the connection of two separate services regarding dental surgery.

7.3 *Envisaged measures*

As long as public and private actors compete on the same market, problems relating to distorted competition will continue to exist. It is therefore important to ensure that this competition takes place on as equal terms as possible. The Competition Authority, among others, has recommended the introduction of provisions to existing legislation with the aim of correcting competition distorting behaviour by public actors. Such a measure would make it possible to deal with more important cases of competition on unequal terms.

The Ministry of Industry has presented a proposal on a supplement to the Competition Act, according to which the Market Court – on motion of the Competition Authority – would be able to prohibit a public agency from applying procedures that obstruct the opportunities for efficient market competition in a way that is detrimental to the general interest. The proposal is being processed within the Swedish Government Offices.

In its instruction for 2004, the Competition Authority has been assigned to monitor the issue of competition on equal terms between the public and private sectors. Pending a possible new legislation in this field, the Authority will follow the current developments and within the existing legislative framework focus on recent competition conflicts. On February 5, 2004, the Authority received an additional assignment to analyse and suggest remedies which might be needed to improve competition between the public and private sectors. A report will be presented to the Government on October 1, 2004.

SWITZERLAND

1. Introduction

The Swiss Confederation does not have a horizontal neutrality policy. However, the principle of competitive neutrality is enshrined in the Federal Constitution and, generally, activities of the Federation need to have a legal basis which in itself must be in conformity with the Constitution. Moreover, cartel legislation is to a certain extent applicable to activities of the Federation in the public sector. Also the Swiss competition authorities may address recommendations to the federal, cantonal and municipal bodies as a means of encouraging revisions of those laws which could have considerable implications for competition. Notwithstanding these recommendations, the possibilities to intervene in cantonal competencies are legally limited.

The first part of this presentation will therefore briefly describe the general set of rules and procedures establishing the principle of competitive neutrality. In the following chapter, emphasis will be put on a few important examples of sector-specific regulation on the cantonal as well as on the federal level. These examples show that for Switzerland the key challenges within the discussion about competitive neutrality lie primarily in finding the right balance between the conflicting interests of private profit-maximization on the one hand and the guarantee of sustainable public services on the other hand.

2. Set of rules and procedures establishing the principle of competitive neutrality

2.1 *The Federal Constitution*

The Swiss Federal Constitution guarantees certain fundamental rights and principles of an economic character. This guarantee includes also the principle of competitive neutrality which implies that the Federation abstains from adopting any measures which might result in competitive distortions between market operators. Moreover, the federal state may not grant any kind of privilege of an economic nature.

A limitation of this principle is not possible unless such a limitation can be justified by a public interest proportionate with regard to the object which has to be achieved by means of the measure in question.

Moreover, according to art. 94 (4) of the Constitution measures constituting a derogation from this principle must be based on an exception enshrined in the Constitution or be part of the few traditional cantonal monopolies.

2.2 *Control by the competition authorities*

The Swiss competition authorities control in a general manner the competitive neutrality of federal and cantonal legislation. They are involved in the drafting of bills and participate in the consultation process which takes place prior to the adoption of a certain rule. This system enables the competition authorities to draw the legislator's attention to potential competitive distortions.

In the same way competition authorities may address a recommendation to the competent bodies if they hold the view that a measure actually in force amounts to a competitive distortion or constitutes

otherwise an obstacle for competition. These recommendations may be addressed to federal, cantonal and municipal authorities. However, these recommendations are not legally binding.

Finally, competition authorities may initiate proceedings against private and public enterprises in order to ban cartel agreements or an abuse of a dominant position. This implies that activities of public bodies carried out by public enterprises may be subject to an investigation if it turns out that they violate cartel legislation. However, if a certain competitive distortion is the result of a choice by the legislator the competition commission may only address a recommendation to the relevant public body.

2.3 *Control by the Swiss Supreme Court*

The Swiss Supreme Court may have to render a judgement in a case where an individual brings an action against a cantonal or municipal government if a decision or a law adopted by either of these authorities violates constitutional law. In this context, it has to be mentioned that the Swiss system is characterised by an important particularity: Whereas cantonal laws can be controlled *and annulled* by the Swiss Supreme Court the same is not true for federal laws which must be applied by the judiciary even if they violate constitutional law. It is ultimately left to Parliament and the Swiss people whether or not the law should be revised.

A private operator in the market thus has the possibility to bring an action against a cantonal or communal act or a federal decision which might constitute a disadvantage for the private operator compared to the public enterprise and thereby amounts to a limitation of the fundamental economic principles and rights guaranteed by the constitution.

In this case the judiciary is to verify the existence of a sufficient legal basis, a public interest and the proportionality of the measure in question. It may annul the relevant legal provision or decision if these conditions necessary for the limitation of a constitutional right are not met.

3. Sectoral policies

3.1 *Cantonal banks*

According to art. 3 of the Federal Banks Act a cantonal bank is defined as a bank created on the basis of a cantonal legislative act. Moreover, it is legally constituted as a private or public law corporation. The canton has to hold more than one third of the shares and the voting rights. It may guarantee the totality or only a part of the bank's engagements.

The majority of the cantonal banks are public enterprises the shares of which are exclusively held by the cantons. Apart from one exception, in those banks which are private corporations, cantonal participation amounts to more than 50 %.

Apart from two cases, cantonal banks benefit from a state guarantee. The nature of such a guarantee is not precisely defined. It consists mainly of a guarantee of the banks' solvency.

These state guarantees may represent certain advantages. In particular, cantonal banks might benefit from a better reputation with regard to their solvency. This implies a better rating by the assessment agencies and might influence the refinancing of these banks.

Besides, federal legislation stipulates that the banks must maintain an appropriate balance between its own resources and the amount of the totality of their engagements. The federal bank ordinance defines the notion of « own resources » and distinguishes between banks and cantonal banks with regard to the mode of calculation.

In this context it is important to mention that the legislation has been recently modified. In particular, a state guarantee is no longer necessary for the definition of a cantonal bank. Moreover, certain cantons provide that the value of the state guarantee must be repaid by means of a contribution.

Finally, empirical evidence highly questions whether these state guarantees really constitute a competitive advantage. As a matter of fact, a development of certain competing banks has been observed. Such a development would not have been possible if the state guarantee had the effects usually ascribed to it. Moreover, certain banks are certainly « too big to fail ». Despite the fact that they do not benefit from such a guarantee, in case of bankruptcy, an intervention either by the public authorities or even by competing banks to guarantee its solvency is highly probable.

Although such a state guarantee has traditionally been considered as constituting a competitive advantage, experience thus shows that this is not clearly the case. Besides, modifications of the law progressively change the whole sector.

3.2 Cantonal hospitals

The problem concerning cantonal hospitals seems *a priori* similar to the one concerning cantonal banks. However, the sanitary sector is a rather regional one taking into account that the mobility of the consumer is quite limited.

The Swiss cantons hold participations in these hospitals thereby guaranteeing the deficit of these establishments. Moreover, it falls within cantonal competency to carry out the planning of the hospitals and to determine the establishments figuring on the hospitals' list. Only these are to be compensated by the insurers for their services offered within a basic health insurance. The cantons are also competent to authorise the tariffs agreed upon between the insurers and the hospitals. If there is no agreement on these tariffs, they are fixed by the cantons themselves. Finally, the payment of medical treatments in a hospital is carried out differently for treatments in a public hospital (one half is paid by the canton, the other half is paid by the insurance) and for treatments in a private clinic (all costs are covered by the insurance). It has also to be mentioned that public hospitals – contrary to private ones – do not finance their capital. For these reasons, the cantons are not neutral operators in the market.

With regard to the planning of the hospitals it has nonetheless to be emphasized that the law stipulates that private clinics need to be taken into account in an appropriate manner, but due to overcapacities in Switzerland, the cantons tend to consider rather the offers of public establishments than those of private ones. Therefore, private clinics have been specialising mainly in the field of supplementary insurance. A possible solution to limit the interests cantons have with regard to this problem would consist in introducing a system of monist financing of hospitals. As a first step it could thus be considered to switch from a system of deficit spending to a system covering the costs of the services independently of the establishment which has provided these services. In a second phase it would be necessary to eliminate the distortion that has been created by the financing of the services distinguishing between public and private establishments. Finally, in order to solve the problem of the role of the cantons and the distortion prevailing between outpatients and inpatients, the system of financing should be monist. The cantons would pay their contributions directly to the insurers which would be charged to use these funds in order to cover the costs of medical treatments in hospitals independently of the establishment which has offered these services.

3.3 Postal services

The Swiss constitution stipulates that “the Confederation shall ensure sufficient and reasonable basic postal [...] services in all regions. The rates shall be fixed according to uniform principles.” Still, the 1998

Postal Act introduced competition for a limited range of services, for so called “non-reserved” services (parcels and payment services). Furthermore, the financing of Swiss postal services is no longer assured by public subsidies. Instead, the law prescribes that universal service obligations are to be financed by the revenues from reserved services and non-reserved services¹ and services supplied in competition. Apart from being self-financing, the Swiss post is also supposed to achieve business profits according to the strategic targets set by the Swiss government in a four-years-term.

In short, competitive distortions consisting of advantages as well as of disadvantages in comparison to the Post’s private competitors arise mainly due to the following reasons:

- universal service obligations by constitutional prescription;
- the granting of a monopoly for letters which according to the current legal definition comprises letters up to a maximum weight of 1 kg and a maximum depth of 2 cm;
- the salaries of the Swiss post’s employees are to be fixed according to the Federal Civil Servants Act which implies that salaries for the same work are to be equal in the whole territory whereas private competitors may adapt salaries to differences found in the respective branches and / or regions.

While cross-subsidization of *universal* services is allowed or even prescribed by law, the Postal Act clearly bans cross-subsidization of non-reserved services and services supplied in competition by revenues from reserved services in order to prevent further competitive distortions. However, competitive pressures are continuously increasing for the Swiss Post: Since the beginning of 2004 parcel services have been completely liberalised – before that date the Post had a monopoly for postal services up to 2 kg. The current monopoly for letters with a maximum weight of 1 kg will be further reduced to letters up to 100 g by 2006. In addition to this, e-mails constitute ever more substitutes to physical letters.

Under these circumstances and despite the recent positive transformation of the Swiss post from an administration into a fairly independent public enterprise governed according to commercial management principles, the obligation to finance universal services without additional public funding becomes more and more questionable if the Swiss post is meant to have an equal chance in a largely liberalised, competitive environment. Independent studies propose the introduction of a new model of financing this *service public* which consists of a general tax calculated according to the annual turnover for *all* enterprises operating in that market in order to live up to the constitutional obligation on a non-discriminatory basis. The current legislative solution allows for an obligatory payment of royalties by private providers of non-reserved services if the Post is able to prove that its revenues are not sufficient to cover the cost of its *service public* obligation. Although this possibility has not been used yet, it might be done so in the near future.

Finally, the Swiss Post is currently negotiating a new collective labour agreement, which ideally grants some more flexibility with regard to salaries and working conditions. The outcome is yet uncertain and causes a stir among the 50 000 employees of the Swiss Post and the Swiss political system.

3.4 *Telecommunications*

Similar to the Postal services, the Swiss constitution prescribes that the Confederation has to assure a sufficient and reasonably priced universal service. Although the recent liberalisation in the telecommunications sector has actually had some of the positive effects that were hoped for, a number of difficult issues which are well known also in other countries remain yet to resolve. The Swiss Telecommunications Act is currently being revised and the proposed solutions concerning the unbundling of the “last mile” are in the centre of a vivid academic, political and legal debate. The main competitive

distortions having their roots in the former monopolistic times arise or have arisen due to the following reasons:

- difficulties with regard to the access to the network, in particular to the last mile, by new entrants;
- universal service obligations by constitutional prescription.

With regard to the first issue concerning non-discriminatory access to the local network, Switzerland has chosen to introduce the “unbundling of the last mile” by means of an ordinance at the beginning of the last year. The measures foreseen include leased lines, bit stream access, shared line access and full access. However, a currently ongoing political debate is focused on the question of whether or not this ordinance constitutes a sufficient legal basis at all and whether these forms of unbundling do not go beyond the actual obligation for interconnection which is stipulated by the law actually in force. Upon request of a Parliamentary commission specialised in the matter, the government has decided to propose a revision of the Telecommunications Act in order to allow a broader discussion and to ensure herewith a sound political basis of this important phase of market opening. Besides, the issue is also pending before the Swiss Supreme Court² which, however, will most probably interpret the current legal provisions rather cautiously as long as the revision of the Law is still discussed in Parliament and by means of a referendum might even be subject to a vote of the Swiss people. Supporters of the unbundling measures fear that while this final step towards market opening is further delayed, the definitive introduction of these measures only within roughly 2 or 3 years might be, in the worst case, useless. Critiques, however, hold the view that the forced opening of the last mile at a regulated price will promote “cream-skimming” entry by competitors which are themselves released from infrastructure investment risks. As a consequence, Swisscom would have little incentive to invest in its infrastructure as a means of competition.

The issue concerning universal service obligations, which is particularly important in those regions where no alternative providers are available, seems to be adequately settled by Swiss law. Since the beginning of 2003, a universal service license is periodically put to tender based on principles of objectivity, non-discrimination and transparency. If the tender reveals that investments necessary to provide universal service cannot be recovered within the usual period of time, then the firm with the best offer receives an investment contribution along with the universal service license. These investment contributions³ are financed by a special fund, which is fed by periodic license fees for the right to offer services. These license fees are allocated proportionally to the turnover subject to the value-added tax among the licensed operators. If no suitable candidate for a universal service license can be found, the regulatory authority (ComCom) can order any license holder to supply universal service in exchange to an investment contribution. However, Swisscom applied as the only candidate for this license but did not apply for an investment contribution along with its universal service license. In order to increase the probability that alternative suppliers apply for the universal service license, the law provides that the universal service license may be divided into several geographic areas and be attributed to different network operators. Finally, the regulatory authority may impose the obligation to provide universal service upon one or several operators without a tender if such a tender would not take place under competitive conditions.

3.5 Railways

Railways and Railway systems are highly complex, extremely expensive both with regard to operation and maintenance, but still indispensable for modern infrastructure. Since 1996 (Revision of the Federal Railway Act, “Railway Reform 0”), the Swiss Railway sector has been the object of a step-by-step liberalisation and a continuous market opening. As early as 1999 (“Railway Reform 1”), the market of *freight transportation* was completely liberalised (“open access”). The ratification of the bilateral agreement between the EC and Switzerland (entry into force 1.6.2002) allows access of foreign railways as

well. As far as the market for passenger transport is concerned, national passenger transport is still exclusively reserved to the former monopoly operator SBB. The reason for this is that the *national* passenger transport network is very dense and thus highly complex, and its good functioning depends on an accurate coordination of the various connections. The segregation of single train paths – private operators would choose only the most profitable ones – would inevitably destroy this sensitive and highly interdependent network and thus question its functioning. Besides, due to the internationally renowned high quality of SBB public services, major changes with regard to this market segment have not been considered necessary. *Regional* passenger transport, however, shall be put to tender under certain circumstances. The general underlying Swiss policy aims at transferring transport “from the trucks to the tracks” as much as possible and thus at rendering railway transport a more attractive alternative to the roads. This goal is mainly to be achieved – where possible – by means of competition by substitution. The currently ongoing “Railway Reform 2” seeks to further improve the steps already undertaken.

Again, in the liberalised market of freight transportation the main neutrality issue is centered on a non-discriminatory network access. “Railway Reform 1” aimed at assuring non-discriminatory network access by a separation of infrastructure and transport as far as organisation and accounting are concerned. An arbitration commission further monitors equality of treatment. The law actually in force prescribes the basic principles of network access by the infrastructure managers. An undertaking wishing to use the infrastructure of another undertaking needs an authorisation, which is granted by the competent federal office if certain objective requirements are met (minimum financial capacity, sufficient qualification of the staff, security of locomotives and wagons). Charges for the use of the railway infrastructure are to cover at least the (average) marginal costs of a modern infrastructure. The price for a certain train path is to be set according to the same basic principles determined by the relevant federal office in charge. In Switzerland, the infrastructure managers themselves usually allocate train paths. However, with regard to integrated enterprises such as the SBB, independence of train path allocation is vital to guarantee non-discriminatory access. In case of disputes with regard to charges and prices parties may have the case decided by the arbitration commission. Despite this possibility, Swiss experience has shown that smaller enterprises avoid referring to the arbitration commission since they fear subsequent retaliation measures by the bigger firms operating in the same market. The reform project therefore suggests that the arbitration commission may initiate proceedings also on its own without a formal complaint by the parties. Opponents prefer the creation of a “railway regulator” since an arbitration commission only may decide in cases of disputes between parties but not act at the same time as a supervising authority. Others have criticised mainly that the Federal State acts contemporaneously as owner of the SBB, supervising authority, regulator and as orderer of services.

Other aspects of infrastructure management such as investment planning, maintenance and the arrangement of the schedule, shall – according to the proposals of “Railway Reform 2” - not be subject to regulatory intervention, but left to the railway enterprises themselves. However, also with regard to these aspects an appropriate and equal participation of external network users in the decision-making process is equally vital for non-discriminatory access.

Finally, as far as universal service obligations are concerned, this seems rather not to be an issue here. Generally, a quite overwhelming political consensus sticks to the fact “*that this business depends on government support and it's as simple as that*” (Financial Times 9. 10. 2001). The Federation and the Cantons put their demands for universal services (infrastructure and operation) to tender, both nationally and internationally. Providers of universal services are compensated for the uncovered costs of these services. The average financial compensations paid by the Federation amount up to 1.3 billion CHF per year.

4. Monitoring and enforcement

Whereas all the network industries described dispose of specialised regulators and supervising authorities, it has sometimes been criticised that these authorities do not dispose of the necessary powers to be really effective as has been briefly described in the above chapter on the railway sector.

However, it seems that the real not yet broadly discussed issue lies rather in the fact that actually too many authorities may intervene and therefore conflicts of competences between the specialised regulators, the competition commission, the price supervisor and the relevant governmental authorities arise more easily and may constitute an obstacle to effective monitoring. Another concern is focussed on a historically grown institutional weakness – again particularly present in the railway sector - which unites a variety of partly conflicting roles of the state which intervenes sometimes as regulator and supervisory authority and acts at the same time as the owner or majority owner of the former monopolist operator.

5. Summary and conclusion

Although the principle of competitive neutrality is enshrined in the Federal Constitution, Switzerland has no horizontal “neutrality policy”. Instead, it can be observed that the main focus has been put on Swiss network industry whereas less public attention has been paid to inequalities on the cantonal level where neutrality issues consisting essentially of certain financial advantages arise for instance with regard to the historically grown cantonal banks and to the cantonal hospitals. The reasons for this are twofold: Either empirical evidence has shown that the legal advantages actually have not had any major influence on the competitiveness of the cantonal banks compared to other banks offering the same services, or a certain financial engagement by the state is simply regarded as indispensable for the guarantee of a minimum public service as is the case in a politically sensitive matter like sanitary affairs which are mainly a matter of cantonal legislation.

With regard to the network industries, the general trend towards liberalisation and market opening was followed by a general trend towards re-regulation. Generally, these trends have been considerably influenced by international developments, especially by European legislation. This is particularly true for the railway sector since international transports are vital for a small country in the heart of Europe.

Main differences - which partly are hoped to be solved with currently ongoing reforms or have already been solved in recent revisions of the law - persist with regard to questions of network access and universal service obligations. Swiss policy basically recognises that market failure exists in particular for remote rural and therefore not very profitable areas while market participants shall still be treated equally with regard to those fragments where competition seems feasible. In order to meet these challenges, Switzerland has chosen a sector-specific approach. The reason for this is mainly that – despite certain analogies – each sector is characterised by some important differences which consist for instance in the:

- nature of the network: physical (railways, telecommunications) or services (postal services)
- market opportunities: whereas traditional postal services (letters) constitute a shrinking market due to the competition of e-mails, the market for telecommunications is much more promising and with regard to railways, the strengthening of the railway sector is part of Swiss public policy
- profitability of the service and necessity of public funding involved: big differences persist with regard to postal services and telecommunications on the one hand and railways on the other hand
- technical possibilities: while there is no substitute to railway infrastructure, in the near future there might be serious alternatives to the Swisscom access network⁴

Moreover, a few not yet broadly discussed neutrality issues concern monitoring and enforcement which mainly touch upon conflicts of competencies between the different authorities as well as upon the multiple and partly contradicting roles of the state in the liberalisation process, acting at the same time as owner of the public enterprise, regulator and supervisory authority as it is the case in the railway sector.

Finally, it is worth mentioning that other issues giving raise to competitive distortions such as inequality with regard to tax payments or lack of commercial management have not been a major issue in Switzerland. Commercial management is mainly ensured by the fact that state intervention is limited to the setting of strategic targets, which are renewed in a four years term, thus leaving public enterprises sufficient room of manoeuvre as to avoid being a handicap in competition with private enterprises.

NOTES

1. I.e. services that the Swiss post must supply, but there may be competition in these segments, as is the case for instance with regard to payment services.
2. The Swiss regulatory authority (ComCom) has decided that the ordinance is a valid legal basis to unbundle the local loop. Swisscom has appealed this decision.
3. The notion of investment contribution has been recently precised during a revision of the ordinance on telecommunication services and thus been kept in line with European legislation. According to its art. 17 an investment contribution is meant to finance non-covered costs of the universal service, which correspond to its total net cost. The total net cost is equivalent to the difference between the net cost of the enterprise, which has to provide the universal service and the cost it would have to bear if it did not provide this service.
4. In particular CATV is a potential technical alternative currently discussed.

TURKEY

1. Introduction

Turkey has chosen an economic system based on market mechanism and free competition and it has pursued to establish this economic system with all its elements both in institutional and legal perspective since 1980. Generally in market-oriented economies, the state is expected to stop producing goods and services, which can better be done by private undertakings. The state is regarded to be a referee not a player. However, unlike what is known, in many countries including Turkey, which accepted market economy, the public sector has a significant role in the production of goods and services.

It can be argued that for the establishment of a well-operating free market economy, the state should not have a role in the production of goods and services to be served by private undertakings more efficiently, and it should only suffice with the role of regulator in the markets. However, what is known well in theory cannot be transformed into practice easily. In this juncture, having a role of referee or regulator (legislative, executive and judiciary role), the state is in a position to play against private undertakings. This seems to be very strange, and certainly creates what is called conflict of interests.

2. The Role of Public Undertakings in the Turkish Economy

In Turkey, public undertakings are still key players in some sectors, such as banking, petroleum refining¹, cigarette², mining; the management of those entities is approaching market conditions. State economic enterprises account for about 5% of GDP and about 19% of the value added in the manufacturing sector. State banks account for about 1% of GDP, but make up nearly one third of the value added in the banking sector alone. In the manufacturing sector fully state-owned undertakings still account for about a quarter of the sector's value added and for about 12% of the sector's employment³.

In terms of employment, staff in public undertakings and state banks accounts for about 450.000 persons (2,5% of total employment). The number of staff in those undertakings has declined by nearly 10% during the last year mainly within the process of privatisation⁴.

The above-mentioned figures show the place of public undertakings in the Turkish economy. Despite the declining trend, public undertakings still have an important role in the production of goods and services. The existence of state as a manufacturer in the economy is a crucial source of criticism. The basic issue is mainly about the distortions arising from the state's economic activities.

"Platin⁵", a respected Monthly Journal published an interview with Mr. Mustafa Parlak, the President of the Competition Authority. The title of the interview is an excerpt from Mr. Parlak: "*The state is the main actor which distorts competition*". Actually this excerpt explains very well the importance of competition distortions arising from the activities of the state with the roles of both regulator and player. It also demonstrates very well that the TCA is well aware of this fact. However, that does not mean that in Turkey the state disregards the importance of competition fully. It is aware of the significance of the establishment of a competition culture and a competitive environment considering the virtues of competition for the welfare of the country. However, as is known, it is not an easy task to transform an economy.

As is stated above, since 1980, Turkey has set her direction towards the establishment of free market economy within the country, and there has been a continuing process of restructuring and reforming the prevailing rules and procedures in order to achieve this end. Up until today, Turkey has achieved a great job in establishing the constituent element of a market economy. However, these achievements can be regarded insufficient, and further steps might need to be taken. Despite substantial moves toward liberalisation, some state monopolies remain.⁶

3. The Competitive Neutrality and the Privileges of Public Undertakings

An important concept introduced for the discussions of these roundtables is “competitive neutrality”. In a *policy statement* regarding competitive neutrality by the Government of South Australia, the concept of competitive neutrality was explained as follows:⁷ “*The objective of competitive neutrality is the removal of net competitive advantages for significant government business activities, arising simply from the fact that they are government owned. It questions how significant government business activities are run, and whether they have an advantage from not paying taxes; having cheap government finance; or not being covered by the same regulations as the private sector.*”

According to this policy statement, unfair competitive advantages such as these can lead to resource allocation distortions, resulting in the society’s resources not being used in the most efficient way. In the *policy statement*, it is argued that people might tend to choose the product of the government business activity because it may be artificially cheaper, rather than because it may be inherently better or produced more efficiently. Therefore, competitive neutrality policy aims to eliminate resource allocation distortions arising out of public ownership of entities engaged in significant business activities⁸.

Importantly, in the *policy statement* it is accentuated that “competitive neutrality policy and principles are intended only to apply to the business activities of government, not all activities of it”⁹.

When closely examined, it can be easily seen that this concept is an important and complementary aspect of creating a competitive environment in markets. In short, this concept adds up to that *any market activity by public sector should not be treated in a manner to provide more advantage against private competitors only since it is public undertaking*. These advantages of public undertakings can take place in many ways such as lower taxation, providing advantageous position for state tenders, attaching priority for government procurement, no possibility of bankruptcy in case of financial difficulty, pricing not based on true costs etc.

These advantages of public undertakings come from just the fact that they are publicly owned. Not only national public undertakings do have such privileges, but also undertakings of local governments possess such privileges, which bring them in a better position in compare to their competitors.

In Turkey, the above-mentioned privileges (either *de jure* or *de facto*) have always been a source of criticism against economic activities by public undertakings. Competition distortions resulting from public undertakings are fundamentally associated with these privileges. However, the legal privileges explain the problem only to a certain extent. An important issue is the fact that public undertakings do not feel competitive pressures upon them as they can be financed easily from the government budget if necessary. In many cases, these undertakings are overstaffed and inefficient. Prices are only partly cost-recovering. In other words, these undertakings are not subject to the market discipline relevant for private undertakings. The inefficiency of public undertakings cause not only direct competition distortions but also as these undertakings mainly produce inputs to the manufacturing sector, price distortions can spread through the whole economy.

It could be argued that Turkey does not have a direct policy for introducing and advocating a competitive neutrality policy. At first sight, this argument might be regarded to be relevant for Turkey. However, the acceptance of this proposition in an absolute way would be unfair taking into consideration some significant steps taken in Turkey in eliminating the public competition distortions.

The policy of privatisation together with liberalisation, and the introduction of competition law have jointly become two significant and inter-related pillars of the efforts to make economy liberal and market-oriented. The main concern is the establishment of competitive structure free from artificial distortions in markets for goods and services. In this regard, the privatisation policy and competition policy can be considered to be associated with the concept of competitive neutrality.

In this context, privatisation and liberalisation are regarded as important policy tools in the elimination of these advantages. In other words, privatisation and an accompanying liberalisation are the main instruments to reduce the role of the state as player in the economy and to eliminate distortions arising from the presence of public undertakings. Through privatisation, it is aimed to confine the role of the state in economy to supervision and regulation by minimising its activities in producing goods and services, and to establish international standards in the Turkish economy. Accordingly, privatisation has been one of the essential elements of the economic program with the aim of full integration into world markets, ensuring free market conditions, and increasing the efficiency and competitiveness of economy.

For the last twenty years, the role of public administrations in economic life has been profoundly discussed. Just like in any other country, in Turkey as well, governments save a particular place for privatisation. In the general sense, privatisation may be defined as transfer of undertakings, directly or indirectly controlled by the state, to private sector. The main target in privatisation is the increase of economic efficiency. The income received by the State through privatisation may only be the secondary target. The main way to increase economic efficiency is the establishment of competition in the market. In order to achieve this, first of all, state monopolies should not be turned into private monopolies. For instance, due to natural monopoly, it is necessary to subject private monopoly to regulation where not possible. In the short run, privatisation may decrease employment. This may be overcome via creating competitive markets and in the long run, entry of high number of companies into the market¹⁰.

The main philosophy of privatisation is to confine the role of the state in the economy in the areas like health, basic education, social security, national defence, large scale infrastructure investments; provide legal and structural environment for free enterprise to operate and thus to increase the productivity and the value added to the economy by ensuring more efficient organisation and management in the enterprises that should be commercialised to be competitive in the market¹¹.

Public undertakings under privatisation can be examined in two sub classes:

- Undertakings operating under competitive circumstances,
- Undertakings operating under monopoly circumstances,

It is not possible to arrive at a general conclusion that privatisation increases economic efficiency in any case. The reason is that in this relationship, we face the market structure as an important variable, and the impacts of privatisation on economic efficiency vary in different market structures. In competitive markets, sufficient technical and de facto bases are present in order to put forward that privatisation leads to an increase in economic efficiency.

With regard to public undertakings operating as legal or natural monopoly, for the privatisation to be successful, it should be accompanied by a policy based on deregulation of services provided via the infrastructure of the incumbent public undertaking. In this way, if the market can be opened up to free

competition, this should be pursued as a policy option together with privatisation. However, if there are some inherent impediments such as natural monopoly, which may inhibit the introduction of free competition totally or partly, the policy should be the introduction of re-regulation. This re-regulation requires the establishment of independent regulatory authorities to control regulated industries. This is the case in Turkey for telecommunications services and electricity which are defined as natural monopoly industries as they are based on an infrastructure, duplication of which is almost impossible or economically irrational.

A liberalisation process accompanies privatisation process in particular for the industries previously under state monopoly. The purpose of liberalisation is basically to create a more competitive environment in the market during the post-deregulation period and to dismantle any privileges assigned to the undertaking in question. Generally, liberalisation is an important policy to create a healthy environment in the post-privatisation period. Therefore, it is a general proposition that before privatisation takes place, there should be a liberalisation policy in order to fully achieve the expected benefits.

4. The Problem of Conflict of Interests

Conflict of interests is an outstanding issue that leads to competition distortions by public undertakings. This is the case in particular in markets under regulation¹² by government agencies. This regulation may be the case at national and local levels. However, the main problem emerges if the state has an economic activity in these markets, and in particular if the economic agent of the state has also the role of regulator for these markets. As it can easily be seen the logical corollary of this emerging conflict of interests will certainly be a competition distortion.

This issue of conflict of interests is also an important aspect of privatisation and liberalisation. During the process of liberalisation, an important purpose is to eliminate such a dual role and resulting conflict of interests.

TEKEL is a good example in demonstrating very well the issue of conflict of interests and how to overcome it. The conflict of interests has been until recently an important problem in particular with regard to TEKEL (The Turkish Alcohol and Tobacco Monopoly). However, following the initiation of double processes of liberalisation and privatisation, this problem was skilfully solved. Before the initiation of liberalisation process, TEKEL had double role in the alcohol and tobacco markets. On the one hand, it was a player in these markets; on the other hand, it was the regulator of these markets. This dual role of TEKEL created the problem of conflict of interests. It had certainly a privileged position against its competitors as the regulator of them.

Together with this problem of conflict of interests; the pricing policy of TEKEL, which did not reflect true costs, was criticised as it allowed TEKEL to have a relatively advantageous position vis-à-vis its competitors.

The problem of conflict of interests was solved by the Act numbered 4733¹³. This Act gave an end to all regulatory powers of TEKEL. The main purpose of the Act is to restructure TEKEL in order to prepare it for privatisation, and to establish a Regulatory Body to fulfil the regulatory powers of TEKEL together with other duties assigned to it.

The Tobacco and Alcoholic Beverages Board was established to transfer the regulatory powers of TEKEL. In this way, an important problem for these sectors was eliminated with a view to create a more competitive market structure. The Act No.4619 which amends the Act No.4250¹⁴ brought an end to all exclusive rights of TEKEL, removing its monopoly position in alcohol and alcoholic drinks industry. In

particular the monopoly position of TEKEL in the production of famous Turkish alcoholic beverage Raki has been eliminated and the market for raki is open to private-sector competition.

5. Economic Activities of Local Governments

Local governments are generally considered to be important for democracies as the local governors are closer to people as compared with central governors. Having significant executive and legislative powers, local governments have economic activities within local markets under their regulation. In this regard, considering the issue of conflict of interests, markets under the regulation of local governments such as municipalities are good examples. Municipalities have significant authorities in regulations of certain local markets, arising from the Act No.1580 on Municipality. However, together with their role to regulate these markets, municipalities might have economic activity as player in these markets. Municipalities have economic activities in local transportation, bread production, retailing etc. in competition with private undertakings. In particular, markets for bread and transportation have faced this issue of conflict of interests significantly in recent years. Municipalities have significant regulatory authorities regarding these markets including the interference with the prices. This interference might be reasonable. However, the issue is complicated by the fact that these local governments are also player within these markets.

Together with the issue of conflict of interests, there exist the problems of subsidy and not being subject to market discipline relevant for private undertakings. In other words, these economic activities are either inefficient or substantially subsidized from the financial resources of local governments. The immediate result of the existence of local government as a player in the markets is the pushing private undertakings out of the market. At first sight, economic activities of local government can be justified on the basis of providing cheap food for those living under poor circumstances. However, the resulting competition distortion creates further problems by substantially influencing the dynamics of the markets in question. It could be argued that instead of having direct role as player in these markets, some other policy options could be developed, if the purpose is to help the poor.

Generally, some services with the characteristics of natural monopoly (such as water, sewerage and natural gas supply) are run by local governments in Turkey. An important criticism against the provision of these services by undertakings under the control of municipalities is related to inefficiency. In this case, the issue is related to the monopoly position of these governments. As they operate under monopoly conditions, they may easily disregard any competition concerns and this might result in inefficiency. This inefficiency is associated with discretionary pricing, low service quality and high cost.

The above-mentioned issues concerning services provided by local public undertakings are addressed considerably within the report¹⁵ on local governments, prepared within the framework of the 8th five-year development plan under the auspices of the State Planning Organisation. This report is a part of a master plan to be followed by the Central Government. Therefore it is very important.

Within this report, the problems of conflict of interests and inefficiencies associated with local public undertakings are dealt with extensively. Importantly, regarding how to overcome these problems, the Report has introduced reasonable solutions which are as follows:

- Privatisation policy where services can be provided by private undertakings better (this will serve to cure the problem of conflict of interests),
- Disciplining the pricing policy of these undertakings in a manner to reflect true cost (this will serve to cure the problem of inefficiency of undertakings and it will also eliminate distortions which threaten private competitors),

- Re-structuring policy in order to make public undertakings work efficiently (this will be important in particular for natural monopolies).

It is certain that the above-mentioned proposals would help the introduction of a competitive neutrality understanding for market activities of local public undertakings. Importantly, the perception of importance of competitive neutrality at local or regional level is to contribute to efforts in establishing a competition culture in Turkey.

However, it should be accepted that the introduction of competitive neutrality via the above-mentioned reforms is not an easy task, taking into consideration some significant problems faced by local governments. Therefore, it is important to approach the issue with a global perspective supported by the Central Government. Recently, the current Government (AKP) has brought a new package of reforms for public administrations before the Parliament. And a significant part of this reform is related to local governments. This reform process for the local government can also present an opportunity in order to establish the concept of competition neutrality. In this context, it could be argued that the TCA should have a priority of competition advocacy with a view to introduce competition for the provision of local services.

Also, the recent discussion on “water and sewerage regulation” within the framework of the OECD and an expected process of liberalisation seems to be presenting another important tool for the TCA in advocating competition at local or regional level as these services are completely provided by the local government in Turkey.

6. The Position of the Turkish Competition Authority

The concept of competitive neutrality has three facets regarding the state-origin competition distortions for the TCA to deal with:

1. The role of the TCA in privatisation,
2. The issue of whether competition rules can be applied against anticompetitive practices of public undertakings,
3. The advocacy role concerning some measures, which saves public undertakings against private competitors.

6.1 The Role of the Turkish Competition Authority in Privatisation

The Competition Authority adopted a “Communique Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorisation Made to the Competition Authority in order Acquisitions via Privatisation to be Judicially Valid”.

This Communiqué has the purpose of regulating the procedure of cooperation between the TCA and the Privatisation Authority, regarding privatisation transactions. It is based on a double stage-procedure, respectively pre-notification to take the view of the TCA, and the final notification for the permission of the TCA. Hence, under this Communique, the TCA has a dual role to fulfil. The very first one is about control of concentration in the post-privatisation period. The other one is basically related to its advocacy role. In this regard, the TCA has tried to ensure that the market should be opened to full competition and it should be free from artificial barriers for all competitors. In particular, this Communiqué demonstrates the position of the TCA regarding the privileges assigned to undertakings under the process of privatisation.

Article 3 of the Communiqué is very important in demonstrating the approach of the TCA towards the privileges assigned to the undertakings to be privatised. Article 3 is about the pre-notification of

privatisation transactions, and determines the conditions for this stage. This pre-notification is an important stage, because tender conditions are determined on the basis of the TCA's opinion at this stage.

“...For procedures of acquisition via privatisation under the scope of this Communiqué, in the case where the market share of the undertaking to be privatised or the unit aiming at producing goods and services at the relevant market exceed 20% or where the turnover of the same undertaking or unit exceed 20 trillion Turkish Liras or *even though the aforesaid limits are not exceeded, but where the undertaking to be privatised does have judicial or de facto privileges, it is necessary to make a pre-notification to the Competition Authority before tender conditions are announced to the public in order to evaluate the results of such privatisation* in the relevant market, the condition of judicial or de facto privileges –if any- of the undertaking to be privatised after privatisation and it is necessary to take the view of the Competition Board which shall be taken as the basis in the preparation of tender conditions document...”

The following paragraph of Article 3 explains the meaning of privilege as follows:

“...all privileges including the monopoly rights not had or expected to be able to be not had by other undertakings operating in the relevant product market; appeared as a result of the undertaking being a public organisation; being based on a law or other judicial regulation or formed as *de facto*...”

The main philosophy behind this Communiqué is based on the concern of the TCA in eliminating anticompetitive privileges with a view to create a more competitive market structure which is free from artificial distortions.

6.2 *The Enforcement of Competition Rules and Public Undertakings*

The substantial articles of the Turkish Competition Act are in line with those of the EC competition rules. However, the Turkish Competition Act does not contain any specific article which is comparable to Article 86 that governs anticompetitive practices of public undertakings.

As is known, the Treaty of Rome has a special article regarding the application of competition rules against public undertakings. According to article 86, “*public undertakings*” do not escape the application of competition rules. The article has two paragraphs, which explains the applicability of competition rules with regard to public undertakings. In other words, the article envisages two kinds of particular undertakings:

- 1) Undertakings to which member states grant special or exclusive rights (article 86.1);
- 2) Undertakings entrusted with the operation of services of general economic interest (article 86.2).

Concerning public undertaking falling under paragraph 1, the state is expected not to maintain in force any measure contrary to the rules of competition. However, concerning public undertakings falling under paragraph 2, competition rules are not applicable only if the application of such rules obstruct the performance in law or in fact of the particular tasks assigned to them.

The scope of the Turkish Competition Act is defined in Article 2 as follows: “Agreements, decisions and practices which prevent, distort or restrict competition between the **undertakings** which operate in or affect goods and services markets in the territory of the Republic of Turkey and the abuse of dominant position by those undertakings which are dominant in the market and all kinds of operations and practices

which are considered to be a merger or an acquisition by which competition in the market is significantly impeded, and all operations concerning the measures, decisions, regulation and supervision for the protection of competition are within the scope of this Act”.

To answer the question of whether this scope covers public undertakings, we have to examine the meaning of undertaking which is defined in Article 3 as follows: “*any natural or legal person who produces, markets or sells goods and services, and who forms an economic whole, capable of acting independently in the market*”. This definition is very important with regard to anti-competitive practices of public undertakings as it does not make any distinction between the private and the public. Therefore, public undertakings cannot escape the coverage of the Competition Act just because of their public ownership.

Correspondingly, an important aspect of competitive neutrality is related to the fairness of Competition Authorities in applying competition rules. In other words, the competition authorities should not treat differently public sector undertakings just because of their public ownership. In Turkey, the TCA has sometimes faced such criticism that it discriminates in applying competition rules in favour of public undertakings.

In some cases, the TCA faced the problem of how to interpret the meaning of undertaking as defined in article 3 with respect to public undertakings. In particular the issue is about whether the undertaking in question meets the condition of “*capable of acting independently*”. The interpretation of this definition in Sugar case¹⁶ caused the TCA to stop the investigation against allegedly anticompetitive pricing of the public undertaking with a dominant position in sugar market. The evidence found during the inquiry showed that the pricing policy of this undertaking had been based on a ministerial order. If a minister has the power to determine the price, or simply endorses the price as a formality, then the enterprise is not considered to be an undertaking. Thus the Board had to drop the complaint against the state sugar firm, for abusing its dominant position to push other firms out of the business, because the public enterprise’s prices and policies were determined by the government. Dependence on ministerial direction, rather than public ownership, determines the issue¹⁷.

Related to the case mentioned above, another important issue in Turkey is related to some privileges assigned by an Act. When the practice of a public undertaking is based on a specific power arising from and Act, then competition rules may not be applied in these cases.

Therefore, the problem is not the inefficiency of the TCA. However, in such cases what the TCA should do is to advocate competition to remove such legal powers in order to enable a market structure in which the public undertaking does not have any privilege. At the moment the TCA has already established a committee of experts to examine and determine such legal privileges assigned to public undertakings. However, the TCA is well aware of the fact that some of these legal privileges are crucially important, and the rationale behind them outweighs any benefit accrued from a competitive market structure. As soon as the Committee finishes its work, then the TCA will determine a master plan via which it will pursue an extensive advocacy policy to eliminate these legal privileges to the extent the public interest allows.

However, the TCA decided vigorously against public undertakings where there are no legal privileges, which may inhibit the application of the competition rules. In applying the competition rules, there is no discrimination between national and local government economic agents. In this context, the Belko decision and the TTAŞ decision will be important in explaining the position of the TCA. In these cases, public undertakings in question were decided to infringe the competition rules by abusing their dominant positions and therefore were fined by the TCA.

BELKO Decision

Belko Ankara Kömür ve İhtiyaç Maddeleri Dağıtım Ltd. Şti. (Belko) is an undertaking controlled by Ankara Metropolitan Municipality. In the city of Ankara, the right to import and sell coal was granted to Belko, and the coal sale of other coal importing undertakings was prohibited, thus leading to monopolisation in the coal market of this city. The claimed infringement was that Belko applied exorbitant prices in the retail sale of coal. Following the investigation, the Competition Board decided that *in the "market for imported fragmented coal for heating purposes in the centre of the city of Ankara and its neighbouring areas", Belko Ankara Kömür ve Asfalt İşletmeleri Sanayi ve Ticaret Ltd. Şti. abused the privilege of monopoly granted to it in a way to prevent selling by other undertakings, by means of leading to costs realised at levels higher than due during purchasing coal and afterwards, and applying excessively high prices for this reason, thus infringing article 6 of the Act on the Protection of Competition No. 4054.*

An important aspect of the Board decision was the fact that the Board considered high prices resulting from reflecting on prices the increased costs due to inefficient management of the company as an abuse of dominant position under article 6 of the Turkish Competition Act. The remarkable point is that even where there are no excessive profits and even if companies incur losses, prices determined by them may be considered excessive prices.

The Board also decided that Belko Ltd. Şti. whose establishment was intended to provide residents of Ankara with cheap and quality coal be notified, in accordance with article 9 paragraph 1 of the Act¹⁸, that it was required to ensure that the cost of coal was reduced to the lowest possible levels, and utmost attention needed to be shown to reduce the selling prices of coal to reasonable levels comparable with the prices in competitive markets. The Board decided that under article 27 paragraph (g) of the Article No. 4054¹⁹, Ankara Governor's Office, Ankara Metropolitan Municipality, Ministry of Internal Affairs, Ministry of Environment, Ministry of Health and Ministry Responsible for Economy be notified of the opinions and recommendations of the Competition Board as to how to establish a competitive environment in the relevant market.

Accordingly, Ankara Governor's Office Board of Hygiene which had granted Belko the monopoly right in selling coal resolved to abolish the monopoly right granted to Belko with its decision of 2.11.2001, in accordance with the opinion of the Competition Board.

Here Regarding the Belko case, it is important to mention the decision of High Council of State which is the appeal court for the decisions of the TCA. In its decision while approving the decision of the TCA which established the pricing policy of Belko an abuse of dominant position. Importantly, High Court of Council evaluated the issue of whether Belko is entrusted with the operation of services of general economic interest, whether the Turkish Competition Act is applicable or not. First of all the Court held that the Act is applicable for public undertakings. Following this, it considered the position of Belko and decided that despite the fact that Belko is entrusted with the operation of services of general economic interest, the competition rules are still applicable with regard to the pricing policy of Belko. Here by reference to the main rationale behind the Article 86 (2) of the Treaty of Rome, the Court concluded that the duty of Belko to provide a service of general economic interest does not allow the Belko to apply a discretionary pricing policy and therefore the finding of the TCA regarding the excessiveness of the prices applied by Belko was correct in deciding an abuse of dominant position.²⁰

*TTAŞ Decision*²¹

On 4th October 2002, The Turkish Competition Board imposed an administrative fine on Turk Telekom, the state-owned telecom operator in Turkey, for abusing its dominant position in order to exclude competition in the Internet services market and satellite services market. In 2001, TTNET, Turk Telekom's Internet service provider brand, lowered fees for its customers and set below-cost monthly and yearly access fees; at the same time, however, Turk Telekom, as the only supplier in the market, increased the prices for ISPs accessing Turk Telekom's lines. And Turk Telekom increased the satellite royalty fees by 2.4 to 64 times for satellite operators. Pursuant to the Act No. 406, until 1st January 2004, Turk Telekom had legal monopoly rights for the provision of national and international voice telecommunications and for the establishment of telecom infrastructure except in cases where an infrastructure company was permitted via a telecommunications authorisation granted by the Telecommunication Authority. Turk Telekom also provides lines to these ISPs over the Internet backbone; however, it is also a competitor to these ISPs via its subsidiary TTNET.

In addition to this case, there is an ongoing investigation on TTAŞ regarding the cable modem monopoly it has. On 21, July 2003, after a preliminary inquiry, The Authority initiated an investigation about the practices of Turk Telekomunikasyon A.S. with regard to its cable modem services. The investigation concerns the alleged monopolisation of broadband Internet access services via refusal to deals to access cable modem infrastructure. Currently, the it is the 8th month of the investigation which means, after the extension of the usual 6-month period with another, there remains 4 more months for the Investigation Committee to form their statement of objections.

The cases of Belko and TTAŞ examined in further detail above, demonstrate very well the fact that the TCA has applied competition rules against anticompetitive practices of public undertakings regardless of whether they are national or local.

6.3 *Advocacy Role of the Turkish Competition Authority, and State Measures Distorting Competition*

Together with its enforcement role, the TCA has a competition advocacy role with regard to specific state measures which may distort competition in favour of public undertakings. The TCA has attached great significance to following up these sorts of measures in order to eliminate them in a reasonable way.

However, during the very first years of the TCA, the advocacy role was not understood well. It is thought that only the enforcement of competition rules would be sufficient. However, by the time, it has been seen that the negative effects of some state measures have been worse than anticompetitive practices of private undertakings. Therefore the TCA has begun to perceive and understand that it must have an advocacy role in eliminating the distortions arising from state measures. In parallel to the perception of the TCA, private undertakings have also understood the importance of advocacy role of the TCA in this regard.

Since then, the TCA has strived for influencing the public institutions in order to prevent them from taking any measure which distorts competition in markets against either private undertakings or directly the consumers. In this regard, a recent application of the Turkish Union of Banks (TBB) is very striking in understanding the level of appreciation of the competition advocacy role by private undertakings.

In the application filed with the Competition Authority by TBB, it was communicated that with the new Banks Act issued in 1999 and the amendments to this act, differences between public and private banks were eliminated, but intervention in the selection of banks where public institutions and organisations would deposit their monies, through the provisions introduced in budgetary acts contradicted

with the principle of free competition. It has been stated that efficiency which might be displayed by the banking system in the collection of resources and having them utilised within the market mechanism would be distorted by such interventions preventing the flow of resources, and it would lead to serious negativity in the bank system which was undergoing the stage of reform.

It is claimed that provisions introduced in statutory regulations mentioned in the application of TBB, and practices based on such provisions are not compatible with the principles of free competition due to limiting and discriminatory provisions introduced in the entry of public resources to the banking system, and do mean a discriminatory practice between banks which have to operate within same the conditions. In the same way, the limitation of activities of state economic enterprises, their affiliated partnerships, establishments and undertakings which are supposed to utilise their resources and operate within the system under the conditions of free market presents as distorting competitive conditions in the sector where these undertakings operate. In this context, the claim by TBB that public treasury is required to be conducted by all banks is justifiable in terms of competition policy. Even though it is accepted that the policy-making as to how to incorporate the resources of public institutions into the system would be a political choice, the ability to verify such a choice in terms of competition policy may be possible if it encompasses an equal practice for all actors.

As is stated before, with regard to the legislative regulations mentioned and in accordance with the Act on the Protection of Competition No. 4054, the Competition Board possesses the task of notifying that an amendment be made to the relevant legislation, according to article 27 sub-paragraph (g) of the Act, in case the State commits practices distorting competition, through acts and other legislations, or decisions of the Council of Ministers, which is the executive body. The issue was discussed by the Competition Board and it has been considered that for purposes of ensuring the removal of similar provisions in the Budgetary Act and the other relevant legislations as well, it would contribute to the establishment of market competition that the authorised bodies be notified through the relevant Ministry about making a regulation in the intended amendment to the Banks Act, aimed at the elimination of provisions in miscellaneous acts that monies of various institutions be collected in state banks.

Importantly, in order to strengthen the advocacy role, the TCA has prepared a new set of proposals, which contains significant amendments with regard to both substantial and procedural articles. The new set of proposals contains the inclusion of a specific Article regarding state measures, which distort competition. The main reason in designing this Article is to further empower the TCA in minimising competition distorting measures by Government agencies.

The proposed Article is as follows:

“In case, the Board establishes public measures, regulations and transactions having similar effect with cases prohibited in articles 4 and 6 of this Act, it may decide that resort to jurisdiction be made for purposes of annulling a part or all of the regulations and transactions in question.

It is compulsory to receive the opinion of the Board concerning the Acts, bylaws and regulations which are prepared by public institutions and organisations, and which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory.”

If the proposed amendment is passed by the Parliament, it could be argued that the TCA will certainly have strong weapons in fighting state measures which distorts competition.

7. Conclusion

As a country adopted free market economy, Turkey has taken important steps in establishing an economy free from artificial barriers. In some cases, the state might lead such problems which distort well-functioning of markets. The distortion might be associated with many factors such as, conflict of interests, existence of de jure or de facto privileges and inefficiencies of public undertakings. At the moment it is not possible to argue that Turkey has an extensive policy of competition neutrality. However, that does not mean that Turkey is unaware of its importance. The steps taken towards removing all artificial barriers distorting competition including those resulting from the state, could be considered within the ambit of a competitive neutrality policy. It is important to stress that there are further steps to be taken. An important aspect of this written contribution is the role played by Competition Authorities. In this regard, it is argued that the TCA has contributed to the establishment of a competition culture regarding the state measures and public undertakings. Hence, the TCA has played a major role in the privatisation process, dealing with anticompetitive practices of public undertakings and advocating competition regarding the state measures which may distorts competition, since its establishment in 1997.

NOTES

1. Privatisation of TÜPRAŞ was concluded in January 2004. That transaction was one of the most important privatisation cases of Turkey since TÜPRAŞ had been holding four (İzmit, İzmir, Kırıkkale, Batman) out of five refineries, thus 86% of the refining capacity of Turkey in hand. Besides, TÜPRAŞ has been a dominant firm in the refinery sector with 74% market share in terms of sales, since the import was very limited due to the legal arrangements. Public shares (65.76% of the total shares) in TÜPRAŞ was sold by block sale to a Germany-based company, namely Efremov Kautschuk GmbH which has been controlled by a Tatarstan based company, namely Tatneft. The TCA authorised the transaction with the condition that investment in capacity increases will be observed by the TCA for the possibility that a vertically integrated structure might have a potential advantage to form an obstacle for potential entrants in the refining and import markets. The procedure is due to be completed by the Privatisation Authority in early June 2004.
2. Cigarette Division of TEKEL was tendered for privatisation together with the alcohol division. However, the High Board of Privatisation did cancel the tender for the fact that the amount of money offered by the winning undertaking was deemed insufficient. The cigarette division is expected to be tendered for privatisation before the year 2004 ends.
3. Commission of the European Communities, “2003 Regular Report on Turkey’s progress towards accession” 5.11.2003 (COM(2003) 676 final) www.deltur.cec.eu.int/english/2003RegularReport.doc, p.51
4. Ibid, p.50
5. Platin, May 2004, p.74-76
6. OECD (2002) “Regulatory Reform and Competition Policy in Turkey”, p.7
7. Government of South Australia, “Policy Statement”, www.premcab.sa.gov.au/pdf/competition/CNPolicyJuly2002.pdf. p.6
8. Ibid.
9. Ibid.
10. <http://www.rekabet.gov.tr/eozellestimeler.html>
11. http://www.oib.gov.tr/baskanlik/felsefe_eng.htm
12. Here regulation is mainly the one applied in competitive markets. For example the control of certain markets by the local governments or the regulation of some.
13. The Act No. 4733 on Re-Structuring the Directorate of Tobacco, Tobacco Products, Salt and Alcohol Undertakings and about the Production, Domestic and External Purchase and Sales of Tobacco Products,

in Act No. 4046 and the Law making alterations in Decision 233 which has the force of law, dated 03.01.2002.

14. The Act No:4250 on Alcohol and Alcoholic Liquors Under Government Monopoly dated 08.06.1942.
15. State Planning Organisation, “Report of Special Expertise Commission on Local Governments (Yerel Yönetimler Özel İhtisas Komisyonu Raporu)”, OIK544, Ankara-2001. p.83-95
16. The Board Decision, No: 01-57/587-145 and Date: 27.11.2001
17. OECD (2002) “Regulatory Reform and Competition Policy in Turkey”, p.21
18. Article 9 is about termination of infringement and 9/1 is as follows: “*Where the Board, either upon a denunciation or a complaint or the application of the Ministry or upon its own initiative, finds that there is an infringement of Articles 4, 6 or 7 of this Law; it informs the enterprise or associations of enterprises concerned by a decision comprising of the conduct to be performed or avoided in accordance with the rules set out in Chapter Four of this Law, for the maintenance of competition and restitution of the situation before the infringement.*”
19. Article 27 is entitled as Powers and Duties of the Board and article 27(g) is as follows: “*To opine, directly or upon the application of the Ministry, on the necessary amendments to be made in the competition legislation*”
20. High Council of State, 10. Division’s decision with the case no. 2001/4817 E. and 2003/4770 K. 5.12.2003
21. Board Decision, No: 02-60/755-305 and Date:02.10.2002.

UNITED KINGDOM

1. Introduction

The UK, unlike Australia, does not have an overarching administrative framework for government bodies engaging in competition with the private sector. Instead, the UK system has relied on a combination of broad guidelines for public bodies and (mostly *ex post*) application of competition laws (from which public bodies are not exempt).

The UK government has however encouraged the competition authorities to assess government laws and regulations that may inhibit competition.¹ In the light of this, the OFT has also been proactively examining wider issues of the impact of government on competition, such as the role of subsidies and public sector procurement, that the OECD working group might want to consider alongside a discussion on competitive neutrality.

2. Framework for competitive neutrality in the UK

The framework for competitive neutrality in the UK consists of government guidance – published by the Treasury – and of application of competition law. These are considered in turn.

3. Government Guidance

The UK government is keen to encourage public bodies to make better use of their assets, both physical and intangible, and, when appropriate, supports engaging in commercial services in order to do so.² Nonetheless, it has put in place a guidance framework within which commercial activities by public bodies should be undertaken.

The key piece of guidance in this area is Treasury guidance on ‘Fees and Charges’, which outlines the appropriate rate of return for those elements of the public sector that have commercial involvement in competitive (or potentially competitive) markets.

The guidance states that the appropriate rate of return on capital should reflect an average return on capital reflective of:

- market pricing;
- the cost of capital faced by the private companies in that sector; and
- the level of risk associated with that sector.
- other issues that may impact on performance.

The Treasury has said that it would expect the real pre-tax return on capital to lie in the region of 5.5 per cent for low-risk activities to 15 per cent for high-risk ones.³ For public sector bodies facing potential competition only, estimates of the cost of capital of private firms in that market are to be made with reference to comparable sectors.

The rates of return apply to government departments including agencies and Trading Funds, non-departmental public bodies, NHS Trusts and other NHS bodies and certain other public bodies. However, this guidance does not apply to self-financing public corporations (as defined by the Treasury) or local authorities. Charging practices by local authorities are covered by specific legislation, under the Local Authorities (Goods and Services) Act 1970 and the Local Government and Housing Act 1989.

The UK government does not have definitive guidance on other elements of Australia's competitive neutrality framework, relating to:

- the cost of debt;
- differing taxation policies; and
- potentially different regulatory environments.

However, since the rate of return that government departments are expected to set takes into account the market price set by the competing private firms, it arguably takes a top-down approach to competitive neutrality, not concentrating on individual cost deviations (as does the Australian framework) but rather mirroring the costs (reflected by the price) faced by private sector firms.

The Treasury states that public bodies' pricing strategies and cost recovery should be reviewed on an ongoing basis and at least annually. The National Audit Office independently audits all government accounts and scrutinises the use of public money, while the Public Accounts Committee of the House of Commons can question any aspect of a department's financial performance. Rates of return are monitored via departmental annual accounts which outline the target rate and the actual rate received.

4. Legislative provisions

4.1 *EC Directives*

One EC Directive in particular bolsters the competitive neutrality framework in the UK. Directive 2000/52/EC puts in place greater rules for accounting separation for public bodies that also undertake commercial activities. This is likely to be of particular importance for public bodies that operate in a vertically integrated structure, providing value-added services in addition to the services for which it has statutory responsibility. Better accounting transparency makes it easier for competition authorities to assess whether such public bodies are engaging in anti-competitive activities captured by Competition Act 1998. (see below)

4.2 *Competition Act 1998*

The main legislation for tackling anti-competitive behaviour in the UK is the Competition Act 1998 (CA98), which mirrors Articles 81 and 82 of the EC Treaty of Amsterdam. The CA98 concerns the conduct of all *undertakings*, where an 'undertaking' is any natural or legal person capable of carrying on commercial or economic activities relating to goods or services, irrespective of its legal status. The Act can be, and is, applied to public bodies that undertake commercial activities.

The OFT has in fact investigated a number of public sector bodies under the CA 98, although so far no infringements of the Act have been found. In the main, complaints have concerned government bodies that have a statutory monopoly in collecting certain information, and their conduct when engaging in competitive downstream activities which are dependent on the information provided by the statutory monopoly. OFT has looked into:

- Companies House (responsible for the collection and dissemination of information on company registration); OFT investigated complaints that Companies House was engaging in predatory pricing or anti-competitively squeezing margins, but found no evidence to support either allegation.
- Environment Agency, regarding the supply of environmental data, and property-specific environmental risk reports. In this case, complainants argued that the Agency attempted a margin squeeze, and engaged in predation and anti-competitive discrimination. However, on the basis of existing facts, there was a lack of persuasive evidence of anti-competitive practices, and the OFT closed its investigation and issued a short case closure summary.
- Ordnance Survey, which maintains, updates and distributes topographic information; here, complaints have been received from private sector competitors complaining that Ordnance Survey price discriminates, cross subsidises and that its products directly competes with those of its downstream licensees.

The OFT has also investigated complaints regarding public sector bodies abusing their purchasing power, particularly a complaint by BetterCare – an independent provider of private care homes for the elderly – that North and West Belfast Health and Social Services (N&W) was abusing its dominant buyer position by offering unfairly low prices and terms when purchasing BetterCare’s nursing care services. The OFT dismissed the complaint on the basis that N&W was not in fact the body responsible for setting the prices in question. It also said that ‘paying low purchase prices is only likely to amount to an abuse of a dominant position in exceptional circumstances’.⁴

While the OFT treats complaints made under the CA98 against government bodies undertaking commercial activities in the same manner as all other complaints, it is worth noting that the CA98 only covers explicit *anti-competitive* behaviour. As such, it does not provide a suitable framework for dealing with broader competition problems that government involvement in commercial markets might often involve.

The enactment of Enterprise Act in 2002 has provided a framework in which the UK competition authorities can consider how competition may be dampened in a market as a whole. It therefore allows for a broader, more proactive and positive approach to competition issues in general, and, within this, to competitive neutrality issues in particular. The Act, and how it has so far been applied to regulating government impact on competition (albeit more broadly than just in the context of competitive neutrality), is discussed below.

4.3 *Wider government impact on competition*

The OFT is conscious that market activities by government bodies are not the only way in which government can impact on competition. We have therefore started to explore other key mechanisms in which government impacts on the competitive process. These are:

- Legislation and regulation;
- Subsidies; and
- Procurement.

The legal basis for such investigations is the Enterprise Act 2002, which allows the OFT to conduct market studies if it suspects that features of the market – including government regulations – are limiting effective competition. Under the Act, the OFT can also make market investigation references to the Competition Commission if it has reasonable grounds to suspect that such market features *prevents, restricts or distorts* competition in relation to the supply or acquisition of goods or services in the UK, or a part of it. Some of the ways in which OFT has started to use the new legislative framework are discussed below.

5. Legislation and regulation

In the last few years, the OFT has conducted a number of market studies in which it considered whether the presence of government regulations may have limited effective competition. For instance, in January 2003, the OFT published a report recommending that the ‘control of entry’ regulations for community pharmacies should be abolished, to improve consumer choice and increase competition.⁵ The OFT also recently examined the market for private dentistry, and concluded, amongst other things, that regulatory restrictions on the supply of dentistry services limit consumer choice, competition, business freedom and the potential to develop and deliver better services.⁶

UK government policy aims to minimise the negative impact of new, as well as existing, regulations. Since August 1998, all government proposals for regulation likely to impact on business, charities or voluntary bodies have been subject to a **regulatory impact assessment** (RIA), which assesses the impact of policy options in terms of the costs, benefits and risks of a proposal.

An additional requirement introduced in September 2002 is that all RIAs must include a Competition Assessment, except where the proposal solely affects the public services. This looks at the impact of regulations on competition within UK markets. It analyses the impacts of a proposed regulation on UK firms in the relevant market(s) and on importers into the UK. The assessment ensures that any negative (or positive) impacts on competition are properly documented. The OFT provides advice on completing the competition assessment and, also has a role in scrutinising some of the competition assessments.

6. Government procurement

The OFT is also looking at the impact that **government procurement** might have on competition between private bodies, as well as (in cases of self-supply) between private bodies and the public sector.⁷ The OFT has recently commissioned a study to explore the relationships between procurement and competition. A key output of this study is the development of a systematic approach to identifying particular markets where public sector procurement is likely to lead to competition problems.

7. Subsidies

Another study recently commissioned by the OFT is to examine the extent to which **government subsidies** might restrict competition in the UK.⁸ The aim is to consider ways in which any negative competition impact that subsidies have might be *minimised*, rather than whether subsidies should be used at all.

The study is broad in scope, and also extends to the examination of *cross-subsidies* within government bodies. It therefore touches on a key aspect of any competitive neutrality policy. Effective cost and revenue allocation between the public and the commercial roles of government bodies has the effect of limiting the possibility that government bodies will face an unfair advantage in competing with their private sector counterparts.

8. Conclusion

The UK government and competition authorities have in recent years started looking more closely at the impact of government on competition. The considerations have been broader in range than competitive neutrality alone.

In particular, the UK competition authorities are now in a much stronger position to consider the impact of public bodies engaging in commercial activities on competition.

NOTES

1. DTI (2001), 'Productivity and Enterprise: A World Class Competition Regime', White Paper, July
2. See HM Treasury (2002), 'Selling into Wider Markets: A Policy Note for Public Bodies', December
3. The Chief Secretary to the Treasury announced this on 8 September 2003.
4. <http://www.oft.gov.uk/news/press+releases/2003/pn+171-03.htm>
5. OFT (2003), 'The control of entry regulations and retail pharmacy services in the UK', January
6. OFT (2003), 'The Private Dentistry Market', March
7. <http://www.oft.gov.uk/Business/Market+studies/procurement.htm>
8. <http://www.oft.gov.uk/news/press+releases/2004/65-04.htm>

UNITED STATES

The commercial activities in which various levels of government in the United States – federal, state, and local – are involved are quite limited. Moreover, the objectives of those activities are usually quite specialised and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. Thus, there do not appear to be any “competitive neutrality” issues of consequence. There is no significant regulatory mechanism dealing with these commercial activities, and there is little public debate in the U.S. about these issues.

Following are examples of areas in which the government is involved in commercial activity that competes in some sense with the private sector, although the products offered are usually highly differentiated and the government’s involvement has not been controversial:

- Federal and state governments operate national parks, including privately-operated concessions for on-site hotels and restaurants. These compete at some level with private attractions or off-site hotels and restaurants. The government is not ordinarily attempting to maximise profit or revenue in the operation of these facilities, however, but rather is trying to control the environment, atmosphere, and congestion of the park while maximising access and visitor enjoyment and limiting any deficits from the operations.
- Federal, state, and local governments own and operate transportation facilities. The federal government owns and operates the national passenger rail system (AMTRAK), and sub-federal bodies own smaller rail connections. They compete to some extent with privately owned airlines and buses. The government authorities own them because of the business failures of predecessor private owners. The chief objectives of their operations are to maximise access and provide relief from road congestion while minimising deficits.
- Local and, to some extent, state governments own some major sports facilities. These may compete somewhat with privately owned venues in the same locality for concerts and other events. The local government building such a facility does so to attract major sports teams to the area and to spur general economic development. It hopes for long-run profitability of the individual facility, though this has proven to be an elusive goal.
- All states and some localities operate colleges and universities in competition with private colleges, but the state system provides availability and access to state residents beyond that provided by private colleges. The two forms of higher education compete, although public and private colleges are usually highly differentiated, with private colleges charging significantly higher fees. Similar co-existence of public and private educational systems exists at the secondary and primary levels as well.

There are a few areas where commercial activities of governmental entities have generated some controversy. For example:

- The United States Postal Service (USPS) is an independent establishment of the executive branch. The USPS offers certain physical delivery services in competition with private sector

service providers, such as United Parcel Service and FedEx. The Congress has largely allowed full competition between public and private entities in package and overnight physical delivery. Questions have been raised about whether the USPS is a “fair” competitor because it pays no taxes and may have other benefits associated with its governmental status; however, the USPS maintains that these advantages are outweighed by its obligation to execute numerous non-economic social policies, including universal service, uniform rates for letters, non-commercial rates for certain types of mail or mailers, small post office preservation, and purchasing requirements. Some observers believe that the private sector providers are more efficient and have lower overall costs than the USPS. The private sector firms have gained share in these markets to commanding positions in recent years. Federal law reserves to the USPS a monopoly over non-urgent letters. The letter monopoly is designed to protect the USPS’s revenues, which proponents of this arrangement argue are necessary to preserve universal service.

- Some states and localities reserve for themselves the right to distribute various forms of alcoholic beverages in their own retail outlets. Although the states that have enacted such restrictions generally assert that they are intended to promote temperance and to minimise underage drinking, opponents of the restrictions have called this reasoning into question. In their view, the states’ purported public health objectives could be reached without the need to eliminate competition, suggesting that the restrictions are, in fact, intended to support a means of revenue generation for the state or locality.

The Federal Trade Commission has submitted an addendum to this paper describing its recent work on the state action and *Noerr/Pennington* exemptions to the antitrust laws.

ANNEX I. BY THE FTC

Although situations in which governmental entities compete directly with private firms as market participants are rare,¹ there are situations in which private market participants, through delegations of governmental authority, essentially function as regulators, which creates both a conflict of interest and a potential competitive problem. Furthermore, there are instances in which private firms invoke governmental processes to disadvantage their competitors, rather than to seek a legitimate regulatory outcome.

Two judicially crafted doctrines -- the state action and *Noerr-Pennington* doctrines -- create exemptions from U.S. antitrust enforcement, of limited scope, for regulatory and political conduct that may have significant competitive consequences. In order to address growing concerns that these exemptions have, in some instances, been interpreted too broadly -- thereby magnifying the competitive distortion resulting from public sector participation in a given market, self-interested regulatory conduct, and predatory petitioning -- the Federal Trade Commission has assembled two task forces of Commission staff to investigate the issue, and to address any competitive problems with the regulatory tools at the Commission's disposal.

In addition to the uncommon situations in which the public sector engages in market activities directly, there are at least two other situations in which less obvious participation by the public sector can harm competition in a given market. The first of these involves the self-interested use of delegated regulatory authority. In the U.S., it is not uncommon for a governmental entity, for reasons of resources or expertise, to delegate regulatory authority to selected members of a regulated group. Perhaps the best example is the professions. Doctors, lawyers, and accountants, for example, are often regulated not by a state government directly, but rather by a board of professional licensure staffed by a group of their peers acting pursuant to a delegation of state authority. Although this arrangement often functions quite well, it entails an inherent conflict of interest. While these self-interested regulators generally exercise their authority in a manner that is consistent with the wishes of the delegating entity, there are strong incentives to exercise it in a more anticompetitive manner, which benefits the incumbent members of the industry at the expense of both competitors and the public.

The second involves the predatory use of governmental process. In the U.S., almost every level of government is open to private petitioning. This is particularly true of the judiciary, which is characterised by lenient standing requirements and abundant private rights of action. Although this generous level of access to government has numerous benefits, and is generally regarded as a strength of the U.S. system, it is not without costs. The use of governmental process, whether voluntary or involuntary, can impose a substantial financial burden, much of which may be incurred regardless of the outcome of the process. Perhaps the best example is litigation. Private lawsuits provide firms with an important means of protecting their interests, both commercial and otherwise. However, the substantial costs associated with litigation create strong incentives for firms to invoke the process as a means of burdening competitors, or raising the costs of entry, rather than as a means of vindicating political rights.

In the U.S., the federal courts have recognised a need to balance the objectives of antitrust policy with federalism and free speech concerns. The courts have endeavoured to achieve this balance through a pair of antitrust exemptions. The first -- the state action doctrine -- exempts from antitrust enforcement the actions of state governments, as well as certain actions undertaken at the behest of state governments. The

objective is to prevent federal antitrust enforcement from unduly limiting a state government's genuine regulatory efforts. The second – the *Noerr-Pennington* doctrine – exempts private efforts to request or urge governmental action. The objective is to prevent antitrust enforcement for unduly chilling *bona fide* political conduct.

The State Action Doctrine – Origins and Problems

The state action doctrine was first articulated by the U.S. Supreme Court in *Parker v. Brown*.² The doctrine emerged in response to efforts to apply antitrust rules designed to regulate business conduct to the activities of state governments. The Court based the doctrine on the notion that, in passing the Sherman Act, Congress intended to protect competition, not to limit the sovereign regulatory power of the states. Thus, pursuant to the doctrine, actions that could be attributed to “[t]he state itself” would be shielded from antitrust scrutiny.

The Supreme Court subsequently addressed delegations of state authority in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*³ In that case, the court set forth a two-part test. The conduct of a party acting pursuant to a delegation of state authority is shielded from antitrust enforcement under the state action doctrine if: (1) the party is acting pursuant to a “clearly articulated” state policy, and (2) the conduct is being “actively supervised” by the state.

Since *Parker*, however, the scope of state action immunity from the antitrust laws has increased considerably. At times, courts have failed to consider carefully whether the anticompetitive conduct in question was truly necessary to accomplish the state's objective. Other courts have granted broad immunity to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state.

With respect to *Midcal*'s “clear articulation” prong, some courts have adopted an overly generous view of foreseeability. For example, some courts have inferred an intent to restrain competition from a grant of general corporate powers. In their view, anticompetitive contracts are a foreseeable result of the general power to contract, and anticompetitive mergers are a foreseeable result of the of the general power to make acquisitions. Other courts have refused to recognise sensible limitations on regulatory schemes. Instead, they have concluded that a state's decision to authorise regulation in a particular industry reflects an intention to displace competition in a wholesale manner, thereby rendering almost any regulatory restraint foreseeable.

With respect to *Midcal*'s “active supervision” prong, the problem is somewhat different. To date, the courts have simply declined to elaborate clear standards for application of the requirement. As a result, unless there is a complete absence of supervision, courts have been reluctant to apply the “active supervision” requirement.

These problems with the doctrine are magnified by the potential for interstate “spillovers,” which force the citizens of one state to bear the burden of anticompetitive regulations imposed by a neighbouring state. *Parker*, for example, involved an agricultural marketing program regulating raisin production that extended to California growers only. Because the vast majority of the affected raisins were sold outside California, however, the burden of this program was borne almost exclusively by out-of-state consumers.

The Noerr Pennington Doctrine – Origins and Problems

The *Noerr-Pennington* doctrine was first articulated in a pair of Supreme Court cases: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*⁴ and *United Mine Workers of America v. Pennington*.⁵ Under the *Noerr* doctrine, a private party petitioning for government action – even anticompetitive government action – is exempted from antitrust enforcement.

The *Noerr* case itself involved efforts to petition a legislature, while *Pennington* involved efforts to petition the executive branch. The doctrine was subsequently extended to efforts to petition government through administrative and judicial proceedings, including the filing of lawsuits, in *California Motor Transport Co. v. Trucking Unlimited*.⁶ In each instance, the Court's intention was to prevent antitrust enforcement from preventing, or chilling, legitimate political conduct. The *Noerr* Court explained that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature . . . to take particular action,"⁶ and refused to "impute to Congress an intent to invade" the First Amendment right to petition.⁷

Like the state action doctrine, the scope of the *Noerr* doctrine has grown considerably, and in a manner that potentially threatens competition. In some instances, anticompetitive conduct has been shielded from enforcement efforts despite the fact that it had no "petitioning" component whatsoever. In others, courts have granted *Noerr* protection to abusive tactics, such as repetitive lawsuits and misrepresentations, that were clearly intended to delay a competitor's entry or raise its costs, rather than legitimately to petition government.

Much of the growth in the scope of *Noerr* protection appears to be attributable to the erosion of key limitations on the doctrine. The first of these is the definition of "petitioning" itself. This definition – the first and most fundamental limitation on *Noerr* immunity – has continued to grow. The Fifth Circuit's decision in *Coastal States Marketing*⁸ is representative of this trend. *Coastal States* involved threats of litigation, some of which were not even directed to specific parties. Plaintiff argued that because the threats – as opposed to the litigation itself – were not directed to the government, they could not constitute immunised petitioning. The Fifth Circuit held otherwise. Other courts have retreated from the position that immunised petitioning may entail no government involvement at all, but have yet to specify the precise level of involvement that is required.

While the definition of "petitioning" continues to grow, the other key limitation on the scope of *Noerr* immunity – the "sham" exception – continues to shrink. The "sham" exception, which was first articulated in the *Noerr* case itself, was most recently re-visited by the Supreme Court in *Professional Real Estate Investors* ("PRE").⁹ The *PRE* Court set forth a two prong test for "sham" petitioning. First, a party must demonstrate that the petitioning effort in question is "objectively baseless."¹⁰ If this objective prong is satisfied, the party must then satisfy a second, subjective prong by demonstrating that the petitioning effort reveals an intent to "use the governmental *process*, as opposed to the *outcome* of the process, as an anticompetitive weapon."¹¹

Due to some courts' extremely restrictive interpretations of the "objectively baseless" requirement, however, the "sham" analysis has increasingly been limited to a single step. The Eighth Circuit's decision in *Porous Media*, for example, has held that mere denial of a defendant's summary judgment request conclusively demonstrates the absence of "sham."¹² In practice, *PRE*'s first prong has almost always proven insurmountable for a single petition.

Monitoring and Enforcement

In order to address these problems, in July 2001 the Federal Trade Commission assembled both a State Action Task Force and a *Noerr-Pennington* Task Force. The two task forces were charged with reviewing developments in state action and *Noerr* case law, as well as antitrust exemption issues raised by the Commission's own investigations and cases. As a result of that effort, both task forces have formulated recommendations regarding clarifications of the doctrines that would bring them more closely in line with their underlying objectives. The task forces have also been engaged in a variety of efforts to implement these recommendations, including through competition advocacy, *amicus* briefs, and administrative litigation.

Clarifying the State Action Doctrine

In September 2003, the State Action Task Force issued a comprehensive report.¹³ The Task Force Report surveys current state action case law, identifies problematic interpretations of the doctrine, and makes a number of recommendations regarding specific clarifications. The principal recommendations are:

1. Clarify proper interpretation of the “clear articulation” requirement.
2. Elaborate clear standard for the “active supervision” requirement.
3. Consider explicit recognition of a “market participant” exception to the state action doctrine.
4. Consider judicial recognition of the problems associated with overwhelming interstate spillovers.

The Commission has sought to implement the recommendations of the State Action Task Force through a variety of means. The first of these is competition advocacy. An important part of the Commission’s competition policy agenda involves cooperative, non-litigation advocacy efforts. Frequently, the Commission receives inquiries from state governments regarding the potential consumer impact of proposed legislative or regulatory initiatives. In these instances, the Commission is happy to lend its institutional expertise in the antitrust area to the state decision-making process.

The Commission has recently engaged in a number of competition advocacy efforts in the state action area. These include the following:

1. Physician Collective Bargaining Legislation – FTC staff opined that such legislation would likely increase costs and reduce access, without improving the quality of care. Staff also opined that the supervisory mechanisms proposed in specific bills – in Alaska, Washington, and Ohio – likely were not adequate to satisfy the “active supervision” requirement of *Midcal*.¹⁴
2. Non-Lawyer Participation in Real Estate Closings – In joint letters to a number of different entities, the FTC and the Department of Justice opined that prohibitions on the involvement of non-attorneys, such as real estate agents and paralegals, in real estate closings would increase costs significantly while providing little in the way of additional anti-fraud protection. These efforts addressed specific regulatory initiatives in North Carolina, Rhode Island, and Indiana, as well as a proposal by the American Bar Association.¹⁵ The FTC and the Department of Justice also filed joint amicus briefs in litigation addressing this issue before the Supreme Courts of Georgia¹⁶ and West Virginia.¹⁷
3. Licensing of Out-of-State Contact Lens Sellers – FTC staff opined that requiring stand-alone sellers of replacement contact lenses to obtain Connecticut optician and optical establishment licenses would increase the price of replacement lenses, reduce consumer convenience, harm consumer health (by inducing consumers to replace their lenses less frequently), and impede the expansion of e-commerce.¹⁸
4. E-Commerce Issues – FTC staff examined a number of industries to determine whether legacy laws, enacted prior to the rise of the Internet, are disproportionately burdening e-commerce and preventing consumers from realising the benefits of advancements in information technology. In October 2002, the Commission held a public workshop on this subject, which examined potential regulatory barriers affecting Internet auctions and legal

services, as well as online sales of such products as automobiles, caskets, wine, and prescription drugs.¹⁹ Staff reports documenting regulatory barriers to Internet sales of wine²⁰ and contact lenses²¹ have already been published. Other reports are expected to follow.

The Commission's state action efforts also involve the filing of *amicus* briefs. In November 2003, the Commission filed a brief before the Sixth Circuit in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.²² This case involved a rule promulgated by a high school athletic association that prohibited schools participating in the state's most prestigious and desirable sports leagues from offering financial aid, thereby allegedly raising the cost of private education throughout the state. The FTC brief focused on a narrow issue of state action. Specifically, the Commission argued that the test used to determine whether an entity is a "state actor" for purposes of constitutional analysis is *not* the same as the test to determine whether a party is exempted from Sherman Act enforcement under the antitrust state action doctrine.

Finally, when other alternatives fail, the Commission has resorted to administrative litigation to protect competition. In the state action context, these litigation efforts have targeted both governmental entities and private parties engaged in anticompetitive conduct that is purportedly authorised by "the state itself." Our most recent efforts have addressed both the "clear articulation" and "active supervision" prongs of the *Midcal* test.

With respect to "clear articulation," the Commission recently filed the *South Carolina Board of Dentistry* case. As in most U.S. jurisdictions, a dental hygienist working in the state of South Carolina must be supervised by a licensed dentist. In early 2000, however, the South Carolina legislature amended the Dental Practices Act to reduce the level of required supervision, in order to enable dental hygienists to provide certain oral health care services at lower cost in institutional settings, such as nursing homes and public schools. After the legislature had adjourned for the year, however, the Board immediately passed an "emergency" regulation that re-imposed the pre-amendment level of supervision. According to the complaint filed by FTC staff,²³ the Board's emergency regulation unreasonably restricted the ability of dental hygienists to deliver preventive services, including cleanings, sealants, and fluoride treatments, to South Carolina school children. A motion to dismiss on state action grounds is currently pending before the Commission.

With respect to "active supervision," the Commission recently issued a number of complaints against rate bureaus of intrastate household goods movers. The *Indiana Movers* case was the first of these matters, and involved allegations that an association of movers, charged only with the responsibility of jointly filing its members' rates with the state Department of Revenue, went well beyond that role by actually facilitating its members price fixing. Similar cases were subsequently filed against movers associations in Alabama, Mississippi, Minnesota, Iowa, and Kentucky.²⁴ The Indiana case was ultimately resolved by consent order, and in the Analysis to Aid Public Comment that accompanied the consent order, the Commission set forth clear guidelines that it would use to determine whether the "active supervision" requirement has been satisfied in future cases. Specifically, the Commission will look for: (1) the development of an adequate factual record, including notice and an opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative – of how private action comports with the substantive standards established by the state legislature.²⁵

Clarifying the Noerr-Pennington Doctrine

26. Although the *Noerr* Task Force has not yet published its final report, it has nevertheless formulated a number of preliminary recommendations regarding clarifications of the doctrine. These

recommendations have focused primarily, though not exclusively, on clarifying the validity and scope of various non-“sham” exceptions to the *Noerr* doctrine. To date, they include the following:²⁶

1. Apply a more restrictive view of the varieties of conduct that constitute immunised “petitioning.”
2. Apply the *Walker Process* exception to *Noerr* beyond the patent prosecution context.²⁷
3. Advocate full recognition of an independent material misrepresentation exception to *Noerr*.
4. Clarify the parameters of a pattern, or repetitive petitioning, exception to *Noerr*.

As in the state action context, the Commission has sought to implement the preliminary recommendations of the *Noerr* Task Force through a variety of means. The first of these is the filing of *amicus* briefs. In January 2002, the Commission filed such a brief in *In re Buspirone*.²⁸ The *Buspirone* case addressed whether Bristol-Myers Squibb Co. (“BMS”) violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the Food and Drug Administration’s (“FDA”) Orange Book, thereby triggering an automatic 30-month stay of generic approval under the Hatch-Waxman Act and blocking generic entry.

BMS argued that its communications with the FDA were petitioning efforts protected by *Noerr*. In response, the Commission filed its *amicus* brief, which asserted that Orange Book filings are purely ministerial, and involve no exercise of governmental discretion. The court agreed, holding that Orange Book filings are analogous to tariff filings, and simply do not constitute “petitioning.”²⁹

The court then advanced a second objective of the Task Force by holding that, even if Orange Book filings did constitute “petitioning,” application of the *Walker Process* exception would nevertheless preclude a finding of immunity in the case at bar.³⁰ Notably, the *Buspirone* case, which addressed conduct before the FDA, is one of the first to extend *Walker Process* beyond the PTO context.

The Commission has also attempted to implement the preliminary recommendations of the *Noerr* Task Force through administrative litigation. To date, the Commission has filed two cases: *Bristol-Myers Squibb*, which was resolved by consent order, and *Unocal*, which is currently pending before the Commission.

The Commission’s action against BMS was substantially more complicated than the *Buspirone* case, and encompassed a variety of anticompetitive conduct with respect to three different drug products: BuSpar, Taxol, and Platinol. The Commission’s complaint also alleged a broader range of objectionable conduct. First, the Commission alleged that, during the patent prosecution process, BMS deceived the PTO to receive unwarranted patent protection. Second, that, during the new drug approval process, BMS deceived the FDA by listing in the Orange Book patents that did not satisfy the listing criteria. Third, that BMS filed merit less patent infringement actions. And fourth, that BMS entered into collusive agreements to further delay generic entry.

The BMS case was ultimately resolved by consent order and, consequently, the *Noerr-Pennington* issue was not litigated. However, as in the *Indiana Movers* case, the Commission used the Analysis to Aid Public Comment that accompanied the order to provide substantial guidance on the immunities issue.

The Analysis sets forth independent reasons why each of BMS’s alleged anticompetitive practices is not subject to *Noerr* immunity. However, it also states that “the logic and policy underlying the Supreme Court’s decision in *California Motor Transport* support the application of a pattern exception, and provide

a separate reason to reject *Noerr* immunity in this case.” The Analysis further states that “just as the repeated filing of lawsuits brought without regard to the merits warrants rejection of *Noerr* immunity, so too does the repeated filing of knowing and material misrepresentations with the PTO and FDA.”³¹

The *Unocal* case, in contrast, is the most recent in a line of FTC cases seeking to impose antitrust liability for so called “patent ambush” conduct. Specifically, these cases involve the nondisclosure, and subsequent enforcement, of intellectual property rights in conjunction with industry-wide standard setting proceedings. The principal difference is that, while the Commission’s prior cases involved private standard setting organisations, *Unocal* involves standard setting before a governmental entity: the California Air Resources Board (“CARB”).

In response to the Commission’s complaint,³² Unocal filed a motion to dismiss on *Noerr* grounds, asserting that its communications with CARB constituted protected petitioning. That motion was ultimately granted by the Administrative Law Judge (“ALJ”).³³ However, the ALJ’s opinion was subsequently appealed to the full Commission.

In the briefing before the Commission, FTC Complaint Counsel made three principal arguments in opposition to dismissal. First, that Unocal’s conduct did not constitute “petitioning.” Second, that even if it did constitute “petitioning,” the misrepresentation exception applies. And third, that the *Noerr* doctrine is rooted in the Sherman Act, and does not apply to the FTC Act. A decision by the Commission remains pending.

NOTES

1. See related DOJ/FTC submission to this round table.
2. 317 U.S. 341 (1943).
3. ²445 U.S. 97 (1980).
4. 365 U.S. 127 (1961).
5. 381 U.S. 657 (1965).
6. 404 U.S. 508 (1972).
Noerr, 365 U.S. at 136.
7. *Id.* at 138.
8. *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983).
9. *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).
10. *Id.* at 60.
11. *Id.* at 61 (quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991)) (emphasis in original).
12. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080-81 (8th Cir. 1999).
13. Report of the State Action Task Force (Sept. 2003) available at <<http://www.ftc.gov/os/2003/09/stateactionreport.pdf>>. See also Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective* (Oct. 24, 2003) available at <<http://www.ftc.gov/speeches/muris/fordham031024.pdf>>; Susan A. Creighton, *A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates* (Oct. 1, 2003) available at <<http://www.ftc.gov/speeches/other/031001naag.htm>>.
14. See FTC Staff Letter on Alaska Senate Bill 37 (Jan. 18, 2002) available at <<http://www.ftc.gov/be/v020003.htm>>; FTC Staff Letter on Washington House Bill 2360 (Feb. 8, 2002) available at <<http://www.ftc.gov/be/v020009.pdf>>; FTC Staff Letter on Ohio House Bill 325 (Oct. 16, 2002) available at <<http://www.ftc.gov/os/2002/10/ohb325.htm>>.
15. See FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <<http://www.ftc.gov/be/v020006.htm>>; FTC/DOJ Letter to the President of the North Carolina State Bar re: Proposed North Carolina State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions (July 11, 2002) available at <<http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf>>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <<http://www.ftc.gov/be/v020013.pdf>>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Proposed Restrictions on Competition From Non-Attorneys in Real Estate Closing Activities (Mar. 28, 2003) available at <<http://www.ftc.gov/be/v020013.htm>>; FTC/DOJ Letter to the Indiana State Bar Ass'n

- Unauthorised Practice of Law Comm. re: *Proposed Amendment to Indiana Supreme Court Admissions & Discipline Rule 24* (Oct. 1, 2003) available at <<http://www.ftc.gov/os/2003/10/uplindiana.htm>>; FTC/DOJ Letter to the ABA re: Proposed Model Definition of the Practice of Law (Dec. 20, 2002) available at <<http://www.ftc.gov/opa/2002/12/lettertoaba.htm>>.
16. See Brief *Amici Curiae* of the United States of America and the Federal Trade Commission (July 28, 2003) available at <<http://www.ftc.gov/os/2003/07/georgiabrief.pdf>>.
 17. See Brief *Amici Curiae* of the Federal Trade Commission and the United States of America (May 25, 2004) available at <<http://www.ftc.gov/be/V040017.pdf>>.
 18. See FTC Staff Comment before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <<http://www.ftc.gov/be/v020007.htm>>.
 19. See Federal Trade Commission, Public Workshop, *Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Oct. 8-10, 2002) available at <<http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>>.
 20. See FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003) available at <<http://www.ftc.gov/os/2003/07/winereport2.pdf>>. See also FTC Staff Letter on New York Assembly Bill 9560-A/Senate Bills 6060-A and 1192 (Mar. 29, 2004) available at <<http://www.ftc.gov/be/v040012.pdf>>.
 21. See FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004) available at <<http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>>.
 22. See Brief of Federal Trade Commission as *Amicus Curiae* Supporting Cross Appellant and Urging Reversal (Nov. 13, 2003) available at <<http://www.ftc.gov/os/2003/11/brentwoodbrief03114.pdf>>.
 23. *South Carolina State Board of Dentistry*, Docket No. 9311 (Sept. 12, 2003) (complaint) available at <<http://www.ftc.gov/os/2003/09/socodontistcomp.pdf>>.
 24. *Alabama Trucking Ass'n, Inc.*, Docket No. 9307 (Dec. 4, 2003) (consent order) available at <<http://www.ftc.gov/os/2003/12/031205alabamadod9307.pdf>>; *Movers Conference of Mississippi, Inc.*, Docket No. 9308 (Dec. 4, 2003) (consent order) available at <<http://www.ftc.gov/os/2003/12/031205mississippimoversdo.pdf>>; *Minnesota Transport Services Ass'n*, Docket No. C-4097 (Sept. 15, 2003) (consent order) available at <<http://www.ftc.gov/os/2003/09/minnesotado.pdf>>; *Iowa Movers and Warehousemen's Ass'n*, Docket No. C-4096 (Sept. 10, 2003) (consent order) available at <<http://www.ftc.gov/os/2003/09/iowamoversdo.pdf>>; *Kentucky Household Goods Carriers Ass'n, Inc.*, Docket No. 9309 (July 8, 2003) (complaint) available at <<http://www.ftc.gov/os/2003/07/ktadmincmp.pdf>>.
 25. See *Indiana Household Movers and Warehousemen, Inc.*, Docket No. C-4077, at 5 (Apr. 25, 2003) (Analysis to Aid Public Comment) available at <<http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf>>.
 26. See Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 Colum. Bus. L. Rev. 359 (2003). See also John T. Delacourt, *The FTC's Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, 17 Antitrust 36, 37 (2003); John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, 18 Antitrust 77 (2003).
 27. In *Walker Process*, the Supreme Court recognised a *Noerr* exception that was broader than the traditional "sham" exception. Specifically, the Court held that an antitrust plaintiff may bring a valid monopolisation claim based on a competitor's efforts to enforce a patent through infringement litigation where the patent at issue was originally procured through fraud on the Patent and Trademark Office ("PTO"). The Court's decision was based, in part, on the fact that the PTO has limited information gathering capabilities, and

consequently relies heavily on the accuracy of parties' representations. See *Walker Process Equip., Inc., v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). Applying *Walker Process* in other contexts simply recognises that these limitations on information gathering capacity are not unique to the PTO.

28. See Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss (Jan. 8, 2002) available at <<http://www.ftc.gov/os/2002/01/busparbrief.pdf>>.
29. *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363, 370 (S.D.N.Y. 2002).
30. *Id.* at 372-75.
31. *Bristol Myers Squibb Co.*, File Nos. 001-0221, 011-0046, 021-0181 at 16 (Mar. 7, 2003) (Analysis to Aid Public Comment) available at <<http://www.ftc.gov/os/2003/03/bristolmyersanalysis.htm>>.
32. *Union Oil Co. of California*, Dkt. No. 9305 (Mar. 4, 2003) (complaint) available at <<http://www.ftc.gov/os/2003/03/unocalcmp.htm>>.
33. *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision) available at <<http://www.ftc.gov/os/adjpro/d9305/031125aljsinitialdecision.pdf>>.

EUROPEAN COMMISSION

1. Introduction

In the context of the OECD debate, competitive neutrality may be defined as policies undertaken by a competition enforcer and/or regulator to remove any unfair competitive advantages or disadvantages that public undertakings, which are involved in commercial activities, may experience over their privately-owned competitors, simply as a result of government ownership or involvement. A competition neutrality policy “...systematically reviews [the] legislative and administrative environment in which government businesses operate, and reforms that environment so that the conditions under which government businesses operate are as close as possible to those faced in the private sector. Competitive neutrality also improves the transparency and accountability of government business activities by presenting their costs in a comparable manner to the private sector.”¹ The public undertakings concerned may be the government itself, or any legal entities through which the central, regional or local government conducts commercial activities in competition with privately-owned undertakings. Examples of advantages often enjoyed by public undertakings are exemptions from taxes and charges, exemption from aspects of business regulation, access to capital at lower rates, operating under an unprofitable rate of return-on-investment and being able to maintain a pricing policy which does not take into account all of the costs of production.

The main rationale behind implementing competitive neutrality measures is to allow privately-owned businesses to compete with government-owned businesses on an equal footing. It is believed that the accompanying increase in competition would bring about greater efficiencies and better quality products and services at lower prices, leading to an increase in consumer welfare. Greater efficiencies in the public sector also mean a more effective use of taxpayers’ resources. In essence, competitive neutrality thus involves the application to public enterprises of the taxes, incentives and regulations faced by private businesses. In practice this may require the authority charged with enforcing competitive neutrality policies to levy the full range of taxes and charges on a public enterprise and/or impose a rate of return requirement, debt guarantee fees or pricing structure which reflect that which is faced by privately-owned companies operating in the same sector.²

2. The position in the European Community (EC)

One of the greatest strengths of EC competition policy is that it applies to all undertakings, irrespective of whether they are publicly or privately owned. Article 86(1) of the EC Treaty³ specifically obliges Member States not to enact or maintain in force any measure, with regard to public undertakings, which conflicts with the rules on competition. The EC Treaty thus guarantees the neutral treatment of all undertakings. This principle is again reflected in article 295 of the EC Treaty, which provides that the Treaty shall “in no way prejudice the rules in Member States governing the system of property ownership.” Subject to the rules on competition, Member States are in principle free to carry on commercial activities themselves, or franchise it to publicly or privately owned firms. However, where special or exclusive rights are granted by a Member State’s government to certain undertakings, or where the relationships between the government and an undertaking may give the latter certain advantages in a market where it competes with other undertakings, competition may be distorted. In such cases, the relationship between the government and the undertaking concerned must be scrutinised carefully by the Commission.⁴

Most distortions on competition caused by government involvement in commercial activities in the EC are dealt with under the general competition framework,⁵ which is applicable to all undertakings (public and private), or under the provisions of the Treaty dealing with ‘state aid’,⁶ which similarly apply to state aid granted to both public and private companies. Other articles of the EC Treaty also impose obligations on Member States not to distort competition: Firstly Article 86, which prohibits Member States from implementing or maintaining in force measures, in connection with public undertakings and undertakings to which it has granted special or exclusive rights, which are contrary to the competition rules contained in the EC Treaty. Secondly Article 10 (the so-called ‘loyalty clause’), which in conjunction with Articles 81 and 82, obliges Member States not to distort competition by compelling the conclusion of, or facilitating, anti-competitive agreements between, or practices of, undertakings.

This paper focuses mainly on Articles 86 (regarding public undertakings and undertakings enjoying special or exclusive rights) and 87 (state aid control) of the EC Treaty as well as directives and guidelines issued under these articles. It attempts to provide some practical examples of how these legislative tools have been used to prevent public undertakings from being advantaged vis-à-vis private competitors.

3. Article 86

Article 86 of the EC Treaty may be said to constitute the main tool available to the Commission for implementing competitive neutrality policies. It provides that:

“1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”

The Transparency Directive,⁷ specifically issued to assist the Commission in applying EC competition policy to public undertakings, defines ‘public undertakings’ as any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. The courts have interpreted ‘public undertaking’ widely, incorporating any entity carrying on commercial activities, whether it forms part of the government or has its own legal personality.⁸ The ECJ clarified the meaning of ‘undertaking’ in its *Höfner/Marcotron*⁹ judgement where it held that: *“It must be observed, in the context of competition law...that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.”*

Under Article 86(1), Member States are placed under a clear and strict obligation to treat public undertakings neutrally, as compared to other undertakings, and they are specifically forbidden to enact or maintain in force any measure which would be contrary to EC competition rules. This approach recognises the influence that governments in Member States have over the decisions of public undertakings and undertakings to which it has granted special rights,¹⁰ be it financial or regulatory. As a result of this influence, public undertakings sometimes conduct commercial activities without properly taking factors such as profitability and return-on-investment into account. These factors, in contrast, are crucial in the

decision-making of private undertakings. Article 86 is thus precisely meant to address situations where the special relationship between a government and a public undertaking, places the public undertaking in an advantageous position vis-à-vis privately-owned competitors, leading to a distortion of competition which affects trade between Member States.¹¹

In the case of undertakings entrusted with the operation of services of general economic interest, Article 86(2) provides that the competition rules are equally applicable, as long as these rules do not obstruct the performance by the undertaking of the general interest tasks assigned to it. Article 86(2) recognises the fact that state intervention in the economy is sometimes necessary and justified in order to ensure the provision of services of general interest.¹² Although in the vast majority of cases, the market ensures the optimum allocation of resources for the benefit of society at large, there are instances where services of general interest will not be provided adequately (or at all) if left solely to market forces. This may be, for instance, because their market price is too high for consumers with low purchasing power or because the cost of providing these services could not be covered by the market price. It is therefore the responsibility of public authorities to ensure that services of general interest are preserved when market forces cannot achieve this. With the Treaty of Amsterdam,¹³ an Article 16 was introduced into the EC Treaty which recognises the fundamental role services of general economic interest play in the shared values of the European Union and in promoting social and territorial cohesion.¹⁴ In two communications,¹⁵ the Commission has clarified its position on the application of EC competition policy to undertakings providing services of general interest. In its latest communication the Commission stated that:

“[Competition rules] apply only inasmuch as activities concerned are economic activities that affect trade between Member States. Where the rules apply, compatibility with those rules is based on three principles:

- neutrality with regard to the public or private ownership of companies;
- Member States' freedom to define services of general interest, subject to control for manifest error; and
- proportionality requiring that restrictions of competition and limitations of the freedoms of the single market do not exceed what is necessary to guarantee effective fulfilment of the mission.”

On 12 May 2004, the Commission adopted a White Paper on services of general interest,¹⁶ which sets out a number of guiding principles upon which the Commission's approach to services of general interest is based. Amongst these are (i) achieving public service objectives within competitive open markets and (ii) transparency.¹⁷ In defining public undertaking, the White Paper reiterates the position under EC law that: *“The Treaty provides for strict neutrality. It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations.”*¹⁸ For the moment the White Paper does not foresee the adoption of a framework directive on services of general interest.

It must be kept in mind that Article 86(2) on services of general economic interest, constitutes an exception to the general principle that EC competition policy applies to all undertakings. The ECJ has held that this exception must be narrowly construed.¹⁹

If the Commission finds that a Member State has breached its obligations under Article 86, it may address appropriate decisions or directives to such Member State. It has used this power on a number of occasions:

- In its *Aéroports de Paris* decision,²⁰ for instance, the Commission found that Aéroports de Paris (ADP), a public undertaking which manages the Paris airports, had infringed Article 82 of the EC

Treaty by using its dominant position (as manager of these airports) to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-Charles de Gaulle on suppliers of certain ground-handling services. The discrimination resulted from the structure of the commercial fees charged by ADP to the suppliers for providing ground handling services. The commercial fees were composed of a fixed part, which related to the property occupied by the supplier, and a variable part corresponding to turnover of the supplier at the airport. A private undertaking, AFS, which supplied the above services at the airports and which had to make use of property located outside the airport premises, complained that owing to the manner in which the fees were calculated, it was placed at a considerable disadvantage vis-à-vis its competitors, who operated from property located inside the airport, which was publicly owned. The Commission found that the commercial fees in question formed an important part of a suppliers' cost structure and that the manner in which it was calculated did indeed place AFS at a competitive disadvantage. The Commission thus ordered ADP to stop its infringement of Article 82 of the EC Treaty.

- In *Second Operator of GSM Radiotelephony Services v Italy*,²¹ the Commission decided that an initial payment, imposed only on the second operator of GSM services for its concession to operate a GSM network in Italy, constituted an infringement of Article 86(1) of the EC Treaty, read in conjunction with Article 82, as it placed the second operator at a competitive disadvantage vis-à-vis the incumbent service provider, a public undertaking. The Commission therefore ordered Italy to take the steps necessary to abolish the distortion of competition resulting from the initial payment imposed on the second operator and to secure equal conditions for operators of GSM radiotelephony on the Italian market. It gave Italy the choice to either require the incumbent service provider to make an identical payment, or to adopt corrective measures equivalent in economic terms to the payment made by the second operator.

Under Article 86(3), the Commission has furthermore addressed various directives to Member States to ensure compliance with the obligations resulting from Article 86(1). For instance, the Commission's directive on common rules for the development of the internal market of Community postal services²² provides, inter alia, that: "...in order to ensure sound management of the universal service and to avoid distortions of competition, the tariffs applied to the universal service should be objective, transparent, non-discriminatory and geared to costs."²³ Article 86(3) is also a useful tool through which the Commission continues to liberalise certain sectors, previously characterised by the presence of State monopolies. For instance, the Commission Directive on competition in the markets for electronic communications networks and services²⁴ provides that: "Member States shall not grant or maintain in force exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications services."²⁵

4. Article 87

Another important tool that the Commission uses to ensure a level playing field between public and private undertakings is Article 87 of the EC Treaty, which provides that:

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market."

The aim of Article 87 of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities to undertakings, irrespective of whether they are publicly or privately owned, which in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products.²⁶ For a measure to constitute state aid under Article 87, the state²⁷ must grant an economic advantage, above a certain minimum threshold,²⁸ to an undertaking. Exempting an

undertaking from having to pay certain charges, which would otherwise have been payable, may also constitute state aid. Examples include: tax concessions, the application of excessively low energy prices, preferential interest rates on loans, cross subsidisation, state guarantees and other indirect advantages such as the sale or lease of assets at non-market prices.²⁹

A Member State intending to implement new state aid, or alter existing state aid, must notify its intention, and full details of the aid to be granted, to the Commission³⁰ and may not implement such aid before receiving the approval from the Commission. Implementing new state aid without notification leads to such state aid being considered 'unlawful' and the Commission, or a national judge, may request the Member State to suspend such aid, or to take all measures necessary to recover such aid from the beneficiary. The Commission also has the power to review existing state aid,³¹ that is aid granted to an undertaking by a Member State prior to such Member State's accession to the European Union. The Commission may at any stage find that, due to changing market conditions, such state aid is no longer compatible with the common market and has to be terminated.

There are various examples where the Commission has found, specifically in respect of public undertakings, that the advantages granted to such undertakings by the government amounted to state aid and where it has subsequently implemented measures to ensure that competition is not distorted.

- In *Banco de Credito Industrial*,³² the European Court of Justice (ECJ) found that a measure through which a Member State granted a tax exemption to a public undertaking, in this case a Spanish limited company in which the State had a holding, constituted state aid within the meaning of Article 87(1) of the Treaty. The aid in issue, however, was considered to be existing state aid, and it was found that such aid may be implemented as long as the Commission has not found it to be incompatible with the common market.
- In *Syndicat français de l'Express international (SFEI) v La Poste*³³ the ECJ stated that the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting state aid within the meaning of Article 87 of the EC Treaty. The test is whether the remuneration received in return for this assistance is less than that which would have been demanded under normal market conditions.

Where the Commission discovers areas where there are frequently complaints that, or uncertainty as to whether, state aid is present, it may issue guidelines or communications to clarify what it considers to be state aid, and under which conditions such state aid may be declared compatible with the EC Treaty.

The first such example is the Commission's communication on government capital injections.³⁴ In this communication the Commission stated that, in broad terms, state aid is present where fresh capital is contributed by a public authority to an undertaking (whether public or private) in circumstances that would not have been acceptable to a private investor operating under normal market economy conditions.³⁵ A classical example would be where the financial position of the beneficiary company is such that a normal return on the capital investment cannot be expected within a reasonable time.

A second example is the Commission's 1993 Communication to the Member States,³⁶ in which it formally established the 'Market Economy Investor Principle' (MEIP). In this communication the Commission recognised that public undertakings can, in certain instances, derive an advantage from the nature of their relationship with public authorities through the provision of public funds, whether directly or indirectly, and stated that: "*To ensure respect for the principle of neutrality the aid must be assessed as the difference between the terms on which the funds were made available by the State to the public enterprise, and the terms which a private investor would find acceptable in providing funds to a*

*comparable private undertaking when the private investor is operating under normal market economy conditions (hereinafter 'market economy investor principle').*³⁷

This principle has been applied by the Commission in establishing the presence of state aid in cases concerning capital made available by a public authority to a public undertaking.³⁸

- The judgement by the Court of First Instance in *Nationale Air France v The Commission*³⁹ is one example of where the MEIP has been used in respect of a public undertaking. Air France, a limited company in which the French State at that time held 99% of the share capital, had been experiencing serious financial difficulties for some time. Through a series of share-offerings, taken up by state-controlled entities, capital was made available by the French State to Air France. The Commission took the view that this constituted state aid, inter alia on the basis that a rational private investor would not have injected the large amounts in question into Air France in view of its recent poor financial and operating performance. Ultimately, therefore, it considered the injection of capital in question to be state aid aimed at helping Air France temporarily to overcome its financial crisis. The court upheld the Commission's finding that state aid was present and found that: "...there is State aid within the meaning of Article 87 of the Treaty when a State makes a large investment...for the purposes of [Air France's] restructuring, where the restructuring envisaged is clearly incapable of improving, even in the long term, the undertaking's situation, characterised by a crushing volume of indebtedness and overwhelming losses. In such circumstances, a hypothetical private investor would not have been induced by signs and prospects of improvement which are insignificant in comparison with the undertaking's situation to inject the capital in question, since he would have hardly any prospect of the undertaking returning the funds invested."
- In *Westdeutsche Landesbank Girozentrale v Commission*,⁴⁰ the MEIP was again applied where the Court of First Instance stated that: "Normally, a private investor is not content merely with the fact that an investment does not cause him a loss or that it produces only limited profits. He will seek to achieve the maximum reasonable return on his investment, according to the particular circumstances and the satisfaction of his short-, medium- and long-term interests, even where he is investing in an undertaking of which he is already a shareholder. Thus, as regards the position of the Land as investor, the fact that the transaction at issue is reasonable for the Land does not preclude the application of Community law on State aid. It does not obviate the need to ascertain whether that transaction strengthens WestLB's position by giving it an advantage which it would not have obtained under normal market conditions."

A last example of where the Commission has found it necessary to clarify its position on state aid is in regard to the sales of publicly owned land and buildings. Owing to a number of complaints received by the Commission to the effect that there was an element of state aid in favour of the buyers in certain sales, by public authorities, of publicly owned land and buildings, the Commission issued a communication on the matter.⁴¹ In this communication the Commission stated that it will assume that no state aid is present in such sales if certain procedures are followed. A sale of land and buildings on a publicised, open and unconditional auction, at the highest price is thus not considered to contain any state aid. Selling such property at a valuation set by an independent expert evaluation, within a certain margin thereof or at a price which reflects the cost of the property to the public authority, will also normally be considered to be sales which do not include elements of state aid.

5. The Transparency Directive

In order to effectively apply EC competition policy and ensure that public undertakings are not granted more favourable treatment than their private counterparts, the Commission has to be able to

ascertain what advantages these undertakings receive. For this purpose, the Commission issued the Transparency Directive.⁴² This directive recognises that, in order to ensure equal treatment of private and public undertakings through a fair and effective application of the Treaty rules, the complex financial relations between national public authorities and public undertakings must be made transparent. Article 1 of this directive thus provides that:

“The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:

- (a) public funds made available directly by public authorities to the public undertakings concerned;*
- (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions;*
- (c) the use to which these public funds are actually put.”⁴³*

‘Public authorities’ are defined as the State and regional or local authorities and ‘public undertakings’, as mentioned before, as any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. Some examples of financial relations existing between public authorities and public undertakings that have to be made transparent are:⁴⁴

- (i) the setting-off of operating losses;
- (ii) the provision of capital;
- (iii) non-refundable grants, or loans on privileged terms;
- (iv) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (v) the forgoing of a normal return on public funds used; and
- (vi) compensation for financial burdens imposed by the public authorities.

The directive also requires undertakings which have been granted ‘special or exclusive rights’ by a Member State,⁴⁵ or which have been entrusted with the operation of a ‘service of general economic interest’,⁴⁶ to maintain separate accounts. These separate accounts must clearly show: (i) the costs and revenues associated with the different activities and (ii) full details of the methods by which costs and revenues are assigned or allocated to different activities.⁴⁷ This provision has been inserted into the Transparency Directive to avoid that these undertakings cross-subsidize those commercial activities which compete with private undertakings, from funds raised through activities specifically reserved for them and in which they enjoy special benefits.

6. Conclusion

EC competition rules, being based on the neutral treatment of all undertakings, have proven to be up to the task of ensuring that competition in the common market is not distorted through advantages that public undertakings, engaged in commercial activities, may enjoy over their privately-owned competitors.

Article 86 forms the basis of the Commission’s efforts to guarantee a level playing field for all actors engaged in commercial activities within the common market. Combined with Article 87 on state aid, principles such as the equal treatment of undertakings irrespective of ownership as well as the market economy investor principle (MEIP), and backed-up by stringent transparency requirements, the Commission has the necessary tools to ensure competitive neutrality within the common market. Where certain services in the general economic interest will not be adequately provided under free market

conditions, Articles 86 and 87 provide for a proper balance between the application of competition policy and the special rights or assistance that may be given to these undertakings.

DG COMPETITION will listen with great attention to the experiences of its OECD peers in this domain and in particular to the approach for a competitive neutrality framework adopted (or envisaged) by Australia and the Netherlands.

NOTES

1. OECD draft letter to all Competition delegates and observers, 12 March 2004.
2. See OECD note by the Australian and Dutch delegation, *Regulating market activities by governments*, DAF/COMP/WD (2003)2.
3. *The Treaty establishing the European Communities* (as amended), 2002 OJ C 325.
4. This task is assigned to the Commission by virtue of Article 3(g), read with Article 211, of the EC Treaty.
5. See Articles 81 to 86 of the EC Treaty.
6. See Articles 10, 32, 36, 73 and 86 to 89 of the EC Treaty.
7. *Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings*, 1980 OJ L 195/35 (this Directive has been amended several times, most recently by Commission Directive 2000/52/EC of 26 July 2000).
8. Case 118/85, *Commission v Italy (transparency)* [1987] ECR I-2599, at par 11. See also case 482/99, *French Republic v Commission of the European Communities (Stardust Marine)* [2002] ECR I-4397 on the imputability to the state of aid granted by a public undertaking.
9. Case 41/90, *Höfner/Marcottron* [1991] ECR I-1979.
10. The Transparency Directive defines ‘special rights’ as: “*rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area:*
 - *limits to two or more the number of such undertakings, authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or*
 - *designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an activity, or*
 - *confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.*”See also Article 1 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.
11. Joint cases 188-190/80, *Transparency directive I* [1982] ECR 2545, at par 21.
12. The term ‘services of general interest’ incorporates both economic and non-economic services. Article 86(2) is, however, only concerned with services of general *economic* interest.

13. The Treaty of Amsterdam, 1997 OJ C 340.
14. See also Article 36 of the Charter of Fundamental Rights.
15. Commission communications on services of general interest in Europe, 2001 OJ C 17/04 and 1996 OJ C 281/03.
16. COM(2004) 374, *White Paper on services of general interest*, 12 May 2004, available at http://europa.eu.int/comm/secretariat_general/services_general_interest/docs/com2004_374_en.pdf
17. Ibid. at par 3.
18. Ibid. at annex 1.
19. See for instance *Höfner/Marcotron* at para 24; case 127/73, *BRT/SABAM* [1974] ECR 313, at para 19-23; Case 260/94 *Air Inter* [1997] ECR II 997, at par 144.
20. *Alpha Flight Services/Aéroports de Paris*, Commission decision of 11 June 1998, 1998 OJ L 230/10.
21. *Second Operator of GSM Radio Telephony Services in Italy*, 1995 OJ L 280/49.
22. Directive 97/67/EC of 15 December 1997.
23. Ibid. at par 26.
24. Commission Directive 2002/77/EC of 16 September 2002 (2002 OJ L 249/21).
25. Ibid. at Article 2.
26. Case 173/73, *Italy v Commission* [1974] ECR 709, at par 26; case C-387/92 *Banco di Credito Industriale* [1994] ECR I-877 at par 12.
27. In case 482/99, *French Republic v Commission of the European Communities* (Stardust Marine) [2002] ECR I-04397 it was held at par 23 that: "*It is settled case-law that no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid.*"
28. The Commission established certain *de minimis* rules in the framework of its communication concerning state-aid granted to small and medium-sized undertakings (1990 OJ C 40/2, 1992 OJ C 213/10 and 1996 OJ C 68/C).
29. In Case T-358/94, *Air France v Commission* [1996] ECR II-2109, at par 67, the Court of First Instance stated, with regard to Article 87 of the EC Treaty: "*That provision therefore covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector.*"
30. Article 88(3) of the EC Treaty.
31. EC state-aid policy distinguishes between state-aid which was granted prior to the accession of a Member State to the European Community (existing state-aid) and aid which was granted subsequent to such accession (new state-aid). Existing state-aid may be implemented as long as the Commission has not found it to be incompatible with the common market.
32. Case C-387/92, *Banco di Credito Industriale* [1994] ECR I-877.

33. Case C-39/94, *Syndicat français de l'Express international (SFEI) v La Poste* [1996] ECR I-3547, at par 62. On the calculation of state aid, see joined cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost SA, La Poste and French Republic v Union française de l'express (Ufex) and others* [2003] ECR I-6993.
34. *Application of Articles 87 and 88 of the EC Treaty to public authorities' holdings* (Bulletin EC 9-1984)
35. Ibid. at par 3.3.
36. Commission communication to the Member States of 1993 (1993 OJ C 307/3).
37. Paragraph 11 of the Commission's 1993 communication to the Member States.
38. See also Case 482/99, *French Republic v Commission of the European Communities* (Stardust Marine) [2002] ECR I-04397 where it was held at par 71 that: "...in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation."
39. Case 358/94, *Compagnie nationale Air France v Commission of the European Communities* [1996] ECR II-2109.
40. Case 228/99, *Westdeutsche Landesbank Girozentrale v Commission* (not yet published) at par 314.
41. *Commission Communication on State Aid Elements in Sales of Land and Buildings by Public Authorities*, 1997 OJ C 209/03.
42. *Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings*, 1980 OJ L 195/35 (this Directive has been amended several times, most recently by Commission Directive 2000/52/EC of 26 July 2000).
43. Article 1 of Commission Directive 2000/52/EC of 26 July 2000, 2000 OJ L 193/75.
44. Article 3 of the Transparency Directive (as amended).
45. Pursuant to Article 86(1) of the EC Treaty.
46. Pursuant to Article 86(2) of the Treaty.
47. Article 1(2) and 2 of the Transparency Directive (as amended).

SUMMARY OF THE DISCUSSION

by the Secretariat

Introduction

The Chairman, Frédéric Jenny, began the roundtable by noting that the original request for this roundtable came from the Netherlands, supported by a group of countries including the United Kingdom (UK) and Australia. The background paper was prepared by Ms. Deborah Cope, Consultant to the OECD Secretariat. The Chairman listed a number of general observations. First, there are various ways in which public sector firms can distort market competition as the status of public firms may give them an inherent advantage over private sector firms, because of access to cheap financing, tax benefits etc. Second, public sector firms may be able to engage in anti-competitive practices and be in some cases *de jure*, or in others *de facto*, exempted from the provisions of competition law. Third, public sector firms are often subsidised to provide public service obligations and may be able to use these subsidies to cross-subsidise the part of their activities that is open to competition. Fourth, in some cases public sector firms benefit from lax enforcement of public procurement rules, which give them an advantage in procurement markets.

The Chairman noted his impression that the goal of competitive neutrality policy is somewhat ambiguous. Such a policy aims to promote better competition and more efficiency, but also to ensure fairness.

For historical reasons countries do not have the same attitude towards the public sector and in some countries the public sector is more important than in others, these differences affect the significance of competitive neutrality issues. Also, the extent to which the competition law aims at promoting fairness appears to be related to the country's attitude to competitive neutrality. Countries, mostly European, where fairness has a role in competition policy, appear to also consider that there is a competitive neutrality problem.

The Chairman added that the competition authority plays an important role in competitive neutrality, mostly through its advocacy function. In rarer cases it can intervene through its enforcement powers. Before opening the roundtable the Chairman invited Ms. Deborah Cope to present the findings in the background paper.

Ms. Cope noted that all governments, national, regional and local, are involved in providing a range of services. At one end of the range are public services, which are funded from the budget, and provide services to the community that would not necessarily be provided by the private sector. At the other end are the commercial services, where the government charges for the services, and the services could potentially be provided by private sector organisations.

The advantages and disadvantages that government businesses have, simply because of their public sector ownership, can potentially have a significant impact on competition. These effects influence the fairness and the efficiency of competition. It affects efficiency if the government businesses are able to displace private sector competitors simply due to advantages because of its public sector ownership. Resources will not be used as efficiently, and government businesses will not be driven to improve their

own efficiency. These businesses will also be less innovative. From the fairness perspective, private sector businesses that face competition from government businesses that receive advantages will feel that they are unfairly disadvantaged. This sort of competition has real impacts on private sector profitability.

The background paper looks at how governments might address the efficiency and fairness issues and elaborates on three broad categories of responses. (1) The application of competition law, which many countries can use to address clearly anti-competitive conduct by government businesses that are dominant in a particular market. (2) The use of corporate governance reforms, which is applied in many countries to make the business, management and regulatory structures of government businesses more akin to the private sector. However, a lot of those corporate governance changes, like corporatisation, are generally focused on larger government businesses. (3) Specific competitive neutrality reforms, which are about neutralising, as far as possible, the full range of advantages and disadvantages the government businesses, competing or potentially competing with the private sector, might have. A specific difference between competitive neutrality arrangements and corporatisation and competition law remedies, is that competitive neutrality tends to be apply to much smaller businesses.

Efficiency and fairness in competition between the government and the private sector potentially has benefits. It is likely to make government businesses strive more to be efficient and innovative because they know that their ability to attract customers is a function of their own business performance. It reduces cost-padding because of the commercial pressure on the government businesses, and it helps to clarify the objectives, remove conflicts of interest and increase the effectiveness of their management. There is greater transparency in public sector business management, and greater ability to benchmark the performance of public sector businesses against their private sector counterparts. The private sector businesses will be more attracted to markets where they compete based their own abilities, rather than being disadvantaged by government benefits that come with public sector businesses competitors. Consumers will benefit from the lower prices and better services that this competition can generate. Resource allocation is improved because the businesses that are most efficient and deliver the services the customers want will be the most successful. Ultimately governments will benefit from the economic growth and the greater public sector efficiency that result from better resource allocation and increased competition.

The background paper concludes that competition law and reforming corporate governance of public sector businesses assist in improving the efficiency of markets where governments compete with the private sector, by removing a lot of the advantages government businesses may have. However, they are not the total solution because they tend to apply to very large businesses and may not cover all the competitive neutrality issues. In the case of competition law, it only addresses the issue after the damage has occurred. A full competitive neutrality framework, however, is extensive and complex. In order for it to be effective there needs to be a high level of commitment and cultural change from within government businesses and government agencies, and among politicians at all levels of government.

1. The special case of the United States

The Chairman moved to the contribution from the United States, and quoted that: "The commercial activities in which various levels of government in the United States – federal, state, and local – are involved are quite limited. ...Thus there does not appear to be any competitive neutrality issues of consequence. There is no significant regulatory mechanism dealing with these commercial activities and there is little public debate in the US about these issues". However, the contribution also explains that there have been problems where private firms invoking governmental processes to disadvantage their competitors, and discusses the exemptions resulting from the state action doctrine and the Noerr-Pennington doctrine. It also talks about the case of the United States Postal Service. The Chairman questioned the United States delegate on whether the United States Postal Service was a unique case,

whether competition authorities intervened in this case, and if they did not, why the matter was not relevant to the enforcement agency.

The delegate from the United States put forward that the Supreme Court of the United States made it clear that the Postal Service is not subject to national antitrust laws. The postal services sector has been the subject of attention from the competition agencies in the field of advocacy. The Postal Service is not a trivial commercial enterprise with \$70 billion per year in revenue and 800 000 employees, which makes it the second largest employer in the United States.

The Department of Justice and the FTC have been involved in advocacy in postal services. They have testified before the Congress on a number of occasions, dealing with questions on the structure of the Postal Service. The FTC raised questions about the Postal Service's advertising practices in an informal way. In response to private entry the Postal Service has been offering express service products. One of their products guarantees delivery in 2-3 business days, but the usual delivery time was longer. Following the FTC's inquiry the Postal Service amended its advertisements.

Another important advocacy issue was about blue ribbon commissions, special bodies that within the past few years have looked at postal service competition issues. The FTC has not been involved in the debate on social policy issues, but it has undertaken research that could help stimulate a debate on the sustainability of the *status quo*. One of the scenarios from the research is that postal services depend on a cross-subsidy scheme. The reserved area for non-urgent letters is the source of cross-subsidies to the other classes. One third of that reserved area volume consists of the receipt and presentation of bills, which is a rapidly declining portion of the market. Consequently, the ability to fund the cross-subsidised activities is declining and is likely to be unsustainable. The FTC has used international experience to inform its reform options. Overseas experience shows that there is a trade-off where the incumbent has to decide whether to give up the monopoly franchise in return for an absence of restrictions on commercial freedom, combined with competition policy, or some form of public utility oversight. The FTC's role as an advocate has focused on highlighting the inevitability of change in the existing regime, and to suggest that change might be managed by a deliberate policy making process.

2. Solving the competitive neutrality problem through wide-ranging competition law provisions: the experience of the EU

The Chairman then turned to the European Union (EU) highlighting from their contribution that the issues of public sector versus private sector neutrality and fairness are very important. They are an integral part of all competition law provisions and there are specific provisions in the EU Treaty dealing with those issues. According to the EU contribution these provisions are adequate to solve the competitive neutrality problem and nothing else is needed. The Chairman asked the EU delegate to present their view.

The delegate from the European Union explained that the activities of the public sector are important for the EU. Hence, dealing with issues of public-private sector competition is an essential role in the work of the European Commission and the DG Competition. The characteristics of the system in the EU are not unique. But the strength of the EU's system is that these characteristics are presented all together.

The first characteristic is that the principle of neutrality has been recognised in the Treaty of the European Union for more than 40 years. Article 86 of the Treaty clearly establishes that public companies fall under the scope of competition law, and that member states of the EU are not entitled to do anything against this rule. Public companies also fall under the rules on monopolisation and state aids (subsidies).

The second characteristic of the system is that the Treaty empowers the European Commission with the tools to tackle problems concerning the economic activities of public sector companies. The

Commission cannot impose on member states how to regulate businesses, but it can require the member states to apply competition rules to public companies. If a public company infringes competition rules, the Commission can issue a decision against that company requiring it to stop the conduct, and can eventually impose fines. Hence, private and public companies abusing their dominant position are in the same situation.

If the public company infringes competition law with the help of the government, or because of governmental influence (for example the government requiring the company to charge abusive prices), the Commission can address a directive to the member state, requiring it to stop these practices.

The rules on state aid and subsidies not only apply to public companies, they apply to all subsidies and state aids that the member states or other public bodies give to any company, including private companies. They are particularly important in the context of public companies, given the specific relationship public bodies have with public companies. State aids not only cover capital injections or grants, it also includes tax reductions or tax holidays, reductions in the social security costs, and warranties, etc. The member states are obliged to notify to the Commission if they plan to grant state aid to any company. The Commission scrutinises the planned measure and decides whether to authorise it. State aids are generally forbidden, though there are exceptions.

Another tool for the Commission is the transparency directive, which is about the financial relationships between public bodies and public companies. The transparency directive requires separate accountability. Public companies that have both commercial and non-commercial activities need to separate their accounts to show how their budget is divided between commercial and non-commercial activities. There are examples of how these tools have been used in many sectors, including the postal, energy and transport sectors.

Finally, the Treaty also recognises services of general interest. It is necessary for the government to provide these services, as the market cannot adequately provide them. The principles in the competition rules and state aid rules apply, in principle, to services of general interest, but their application is limited so that they cannot inhibit the company's ability to adequately provide such services. The Commission has provided information on the definition of commercial and non-commercial activities, service of general interest, and state aids.

The EU system has three specific characteristics: (1) the status of the principle of neutrality is recognised in the Treaty; (2) the Commission has operational tools to implement this principle; and (3) the limitation in the application of the principle of neutrality, particularly in the case of the service of general interest, is clearly recognised.

3. The case for a specific competitive neutrality policy

Turning to Australia the Chairman noted that Australia has a specific competitive neutrality policy that is less integrated with competition policy than in Europe. Australia's competitive neutrality policy is based on the principle that government businesses operating in actually or potentially competitive markets should not enjoy net competitive advantages over the private sector because of their public ownership. The competition authority, the Australian Competition and Consumer Commission (ACCC), does not play a major role in implementing the competitive neutrality principle (the National Competition Council and the Productivity Commission are in charge of implementation). The Chairman asked the Australian delegate whether the competitive neutrality principle and policy should be integrated into competition policy. He also asked why Australia had different sets of institutions looking at this principle compared with the competition issues.

The delegate from Australia stated that the increasing corporatisation of government businesses in Australia through to the 1990s had already addressed many competitive neutrality issues. However a need for additional measures, beyond competition law, was identified in 1993 by the Hilmer-review. The review found that while subjecting government business activities to the provisions of competition law was important, this would not address all concerns about the cost advantages and pricing policies of government businesses. For example market distortions would still arise where government businesses were exempted from certain taxes, received subsidies, etc. It also acknowledged that where problems arise from within governments it may be appropriate to address them through ex-ante policy measures. Therefore, the governmental agreement in 1995, signed by all Australian governments, introduced competitive neutrality policy.

The responsibility for implementing this policy rests with government policy agencies for several reasons. Firstly, competitive neutrality is not based in competition law; rather it has been developed and implemented within government. At the Commonwealth level, the policy is the responsibility of the Australian Government Treasury. Secondly, it seeks to encourage policy implementation. It takes an educative approach such that competitive neutrality policy and enforcement bodies work with governments to achieve implementation. It also recognises that individual governments may retain some flexibility, for example where they are at different stages of reform, while competition law is applied uniformly across all jurisdictions. Thirdly, sanctions are provided for through a system of financial penalties upon recommendation by an independent body, the National Competition Council.

Compliance measures at the federal level are consistent with state arrangements. A Complaints Unit was established in the independent Productivity Commission, which is the primary advisor to the Australian Government on microeconomic reform issues. The complaints body is the Australian Government Competitive Neutrality Complaints Office, which receives complaints and works with government agencies to achieve compliance. There have been relatively few formal complaints. These arrangements do not restrict the power of the ACCC to take action under competition law.

The goal of Australia's competitive neutrality policy is to remove any distortions in a market that arise because a business is publicly owned. The policy applies: where there is a market; to significant government business activities (this is where the gains are greatest); to all levels of governments; and only to the extent that the benefits outweigh the costs of the implementation. It does not apply to non-business, non-profit activities.

The key principles under competitive neutrality are: (1) taxation neutrality, which requires that a government business is not advantaged by taxation exemptions or advantages not available to its competitors; (2) debt neutrality, which requires that a government business is subject to similar borrowing costs to its competitors; (3) regulatory neutrality, which requires that a government business is not advantaged by operating in a different regulatory environment to its competitors; (4) commercial rate of return, entities are required to earn a return sufficient to justify a long term retention of assets in the business and pay commercial dividends; and (5) prices reflect costs, which requires agencies undertaking significant business activities as part of a broader range of functions to set prices to reflect full cost attribution for their business activities, in part to ensure that public funds provided for non-business, non-profit activities are not used to subsidise business activities.

Competitive neutrality policy also addresses where governments seek to subsidise non-commercial service obligations. Such subsidies may enable government businesses to achieve a competitive advantage, for example cross-subsidise other activities. Under competitive neutrality policy non-commercial service obligations must be clearly identified and funded so that prices reflect full cost attribution. The National Competition Council assesses whether commercial service obligations have been clearly specified and funded appropriately.

Australia's competitive neutrality policy has worked well for the following reasons: (1) it deepened the reform of public enterprises in Australia; (2) it has been implemented by large governmental businesses, which led to significant efficiency gains; and (3) it substantially eliminated the advantages of government ownership.

Concerning the contribution from New Zealand the Chairman highlighted that the reform undertaken in the 80s was designed to reduce the scope of government involvement in the market and encourage agencies that still carry out public functions to run as efficiently and effectively as possible. The contribution from New Zealand states that those reforms, which were based on the principal of competitive neutrality for public and private service providers, were a shift away from industry specific regulation to generic competition and fair trading regulations. The Chairman asked the delegate from New Zealand whether this system differs from the one in Australia.

The delegate from New Zealand emphasised the importance of the background to the reform in New Zealand. In the 80s and the 90s the government came to a view that a large number of areas of the economy, including the public sector, should no longer be subject to special protection or shelter through regulation or other means. The public sector reforms were aimed at improving its performance in line with what might be expected from the private sector. The reforms included corporatisation and, where appropriate, privatisation of government trading enterprises. Government departments were restructured, and their functions and the shape of their functions were rationalised, separating out policy development, service delivery and regulation.

The New Zealand Commerce Commission was set up as a stand-alone independent authority. Some of the service delivery functions were moved to non-departmental agencies known as Crown entities, and the government established a group of companies called state-owned enterprises (SOEs), with a pure commercial objective. SOEs were expected to achieve a commercial return on the government's equity investments. There are currently 17 SOEs. In addition, there are a small number of companies in which the Crown has a majority shareholding, or a minority ownership interest, which are essentially commercially oriented (for example the government's ownership interest in Air New Zealand). Regional and local governments also restructured by separating contestable and non-contestable services.

The combination of these reforms and a wider group of economic reforms brought a fundamental shift in the competitive environment in New Zealand. While New Zealand does not have a formal policy on competitive neutrality, the public sector reforms were based on the competitive neutrality principle. In practice at the legislative and SOE-policy levels there was strict adherence to the competitive neutrality principle.

A competitively neutral environment requires that a government agency should not enjoy competitive advantages over the private sector simply by virtue of being government-owned. One aspect of this is that the regulatory environment should be neutral, including the application of trade practices law and consumer law. The Commerce Act 1986 is the central pillar of New Zealand's competition legislation. Its purpose is to promote competition in markets for the long-term benefit of consumers in New Zealand. The Commerce Act furthers the competitive neutrality principle by making sure that competition law applies to Crown entities just as it does to private sector entities. The same applies with the Fair Trading Act.

The Commission has considered mergers involving government hospitals, education institutions and electricity retail companies, and businesses owned by local authorities. The Commission received an authorisation application proposing an alliance between Air New Zealand and Qantas. Air New Zealand is approximately 80% owned by the New Zealand government. The government made an explicit policy decision not to intervene on behalf of Air New Zealand in that application. For the merger to go ahead the usual competition and regulatory criteria would have to be met. This matter is currently before the courts

in both New Zealand and Australia. In addition there have been several enforcement investigations under the Fair Trading Act and Commerce Act against government organisations, for example, enforcement actions under the Fair Trading Act against electricity retail companies owned by the Crown, Air New Zealand, and several local authorities.

Both the public sector reforms and the economic reforms in the 80s provided for competitive neutrality across the public and private sector. They also provided an effective platform for ensuring that general competition and consumer law worked across the economy. It allowed New Zealand to move away from sector specific regulation. There are still some limited sector specific regulations but the New Zealand Commerce Commission implements them in a light-handed manner.

The Chairman contrasted the New Zealand and the Australian approach and stated that there is more reliance on the general competition law and the general Fair Trading Act in New Zealand together with the reforms of the 80s and the 90s to achieve the goal of competitive neutrality.

Turning to Switzerland, the Chairman pointed out that according to their contribution there is no horizontal neutrality policy in Switzerland. However, the principle of competitive neutrality is enshrined in the Federal Constitution. The Swiss competition authority has a significant role in promoting competitive neutrality of federal and cantonal legislation. However, this is limited because, as the contribution states, that cartel legislation applies to the public sector only “to a certain extent”, and the competition authority’s recommendations to federal, cantonal and municipal authorities are not legally binding. Unlike New Zealand, Switzerland relies on sectoral regulations to promote competitive neutrality. The Chairman asked the Swiss delegate about the reasons for this approach and Switzerland’s view on shifting away from sector specific regulation.

The delegate from Switzerland stated that governmental activities must be based on constitutional grounds, the government can only be involved in fields allow for under the constitution. These fields include public services, but do not include the economy. For historical reasons the government has become involved in fields such as banking, railways, air traffic, water supply, sewerage, postal services, telecom and electricity, which the government considered in the 19th and 20th centuries to be public services. Banking, for example, in the 19th century was considered to be a governmental service in rural areas where large banks would not provide services. Banks have become privately run enterprises today, but they are still partly publicly owned. These fields are not considered to be public services any more, and there is an issue of neutrality in this transition period.

Competition law generally applies to economic activities undertaken by public or private enterprises, as long the enterprise has its own legal personality. A decision by the Federal Supreme Court struck down a decision rendered by the competition authority ordering the Swiss Bureau of Meteorology not to discriminate on prices. The Federal Court concluded that the Bureau of Meteorology does not have its own legal personality.

New legislation, which will come into force on 1 July, includes a chapter on the transformation of institutions of public law. This legislation will facilitate the corporatisation of public entities, making it technically easy to move from the public to the private sector.

In practice, however, competition law is restricted where the public law establishes another market order. This requires the competition authority to step back when separate market or price regulation exists (sectoral regulations exist in agriculture, public health and some aspects of electricity). In one case an electricity company refused to transport electricity through its lines to serve a client who wanted to buy electricity from another producer. The competition authority considered this an abuse of a dominant position and ordered the company to transport the client’s electricity. The decision was appealed and the

Supreme Court upheld the competition authority's decision saying that there was no constitutionally valid market and price regulation covering that activity. Competition law does not apply where the state replaces the competition system (market system) with another systematic system (market or price regulation).

In summary, normally the state should not carry out market activities. Where the state is involved in market activities it is subject to normal competition law, except where a market regulation has been put in place by the government.

The Chairman then turned to the United Kingdom and noted that the UK does not have an overarching administrative framework for government bodies engaging in competition with the private sector. However, the UK contribution suggests that competition law enforcement against anticompetitive practices of public bodies is insufficient to address all competitive neutrality problems. Guidance provided by the Treasury and provisions in the Enterprise Act of 2000 help address competitive neutrality issues by allowing a *“more proactive and positive approach to competition issues”*. The Chairman asked the UK delegation to explain what is needed beyond competition law enforcement to address the issue of the impact of public bodies on markets, and how these other instruments are used in the UK.

The delegate from the United Kingdom explained the reason why the UK does not think competition policy alone is the right way of dealing with competitive neutrality problems. Competition policy deals with situations after the event and there are some good reasons to forestalling such events. The UK deals with problems by a combination of competition law, and the guidance that the Treasury offers on fees and charges for public bodies.

The background in the UK is very similar to the situations in New Zealand and Australia, as the UK has implemented policies to make its agencies more efficient.

The contribution deals with cases where there were complaints under the Competition Act about the sale of information or the cost of information that was sold by a public body. There is concern about the behaviour of public sector bodies squeezing margins, closing markets or bundling prices together. Three cases were covered (1) Companies House, which has all the information on companies in the UK; (2) Environment Agency, which has data that only it can collect, once again under statutory means; and (3) Ordnance Survey, which has the statutory rights to maps for the country. All these organisations have monopoly information. According to the complaints these public bodies were selling information at prices that were too high, or they were operating unfairly in the market.

These cases are very hard to deal with under competition law. First, it is difficult to get hold of the costs as they are not well set out in the accounts, so allocating the costs is much more difficult than it would be for a private sector company. In spite of the EU directive on the sale of information, which says that prices should be cost reflective, public companies do not make prices clear in that way. Second, some of the complaints are about proposals rather than events, which cannot be dealt with under competition law. The authority has to influence the companies to encourage them to change their policies and pricing.

Overall, it is very difficult to make sense of companies' accounts and it takes a lot of work to get companies to keep proper accounts. It would be easier to deal with complaints if the public bodies allocated cost properly. There may be a question about whether these public sector bodies are acting anticompetitively, or whether they do not have a real handle on their costs and therefore the allocation of those costs. The goal of improving the guidelines is to go beyond dealing with individual cases under the Competition Act and try to set a framework for looking at costs that raises awareness and avoids future problems. The Office of Fair Trading (OFT) is thinking about doing a study into property-search, which is

the information needed for buying and selling a house, where similar information problems arise. This study would try to draw some wider conclusions that can be applied more broadly in the future.

The OFT is also looking more broadly at the impact public bodies have on the market, for example where they make rules or regulations or they interpret rules and regulations. A study prepared on the taxi market concluded that regulations in this market limited competition and choice. The OFT study into government subsidies is considering how the rules on subsidies effect competition. This studies does not question the right of the government to have subsidies, but aims to show whether the subsidies are the most effective way of delivering the public goods.

4. Countries relying mostly on competition law to solve the competitive neutrality problems (for lack of another instrument)

The Chairman next focused attention on a set of countries that rely primarily on competition law to solve the competitive neutrality problem. In Chinese Taipei general competition law plays a central role in promoting competitive neutrality, along with the State Enterprise Act, which contains principles that require businesses to behave in a commercial manner. The contribution elaborates on two cases. In the first case, the incumbent telecom operator was alleged to have used the revenue generated from its monopoly business to subsidise its competitive activity. In the second case, the JTFTC found that the state-owned Chinese Petroleum Corporation was “*unrightfully interfering in the liberalization of the LPG market by engaging in discriminatory pricing against downstream LPG dealers that traded with other LPG importers*”. The Chairman asked the delegation from Chinese Taipei to explain how the competitive neutrality system is enforced in Chinese Taipei and also to address the issue that was raised by the UK saying that competition law is insufficient to ensure competitive neutrality because competitive neutrality problems do not always arise in the context of dominance.

The delegate from Chinese Taipei underlined that in an ideal case a comprehensive and effective competition law would be sufficient to address competition issues for all public and private sector firms. However, if the law creates exemptions or there are special regulations (for example the Telecommunication Act) then there may not be a competitive business environment. There are two examples in the submission from Chinese Taipei. In the first example the telecommunications company decreased the rate for local phone calls in order to subsidise the mobile phone market, which is very competitive. Even though this was a typical cross-subsidy case, it was not easy to address fully the issues associated with the natural monopoly and structural reform in the telecommunications market, and to determine the connection fee. These difficulties can arise because of the competition authority’s lack of technical capability or exemptions provided by law. Other tools are needed. The Liquefied Petroleum Gas case was also about cross-subsidies but it was easier because the competition authority had monitored this industry closely and therefore competition law was sufficient to deal with the issues. You need to look at each sector or industry separately.

In the absence of full privatisation it is very difficult to promote, or to create, a competitive environment. There are exemptions, special regulations or other economic laws, like corporate law and banking law, which contain loopholes that state-owned enterprises can take advantage of. There are also invisible barriers like administrative guidance and administrative prerogatives. These advantages can be comprehensive, invisible and pervasive. These situations are very difficult to handle with any systematic regulatory regime.

The purpose of promoting competitive neutrality is to create a level playing field, which is very difficult and needs a long term perspective. A few years ago the petroleum market in Chinese Taipei was opened to competition so the private sector is entitled to operate refineries and import gas for sale in the retail market. Nevertheless, consumers go to the state-owned-enterprise for petrol and gas, believing that

there is less probability that the state will adopt dirty tricks or dubious activities. It will take years for consumers to trust private owned gas operators, as the quality of gas is very difficult to observe.

The Chairman highlighted two points from the Chinese Taipei delegate. First, according to Chinese Taipei, it is extremely difficult to change the perception of consumers and therefore to really succeed in furthering the competitive neutrality principle, and second, in contrast to previous contributions, the sectoral approach is needed because the problems are different between sectors.

The Chairman turned to Germany, and pointed out that Germany does not have a systematic and comprehensive neutrality policy. The contribution states that, instead, Germany relies on a wide set of laws, such as the community law provisions, public procurement law, and municipal economic law. This approach is different from the other systems. He asked the German delegation to explain how their system works.

The German delegate began by saying that there is a wide range of remedies taking care of competitive neutrality issues. Four key types of competitive neutrality issues were discussed.

First, subsidies to government businesses are addressed by the EU provisions that regulate the funding of public companies by placing strict control on subsidies and state aids. For example, the German Lander Banks had state guarantees behind them, which enhanced their ability to raise money. The EU brought actions on this issue so these banks will not exist for much longer. EU provisions also affect cost allocation and transparency.

Second, public procurement issues are also under EU control. The European directives have been supplemented by corresponding national law in Germany. Public tendering has to be competitive, transparent and non-discriminatory. This is controlled by independent bodies, three of which are located at the Federal Cartel Office.

Third, the economic activities of public sector firms are organised under private law. Even if the rules applied for public companies are different, they do not give them many advantages over the private competitors. Another reason why this issue is easier to deal with in Germany is the trend to more privatisation. Also areas traditionally run by the government are now run by private companies, which are still owned by the state but function under normal civil law rules.

Fourth, the German Competition Act is applicable to all economic activities – private and public companies – but there have been large areas exempted from the application of the Act. In the 1990s the number of these areas decreased. Nowadays telecommunications, railways, postal services and even the economic activities of the local authorities are governed by the same rules.

The Chairman turned to Hungary and noted that the Hungarian government recognises the importance of competitive neutrality, particularly in the regulation of state-owned enterprises. However, there is no overall government policy based on the consistent principles that would impose an obligation on state enterprises to adopt competitive behaviour equivalent to private businesses. A Transparency Act, inspired by the EU requirements, came into force when Hungary entered the EU on 1 May 2004. The Competition Council seems to play a useful role in promoting competitive neutrality through the enforcement of competition law. The contribution discusses two cases: the refusal by a town council to grant a permit to a cable-TV network to protect the existing municipal cable-TV network; and the Hungarian Post Office. The Chairman asked the Hungarian delegate to explain the cable-TV case and whether the Competition Act applies to municipal councils and what the Competition Council can do in such cases.

The Hungarian delegate submitted that the absence of a comprehensive neutrality policy in Hungary is not the result of an intentional policy, rather it is the result of history, and could be changes in the future.

There are three possible types of competition issues relevant to municipalities. The first is when the municipality issues a regulation that is against the principles of the Competition Act or infringes competitive neutrality. In this case the competition authority may turn to the Constitutional Court to have the regulation dismissed. The second possibility is when the municipality makes a decision that influences the market. In this case the competition authority can issue a formal warning to the municipality and, if the municipality refuses to change the decision, the competition authority may ask the court to dismiss that decision. The third possibility is when the municipality does not take a decision but it is acting as a market actor (e.g. when it manages the property of the municipality). In this case the action is subject to the Competition Act, and the competition authority may initiate normal proceedings.

In the cable-TV case, a cable-TV network had been established in a town with subsidies from the municipality, and the municipality supplied consumers on a non-profit basis. Later a competitor intended to enter the market. To acquire a licence to supply services the new entrant had to get authorisation from the municipality to establish installations on public areas owned by the municipality. The municipality refused to give this authorisation and therefore the sectoral regulator had to refuse to grant the license to the new entrant. The competition authority established that the decision of the municipality was not justified, it was a decision of commercial character and it was not part of the practice of the public power of the municipality. Therefore, the municipality was ordered to revoke the decision and to make its decision based on the merits of the offer of the firm seeking to enter the market. If the municipality does not comply with the order, the competition authority can bring down a follow-up decision and impose fines.

The Chairman moved to Korea and pointed out that Korea does not have specific architecture for dealing with the competitive neutrality problem. Competition law has been used at the central and local level against governments or public activities that acted anticompetitively, or where public bodies had an undue advantage. The Chairman asked whether Korea finds that competition law is an effective tool in eliminating the problem of competitive neutrality particularly at the local level. He asked the Korean delegate if there is need for other tools in Korea.

The Korean delegate explained that the Korean FTC (KFTC) has regularly conducted investigations into local public enterprises. Corrective measures were ordered whenever violation of the competition law was found. The most common types of violations at local government level included disadvantageous transactions, coerced purchase, resale price maintenance and unfair uniform contract. If the competition problem results from the institutional restriction of competition by the local government, not from the business behaviours of the local public enterprise, competition law cannot be used against the local public enterprise. A typical example is when the local government includes conditions advantageous to their enterprise in local ordinances and rules.

For example, a local government prevented private firms from entering into the road management business, to protect its own facilities management business. In another case, the local government amended its ordinances to unduly imposing business time and retail sales restrictions on the private local fish markets. This promoted the retail market the local government had built.

The KFTC has consulted the related ministries to put pressure on local government to abolish anticompetitive rules and ordinances. In addition to ex-post measures to improve anticompetitive institutional arrangements and competitive neutrality, the KFTC reviews and makes recommendations on anticompetitive elements of new bills or amendments. The KFTC has a role in guaranteeing competitive neutrality by conducting investigations, making recommendations to the local government about its competitive rules, and using its advocacy power to promote change through consultation with other ministries.

The Chairman noted that there seems to be one difference between Hungary and Korea, the KFTC does not have the power to directly impose its decision on local governments but goes through the ministries that overlook the activities of those local governments. The status of the competition authority and the fact that the head of the KFTC is at ministerial level, helps convince other ministries to comply with its recommendations.

5. Proposals for reform

The Chairman turned to countries that would like to change their system. The contribution from the Netherlands explains that the Market and Government Bill introduced to parliament in 2001 was broadly criticised. As a result, a second bill, based on an alternative approach, is being considered. The Chairman called upon the delegates from the Netherlands to describe the differences between these two bills, and the relationship between the second Market and Government bill and the Competition Act.

A delegate from the Netherlands explained that the first Market and Government Bill was meant to be a specific Act to address the market and government problem in general. It contained two kinds of rules. First, rules for market entry – public bodies when entering a market should take a formal decision to do so, and in this decision they have to justify operating in the market by showing the public interest. Private companies could object to the government's decision to enter the market.

Second, there were five rules for market behaviour. (1) A ban on cross-subsidies between economic activities and public money. For example, municipalities should not levy taxes to cover the losses from their own economic activities. (2) A ban on the exclusive use of data obtained in the public service. That is data collected for public services should not be used for commercial activities unless other companies have access to the data on the same conditions. (3) A ban on the intermingling of public and commercial responsibilities. So that commercial activities are not carried out by the same part of an organisation as public responsibilities. (4) A ban on preferential treatment of state-owned companies. Governments should not give their enterprises advantages that go beyond those that are normal commercial practices (e.g. allowing a state-owned company to use public means without paying for it). (5) Separation of the administration for public services and economic services according to the European transparency directive.

The Parliament raised a lot of objections on this bill. The objections focused on the rules of market entry for public bodies. The scope of the rules was unclear. There were concerns that there were too many restrictions on the freedom of government authorities to decide whether or not to enter the market. It was thought that there would be a risk to public administration from court procedures initiated by private firms who were unwilling to have a government firms as their competitor. As an alternative, the present government proposes to drop the rules for market entry and limit the regulation to rules for market behaviour. Those rules are to be the same rules that were in the first Market and Government Bill. The proposed rules on market behaviour will be incorporated into the Dutch Competition Act and enforcement through that Act.

The Dutch are also discussing three other issues. (1) How to deal with private companies that perform activities that are assigned and paid for by the government? Compensation that exceeds the costs of public services is not prohibited. Therefore, compensation can be used by companies in other open markets, causing a distortion. (2) Should the competition authority be able to fine a public body for infringing competition regulation? (3) A ban on cross-subsidy, which is not intended to hinder the performance of the organisations' public service. This raises questions like, who determines scope of the public service, how is it determined whether a public service is hindered, and who makes this assessment.

The Chairman turned to Finland and stated that the Finnish Competition Authority (FCA) actively influences legislation and regulation that potentially distorts competition. This action contributed to the

marketisation of government production and municipalities' production, and promoted improvements in transparency. The contribution from Finland makes clear that competitive neutrality problems can occur even when public firms are not in a dominant position. Prior to 1 May 2004 the Act on Competition Restrictions allowed the FCA to intervene even if there was no practice prohibited by the Act. However, this provision was repealed to harmonise the Act with the EU legislation. The Chairman asked the delegation from Finland to explain the remaining problems.

The Finnish delegate stated that the deletion of paragraph 9 does not hinder the levelling of possible market distortions by government business activities, as this paragraph had practically never been used. Competitive neutrality is ultimately a matter of competition advocacy, substantial antitrust provisions are not needed in reality. The Finnish contribution states that the Act governing the operation of the FCA provides every tool needed for this work. The tasks of the FCA according to this Act are, inter alia, to take initiatives to promote competition and to repeal provisions and regulations that restrict competition.

A significant project of the FCA is on government and the markets. This project has made local and national politicians aware that the interface between private and public production needs constant monitoring, and that competition brings efficiencies when the financial situation of the municipalities is worsening. There is a need to establish a special law, or a separate paragraph in the competition act, ensuring the FCA has full rights and freedom to continue its work to persuade the municipalities to open up their markets to competition. There is also a need for another project to concentrate more on substantial governmental issues.

Turning to Sweden the Chairman quoted from their contribution that: "Existing legislation such as the Swedish Competition Act and legislation relating to the regulation of local governments has in practice proven to be insufficient to remedy distortions in competition when public actors operate under more favourable conditions than the private business sector". Sweden is considering a proposal to supplement the Competition Act to allow the Market Court to prohibit a public agency from obstructing efficient market competition. The Competition authority has been asked to monitor the issue and to suggest remedies to improve competition between public and private sector firms. The Chairman asked the delegation from Sweden what the main outstanding problems are, what new provisions could help eliminating them, and what should the role of the competition authority be in monitoring or enforcing the new provisions?

The delegate from Sweden announced that on 1 October the Swedish competition authority will present a report to government discussing legal reform in this field. He emphasised that strict compliance with existing legislation, as well as effective sanctions ensuring such compliance, are necessary. This is particularly true for the Local Government Act, which clarifies the scope for municipalities to pursue market activities. Previous experience clearly indicates that legal reform, rather than a voluntary code of conduct, is necessary.

The preliminary view of the Swedish competition authority is that a horizontal approach rather than sectoral reform is needed. Thus, the construction of the legislation is very important. An amendment to the Competition Act is not sufficient. The Swedish competition authority envisages an amendment of the Competition Act or specific regulation, as well as amendments to other legislation, which would be enforced by the competition authority and the administrative courts. The system will need to include efficient sanctions.

The Chairman moved to the contribution from Mexico, which notes that state-owned enterprises are still a significant part of the economy. The Competition Commission has been actively involved in promoting competitive neutrality through issuing opinions about regulatory and legal amendments, and seminars aimed at promoting competition culture and seeking to build regulatory capacity that is

favourable to competition. The contribution states that: *“in order to truly attain competitive neutrality, it is necessary for SOEs to face similar forces as their private counterparts regarding their economic performance on a stand alone basis, which lies beyond the reach of competition legislation”*. The Chairman invited the Mexican delegate to outline the main legal provisions that are necessary to ensure competitive neutrality in Mexico.

The delegate from Mexico explained that the main problem Mexico encounters with the participation of public owned enterprises in economic activities is the way the public enterprises can use their dominant position in the market to earn a monopolistic profit from customers, or displacing competitors from participating in certain economic activities. Some public sector enterprises, especially in the oil sector, aim to maximise the profits of their operation. Monopolistic profits from the oil sector are used to finance general government. The Ministry of Finance determines prices, not necessarily taking efficiency consideration into account. Such prices affect the competitiveness of the economy. There is very little that competition policy can do in these cases.

The other problem is that government enterprises use their monopolistic or dominant position in markets to restrict access to other activities where they compete with private companies (e.g. distribution and transportation of natural gas, where the government is the main supplier and distributor of natural gas and it uses this dominant position to reduce competition in the overall market). Even though the Competition Commission can intervene in these cases, it is very difficult to act. It is difficult to gather evidence, and many of the companies that are affected by the behaviour of the government-owned enterprise are not willing to participate or present a formal complaint against a large corporation that supplies a product which is essential to other parts of their business.

For Mexico to have a reasonable degree of neutrality, legislation has to eliminate the exclusivity of government involvement in strategic activities. The legislator would probably reject such a proposal. Regulations to require competitive neutrality are unlikely to be effective because, first the dominant position of government-owned enterprises in strategic activities is often so strong that it is very difficult for anybody to make a complaint or pursue a case of violation of competition law, and second, the government is using the revenue derived from the energy sector to finance the total budget. This makes it very difficult to introduce a transparent competitive neutrality policy.

Another factor is that government-owned enterprises have very strong trade unions, and certain costs of these government enterprises do not reflect competitive costs. Therefore the electricity tariffs, for example, would have to reflect the true costs of the service, these costs would include distortions due to trade union negotiations and excessive use of labour. The tariff that would be derived from applying such a rule would be excessive because it would not reflect the true economic costs of providing the service. To overcome these excessive costs the government would need to subsidise these service. This is impractical. Hence, the only solution would be to eliminate the restriction on private participation in these strategic activities and to apply competition principles.

The Chairman noted that in some countries there is a degree of entrenched power that goes beyond what legislative provisions can handle and in that case a deep change in the attitude of the country could help.

The Chairman turned to Turkey and stated that Turkey does not have an overall policy of competitive neutrality, although privatisation and the enforcement of competition law contribute to the achievement of competitive neutrality. The Turkish competition law is fully applicable to public firms. The Turkish Competition Authority (TCA) has played an active role in promoting competitive neutrality through its adjudicative powers and advocacy, but it is also encouraging the Parliament to amend the Competition Act *“to further empower the TCA in minimising competition distorting measures by Government agencies”*.

The Chairman asked the delegation of Turkey to describe the role of the TCA in promoting the competitive neutrality principle.

A delegate from Turkey confirmed that Turkey does not have an extensive neutrality policy, but it does recognise the importance of competition. The activities of the state are an important dimension of the competitive environment. State economic activities are subject to competition rules. However, some state measures that are not market activities, but can still distort the market, are not subject to competition rules. Those state measures outside the scope of competition rules are the main concern. There is a recent proposal in Turkey that, if passed by the Parliament, will give the competition authority further power. In a country with forming competition culture it may not be easy to convince other government agencies to comply with competition principles. If the TCA had the right to go to the court to annul the action of a government agency, this would contribute to the introduction of a competitive environment in Turkey. It is not easy to change the approach of other government bodies, even though some of their measures may not be in the public interest. Providing the competition authority with a legal power to address actions by government agencies that distort competition may help reduce this resistance. In Turkey the Constitution includes some competition principles, but to give meaning to these principles they need to be backed by legal powers.

Moving on to Israel the Chairman noted that the contribution from Israel speaks about competition law and the role of the competition authorities, and about Israel's privatisation programme. Many contributors argue that privatisation and competition law are necessary, but not sufficient, conditions for competitive neutrality. He asked the delegation from Israel whether they feel that additional legal or constitutional means are needed to promote the competitive neutrality principle, or whether in Israel the existing approach to privatisation and competition law is sufficient.

A delegate from Israel remarked that while competition law and privatisation alone cannot solve all the problems, this does not mean that the Israeli competition authority does not do anything about competition neutrality. He introduced Mr. Ben-Hamo, head of the Structural Changes Unit in the Israel Government Companies Authority. This unit conducts all the structural changes required in the market in order to enable, among other things, competition prior to privatisation.

Mr. Ben-Hamo stated that privatisation and competition law are not enough to ensure competitive neutrality. For this reason, the Ministry of Finance established the Structural Changes Division in the Israel Government Companies Authority to implement changes in the structure of monopolistic government corporations. This is based on the presumption that changes in the structure can promote competition. This is why structural changes are implemented first, and privatisation should follow after these changes. Antitrust law coupled with structural changes and privatisation processes are the main conditions necessary to achieve a competitively neutral environment.

He discussed two government corporations. First the Ports Authority, which controls all Israeli ports. This authority will be dismantled so each port will be a separate government-owned company. The next step will be privatisation of each company. Second, the Israel Electric Company (IEC), which is currently a full monopoly. The government decided to split the IEC into 4-5 generation companies, a similar number of distribution and supply companies, and a single transmission company. Around the IEC there will be a Holding Company. The generation companies and the distribution and supply companies will be encouraged to compete with each other. In the next stage, each generation and distribution and supply company will be privatised.

The Chairman then invited the countries to participate in open discussion.

A delegate from BIAC commented that, as outlined in the background paper, the benefits of competitive neutrality are clear and there is the potential to improve efficiency in the public and the private sector. If there is a drag on attaining efficiencies because a public sector entity is protected, it distorts the entire playing field and the ability of private sector entities to attain efficiencies. The other benefits are fairness and consumer welfare. The rules for public and private sector entities in these situations should follow three fundamental principles. First, the rules need to be transparent and well understood. Transparency is particularly important when dealing with public sector bodies, for instance in areas such as taxation and accounting. Secondly, non-discrimination, such as in Canada, which amended its federal competition act in 1986 to specify that any public sector body or corporation that is engaging in market activities in competition with the private sector must abide by all of the provisions in the competition act. Third, accountability, under the competition legislation and more broadly. Public interventions (hearings before other regulatory bodies and competition advocacy by the competition authority) can stimulate public awareness of the benefits to consumers and industry from true non-discrimination and a level playing field.

The delegate from Denmark stated that the Danish competition authority has both specific powers relevant to competitive neutrality and is also involved in advocacy. The market distortions created by public conduct can be divided into two groups: (1) concealed distortions that are not a deliberate choice of the politicians, but are more like a side effect; and (2) distortions that are the deliberate choice of the Parliament. Both groups are likely to be large, but the first is probably bigger. If the first group is bigger then the best policy instruments would be more transparency rules and more specific powers to competition authorities. If the biggest problem is unwise choices made deliberately by parliaments, then the main instrument would be more and better advocacy.

The German delegate identified two different approaches during the roundtable. First, those countries without a specific neutrality policy, that think that competition policy alone is enough. They have the general perception that private companies and state-owned companies should be treated on an equal footing. Unless they are a dominant company, private companies are free to set prices, discriminate between clients, and cross-subsidise, and the same freedom should be given to a state-owned company. There are differences between all companies. Private small and medium sized companies have totally different access to financial resources than a company that is part of a big banking group. Article 82 on the rules concerning the abuse of dominant positions applies irrespective of whether it is a private or a state-owned company. The same is true for regulation in countries like Germany.

Second, those countries where neutrality policy is applied, that want to reduce the freedom of state-owned companies in the market so that they do not have the same freedom as private companies. These raise two questions: (1) is it justified to apply more severe regulation to state-owned companies than to private companies in the market; and (2) is the competition authority best placed to regulate the neutrality of state-owned companies. Given the difficulties in controlling unilateral behaviour of dominant companies, it is appropriate not to have a specific regime for the control of unilateral behaviour by state-owned companies. The undesirable behaviour of state-owned companies must be controlled, but institutions, other than competition authorities, may be better positioned to undertake this task.

A delegate from Mexico underscored that what is referred in the literatures as soft versus hard budget constraints is very important for competitive neutrality. Countries often face a question about whether the government-owned companies are allowed to fail or not. Even if subsidies or cross-subsidies are restricted, the fact that the government-owned companies are not allowed to fail is a major barrier to competition. For example, government-owned airline companies that fail and are then rescued by the government. The question is to what extent the government-owned enterprises have a hard budget constraint, including the possibility of bankruptcy.

It is also important for the design of competitive neutrality policy to think about market structure because it is not the same to regulate a company that has dominant position in the market, versus a company that does not have a dominant position. It is much easier to apply the principles of competitive neutrality if the government companies do not have a dominant position in the market.

The delegate from Australia drew some convergence between two fundamental principles that apply in respect of competitive neutrality. These principles have been applied in Australia particularly since the Hilmer-reforms in 1995. The first principle is that the same rules should apply to government business enterprises as apply to the private sector. The second rule is that of the level playing field. There should be no advantage by virtue of simply being a government enterprise.

The issue of imposing certain constraints upon government enterprises arose recently in Australia. Australia introduced competition into areas that were previously monopolies. In these circumstances there were constraints placed on the ability of the government enterprise to compete in the marketplace, not because they were government-owned, but because they were necessary to bring about a transition into a more competitive environment. When there is an incumbent, such as in the case of telecommunications, electricity or gas, then it is appropriate to impose some constraints on market behaviour as a necessary transition towards a more competitive environment, in other words to enable entry by the private sector. Thus, the same rules apply, but as part of the transition additional rules on market behaviour may be necessary to lead to a more competitive environment.

A delegate from Switzerland argued that having the competition authorities regulate state-owned companies is better than other solutions for practical and theoretical reasons. A state-owned enterprise can act as a dominant company so there is an obvious reason to have the same rules to apply. It is both more efficient and fair to have a competition authority applying the same rules to both public and private undertakings. Drawing the line to distinguish government economic activities that are subject to competition law must be done in an unambiguous way. There can be requirements for crossing that line and leaving the economic and competition regulation area, but these requirements should be more than only being a state-owned enterprise. This could require the state to put up a market scheme by law, which may be less efficient, but it would at least be democratic.

He asked the Australian delegate whether corporatisation is a transition program. If corporatisation is not accompanied by privatisation, it can make things easier, but it will not address competition problems. In a short or medium run it may be just as difficult to manage competition issues. Swisscom is a good example, it is corporatised and also partially privatised, with a large, 60%, state-shareholding. There is still a temptation for governments to regulate in favour of the company in which the state has a large stake. In the medium-run corporatisation should be accompanied by privatisation.

The Turkish delegate remarked that the main concern is the elimination of the market distorting activities of public undertakings. In a free market approach the market should be left to private undertakings. Therefore, privatisation should be the first priority in eliminating market distorting activities by public undertakings. However, if public undertakings cannot be privatised then competitive neutrality policy might be relevant. The example of Australia provides very extensive and comprehensive principles that might be followed by other countries. He suggested preparing a best practice guideline based on the Australian model.

The delegate from Brazil emphasised the importance of competitive neutrality issues. Brazil has problems with competitive neutrality in three sectors: oil, gas and electricity/energy. In these three sectors the main companies acting are state-owned. These sectors are linked to the Ministry of Energy. Due to these facts some laws have been changed to maintain the importance of the state-owned companies and, although competition law covers state-owned companies, the competition authority could not do anything

about these legislative changes. Brazil is in the final process of redesigning its system for competition and will probably have a specific body responsible for competition advocacy in regulated sectors.

The Australian delegate explained the reason why corporatisation is a focus of Australian policy. Corporatisation provides for transparency, the market disciplines to apply, and those that are involved in government business enterprises focus on the same factors as the private sector, including the return on capital employed. Privatisation does not have strong support in the current political environment.

Ultimately, while there are particular products and/or services provided by the public sector it is entirely appropriate for governments to require government business enterprises to undertake activities in the public interest. So privatisation is the means of ultimately separating public companies from political interest. Community service obligations can then be provided for through regulation.

The Chairman concluded that there are different ways of looking the competitive neutrality issue. In some countries there is a deliberate attempt to promote the public sector. In others the competitive benefits available to the public sector accrue from non-deliberate behaviour on the part of the government. There are countries that have an overall policy to promote competitive neutrality and countries that do not. Another distinction is that Mexico, Chinese Taipei and Turkey have a lot of dissatisfaction with the problem, whereas the United States, Germany, Hungary and New Zealand are fairly comfortable with the current situation, and in the Netherlands, Finland and Sweden there is a definite attempt to find new avenues around this problem.

The roundtable touched on an important set of issues. There was recognition that the question of neutrality has some relationship with how markets work and with competition. The next question was what would be necessary or sufficient, to promote better functioning markets, what is meant by equality in competition in a world of unequals. The level playing field is beneficial, but the concept of being level can change rapidly and is not the same in all countries. So the question is: does having a level playing field require public firms to be treated differently, that is should they be discrimination against because they derive power from the statutes, something that the private firms can never achieve; or should the conditions under which they operate be exactly the same as the conditions that private firms have.

The role of the competition authority, to be well-positioned to intervene is also crucial. The debate suggested that competition authorities should intervene, the issue is relevant because of its links to competition and in many cases there is no other institution available. The competition authority should at least be the flag-bearer, on competitive neutrality issues.

There are no definitive answers to these questions. Both the technical aspects and the wider social-political context are clearly recognised. Some of the concrete suggestions are particularly interesting, e.g. giving the competition authority the ability to go to the court when local governments impair competition by not respecting the competition neutrality principle. The principles suggested by the Netherlands are also worthy of note. The Chairman proposed coming back to the issue at a later point to consider any developments.

RÉSUMÉ DE LA DISCUSSION

Introduction

Le président, Frédéric Jenny, commence par rappeler que la tenue de cette table ronde a été demandée à l'origine par les Pays-Bas, avec le soutien d'un groupe de pays comprenant le Royaume-Uni (RU) et l'Australie. La note de référence a été préparée par Mme Deborah Cope, consultante auprès du Secrétariat de l'OCDE. Plusieurs observations générales suivent cette entrée en matière. Premièrement, les entreprises du secteur public peuvent fausser la concurrence sur le marché de plusieurs façons dans la mesure où leur statut leur confère un avantage inhérent sur les entreprises du secteur privé en termes d'accès à des financements à des taux préférentiels, d'exonérations fiscales, etc. Deuxièmement, les entreprises du secteur public peuvent avoir des pratiques anticoncurrentielles et être exemptées, de droit ou de fait, des dispositions du droit de la concurrence. Troisièmement, les entreprises du secteur public sont souvent subventionnées pour assurer la part de leurs activités qui correspond à des obligations de service public, mais elles peuvent utiliser ces subventions au profit d'autres activités ouvertes à la concurrence. Quatrièmement, dans certains cas, les entreprises du secteur public bénéficient d'une certaine souplesse dans l'application des règles relatives aux marchés publics.

Le président a l'impression que le but d'une politique de neutralité concurrentielle est quelque peu ambigu. Il s'agit à la fois de favoriser la concurrence et l'efficacité économique, mais aussi de garantir des conditions équitables pour tous sur le marché.

Pour des raisons historiques, tous les pays n'ont pas la même attitude à l'égard du secteur public et ne lui accordent pas la même importance, ce qui donne une signification différente aux questions de neutralité concurrentielle. De plus, il semble que de l'attitude d'un pays à l'égard de la neutralité concurrentielle dépende l'importance que ses lois accordent à la notion de loyauté en matière de concurrence. Dans les pays, surtout en Europe, où cette notion de loyauté trouve sa place dans la politique de la concurrence, on a aussi tendance à considérer que la neutralité concurrentielle pose un problème.

Le président ajoute que l'autorité chargée de la concurrence joue un rôle important eu égard à la neutralité concurrentielle, principalement par ses fonctions de sensibilisation, et plus rarement en vertu de ses pouvoirs d'intervention. Avant d'ouvrir le débat, il invite Mme Deborah Cope à présenter les conclusions du document de référence qu'elle a préparé.

Mme Cope observe que toutes les administrations, que ce soit au niveau national, régional ou local, assurent d'une façon ou d'une autre une large gamme de services. D'une part, elles fournissent des services publics, qui sont financés sur le budget et qui ne seraient pas nécessairement assurés par le secteur privé ; de l'autre, elles fournissent des services commerciaux, qui sont facturés aux consommateurs et qui pourraient être assurés par le secteur privé.

Les avantages et les inconvénients qui sont ceux des entreprises publiques, du seul fait qu'elles appartiennent à l'État, peuvent avoir des retombées non négligeables sur la concurrence. Ils ont des effets en termes de loyauté et d'efficacité de la concurrence. Et ils ont des effets sur l'efficacité économique si les entreprises publiques sont en mesure d'évincer leurs concurrents du secteur privé simplement du fait des avantages que leur procure leur statut. Les ressources seront moins bien employées et les entreprises publiques ne seront pas incitées à améliorer leur propre efficacité. Elles seront aussi moins susceptibles

d'innover. D'autre part, les entreprises privées qui sont en concurrence avec des entreprises publiques bénéficiant d'un régime préférentiel trouveront cette situation injuste et déloyale, car elle nuira réellement à leur rentabilité.

La note de référence s'intéresse à la façon dont les gouvernements pourraient résoudre ces problèmes d'efficience et de loyauté, et distingue trois grandes catégories de réponses : 1) l'application du droit de la concurrence, auquel beaucoup de pays peuvent avoir recours pour mettre fin sans ambiguïté aux pratiques anticoncurrentielles des entreprises publiques en position dominante sur tel ou tel marché ; 2) la réforme du gouvernement d'entreprise, sur le modèle de ce qui se fait dans de nombreux pays, pour modifier les structures commerciales des entreprises publiques, leur mode de management et leur dispositif de contrôle pour les rendre plus conformes à ce que l'on observe dans le secteur privé, même si bon nombre de ces changements, comme la transformation des entités publiques en sociétés commerciales, concernent généralement les entreprises de grande taille ; 3) des réformes spécifiques pour neutraliser dans toute la mesure du possible l'ensemble des avantages et des inconvénients que les entreprises publiques en concurrence réelle ou potentielle avec le secteur privé peuvent avoir. Par rapport aux deux premières solutions, les mesures destinées à favoriser la neutralité concurrentielle ont la particularité de ne viser que des entreprises beaucoup plus petites.

Une concurrence efficiente et loyale entre le secteur public et le secteur privé aurait des avantages. Elle inciterait les entreprises publiques à devenir plus efficaces et plus innovantes puisque celles-ci ne pourraient plus compter que sur leur propre performance commerciale pour attirer les clients. Elle les découragerait de recourir à la pratique du « remboursement » des coûts et elle contribuerait à clarifier les objectifs, à supprimer les conflits d'intérêts et à accroître l'efficacité de la gestion. Il y aurait une plus grande transparence dans la gestion des entreprises publiques et il serait plus facile de comparer leurs performances avec celles du secteur privé. Les consommateurs bénéficieraient d'une baisse des prix et de meilleurs services. L'allocation des ressources serait plus efficace car les entreprises les plus efficaces et qui répondent le mieux aux attentes des consommateurs l'emporteraient sur les autres. Enfin, la croissance économique et l'efficacité accrue du secteur public qui résulteraient d'une meilleure allocation des ressources et d'une concurrence plus développée seraient un atout pour les pays.

En conclusion, l'auteur de la note de référence estime que l'application du droit de la concurrence et la réforme du gouvernement d'entreprise dans le secteur public peuvent contribuer à améliorer l'efficience des marchés où les entreprises publiques sont en concurrence avec les entreprises privées en supprimant une grande partie des avantages dont jouissent les premières. Cependant, elles ne sauraient à elles seules apporter toute la réponse car elles ne concernent généralement que les plus grandes entreprises et ne règlent pas nécessairement toutes les questions de neutralité concurrentielle. Ainsi, le droit de la concurrence ne remédie aux problèmes que lorsque le mal est fait. La mise en place d'un cadre général qui assurerait la neutralité sur le plan de la concurrence serait toutefois complexe et nécessiterait une mobilisation considérable ainsi que des changements culturels au sein des entreprises publiques, de l'administration et du personnel politique à tous les échelons.

1. Le cas particulier des États-Unis

Passant ensuite à la contribution des États-Unis, le président cite tout d'abord le passage suivant : « Les activités commerciales auxquelles participent le secteur public aux États-Unis – aux niveaux fédéral, des États et local – sont très limitées. ... Aussi la question de la neutralité concurrentielle ne semble-t-elle pas vraiment se poser. Il n'existe aucun mécanisme réglementaire de quelque importance pour encadrer ces activités commerciales et il n'y a guère de débat public sur la question aux États-Unis ». Cependant, il y a déjà eu des problèmes avec des entreprises privées qui avaient recours à des procédures légales pour désavantager leurs concurrents, et il existe des exceptions au droit de la concurrence résultant de la doctrine de la souveraineté des États et de la doctrine Noerr-Pennington. A propos du service postal, le

président demande au délégué des États-Unis s'il s'agit d'un cas unique, si les autorités de la concurrence sont intervenues sur ce dossier et, si elles ne l'ont pas fait, pourquoi ne pouvaient-elles pas.

Le délégué des États-Unis explique que la Cour Suprême des États-Unis a clairement établi que le service postal n'était pas soumis à la législation antitrust nationale. Les autorités de la concurrence s'intéressent au secteur des services postaux dans le cadre de ses efforts d'information et de sensibilisation. Il est vrai que le service postal n'est pas n'importe quelle entreprise commerciale : avec un chiffre d'affaires de 70 milliards de dollars par an et 800 000 salariés, il est le deuxième employeur des États-Unis.

Le ministère de la justice et la FTC se sont efforcés à plusieurs reprises de promouvoir le droit de la concurrence dans le domaine des services postaux. Ils ont fait plusieurs déclarations devant le Congrès à propos de la structure du service postal, et la FTC a soulevé la question de ses pratiques publicitaires. Face à l'arrivée de concurrents privés, le service postal avait en effet lancé une nouvelle gamme de produits qui proposait notamment un service d'envoi express avec délai de livraison garanti de deux ou trois jours ouvrables, alors que dans la réalité ce délai était généralement plus long. Après l'intervention informelle de la FTC, le service postal a modifié ses annonces publicitaires.

Toujours dans le cadre de son action pour promouvoir le droit de la concurrence, la FTC s'est intéressée au travail des commissions d'experts qui étudient depuis quelques années les problèmes de la concurrence dans le domaine des services postaux. Elle n'a pas pris part au débat sur les questions de politique sociale, mais elle a fait des recherches qui pourront alimenter la réflexion sur les perspectives de maintien du statu quo. L'un des scénarios envisagés montre que les services postaux dépendent en fait d'un système de subventions croisées, le domaine réservé du courrier non urgent servant à financer les autres catégories de service. Or, comme la part des factures, qui représentent à l'heure actuelle un tiers des volumes traités dans ce domaine réservé, est en train de diminuer rapidement, la possibilité de subventionner horizontalement d'autres activités diminue elle aussi et semble à terme condamnée. En se fondant sur l'expérience d'autres pays, la FTC a mis au point ses options de réforme. Ainsi, elle a compris que l'opérateur historique doit décider s'il accepte de renoncer à son monopole en échange d'une liberté commerciale totale, ou s'il préfère se soumettre au droit de la concurrence ou à une forme ou une autre de contrôle sur sa mission de service public. Dans cette optique, la FTC s'efforce maintenant de sensibiliser ses interlocuteurs à l'idée que le changement est inéluctable et qu'il pourrait être géré dans le cadre d'un processus de réforme mûrement réfléchi.

2. Résoudre le problème de la neutralité concurrentielle au moyen du droit de la concurrence : l'expérience de l'UE

Le président passe ensuite à la contribution de l'Union européenne (UE) dans laquelle il relève que les questions de concurrence loyale et de neutralité du secteur public vis-à-vis du secteur privé sont très importantes, puisqu'elles font partie intégrante de toutes les dispositions prévues par le droit de la concurrence et qu'elles font l'objet de clauses particulières dans le traité CE. Selon les auteurs du document, ces dispositions sont suffisantes pour résoudre le problème de la neutralité concurrentielle et n'appellent aucune autre mesure. Le président invite le délégué de l'UE à présenter son point de vue.

Le délégué de l'**Union européenne** explique que les activités du secteur public sont importantes pour l'UE et que les questions de concurrence public-privé sont donc un aspect essentiel des travaux de la Commission européenne et de la Direction générale de la concurrence. Les caractéristiques du système en place dans l'UE ne sont pas exceptionnelles, mais elles sont toutes réunies au sein d'un même ensemble, ce qui fait la force de ce système.

La première caractéristique est que le principe de neutralité est inscrit dans le traité instituant la Communauté européenne depuis plus de 40 ans. Ainsi, l'article 86 du traité stipule clairement que les entreprises publiques sont soumises au droit de la concurrence et que les États membres de l'UE ne peuvent prendre aucune mesure contraire à cette disposition. Les entreprises publiques sont également soumises aux règles relatives aux monopoles et aux aides accordées par les États (subventions).

La deuxième caractéristique du système est que le traité donne à la Commission européenne les moyens de remédier aux problèmes que peuvent poser les activités économiques des entreprises du secteur public. La Commission ne peut pas réglementer l'activité économique des États membres mais elle peut exiger d'eux qu'ils appliquent les règles de concurrence aux entreprises publiques. Si une entreprise publique enfreint ces règles, la Commission peut publier une décision lui demandant de mettre fin à l'infraction et éventuellement lui imposer une amende. En cas d'abus de position dominante, les entreprises publiques se trouvent donc dans la même situation que les entreprises privées.

Si une entreprise publique enfreint les règles de concurrence avec l'aide de l'État ou sous son influence (par exemple parce que les autorités nationales l'obligent à pratiquer des prix abusifs), la Commission peut adresser une directive à l'État membre pour lui demander de mettre fin à l'infraction.

Les règles relatives aux aides et aux subventions accordées par les États s'appliquent non seulement aux entreprises publiques, mais aussi à toutes les formes d'aides et de subventions que les États membres ou d'autres entités publiques sont à même d'accorder à une quelconque entreprise, y compris une entreprise privée. Elles revêtent une importance particulière dans le contexte des entreprises publiques étant donné la relation spéciale que celles-ci entretiennent avec l'État. Les aides d'État recouvrent aussi bien les apports en capital et les dons que les déductions ou exemptions fiscales, les réductions de charges sociales, les garanties, etc. Les États membres ont obligation d'informer la Commission de tout projet tendant à instituer une aide quelconque en faveur d'une entreprise. Après examen, la Commission décide si cette aide peut ou non être autorisée. Les aides d'État sont en principe interdites, mais il y a des exceptions.

La directive sur la transparence des relations financières entre les pouvoirs publics et les entreprises publiques est un autre outil dont dispose la Commission. Cette directive instaure le principe de la séparation des comptes entre les activités commerciales et non commerciales des entreprises publiques. Elle a été appliquée dans de nombreux secteurs, notamment les services postaux, l'énergie et les transports.

Enfin, le traité contient des dispositions relatives aux services d'intérêt général. C'est aux pouvoirs publics qu'il appartient de fournir ces services, car le marché n'est pas en mesure de les assurer correctement. Les services d'intérêt général sont en principe soumis aux règles relatives à la concurrence et aux aides d'État, dans la mesure où cela n'est pas contraire à la mission qui a été impartie à l'entreprise chargée de les assurer. La Commission a défini ce qu'il faut entendre par activités commerciales et non commerciales, services d'intérêt général et aides d'État.

Le système de l'UE présente trois caractéristiques particulières : 1) le principe de neutralité est inscrit dans le traité ; 2) la Commission dispose de moyens opérationnels pour faire appliquer ce principe ; 3) l'application du principe de neutralité a des limites, en particulier dans le cas des services d'intérêt général, qui sont clairement posées.

3. Arguments en faveur d'une politique spécifique de neutralité concurrentielle

Se tournant vers le cas de l'Australie, le président note que ce pays s'est doté d'une politique spécifique de neutralité concurrentielle qui n'est pas aussi intégrée à la politique de la concurrence qu'en Europe. Cette politique repose sur le principe que les entreprises publiques exerçant des activités sur des marchés effectivement ou potentiellement ouverts à la concurrence ne doivent pas bénéficier d'avantages

concurrentiels nets sur le secteur privé du fait de leur statut. L'autorité chargée de la concurrence, en l'occurrence l'Australian Competition and Consumer Commission (ACCC), ne joue pas un rôle central dans l'application du principe de neutralité (qui incombe au National Competition Council et à la Productivity Commission). Le président demande au délégué australien s'il estime que le principe de neutralité concurrentielle et les mesures qui en découlent devraient être intégrés à la politique de la concurrence. Il voudrait également savoir pourquoi plusieurs structures institutionnelles différentes se partagent la responsabilité de veiller à la mise en œuvre de ce principe, alors que ce n'est pas le cas dans les autres domaines de la concurrence.

Le délégué de l'Australie fait remarquer que le mouvement de transformation des entreprises publiques en sociétés commerciales qui est allé en s'accéléralant jusqu'au début des années 90 a déjà remédié à bon nombre de problèmes de neutralité concurrentielle. Cependant, en 1993, une enquête sur la politique de la concurrence, connue sous le nom de Hilmer Review, a conclu à la nécessité de prendre de nouvelles mesures. D'après cette étude, en effet, si le fait de soumettre les activités des entreprises publiques au droit de la concurrence était une chose importante, cela ne pouvait pas résoudre tous les problèmes liés aux avantages financiers et aux politiques tarifaires de ces entreprises. Ainsi, tant que les entreprises publiques seraient exemptées de certaines taxes, tant qu'elles recevraient des subventions, etc., la concurrence continuerait d'être faussée sur le marché. D'autre part, les conclusions de l'enquête reconnaissent que lorsque des problèmes sont engendrés par le secteur public lui-même, il est peut-être préférable d'y remédier par des mesures ex ante. C'est ce qui a conduit à l'accord de 1995, signé par toutes les autorités administratives australiennes, sur l'adoption d'une politique de neutralité concurrentielle.

La responsabilité de cette politique incombe à plusieurs organismes publics pour plusieurs raisons. Premièrement, la neutralité concurrentielle n'est pas fondée sur le droit de la concurrence, elle émane et relève de l'administration. Au niveau fédéral, la politique de neutralité concurrentielle est de la compétence du Trésor australien. Deuxièmement, c'est une politique qui privilégie l'application et qui mise dans cette optique sur une approche pédagogique pour encourager la coopération entre les institutions qui en ont la charge et le reste de l'administration. Elle autorise en outre une certaine souplesse dans sa mise en œuvre, selon l'état d'avancement des réformes aux différents niveaux d'administration, alors que le droit de la concurrence, lui, s'applique uniformément sur l'ensemble du territoire. Troisièmement, des sanctions pécuniaires sont prévues qui peuvent être infligées par un organe indépendant, le National Competition Council.

Les mécanismes d'application au niveau fédéral sont compatibles avec les dispositions en vigueur au niveau des États. Un bureau de réclamation a été créé au sein de la Productivity Commission, organe indépendant qui joue un rôle consultatif de premier plan auprès des autorités australiennes dans le domaine des réformes microéconomiques. Ce bureau, appelé Australian Government Competitive Neutrality Complaints Office, reçoit les plaintes et intervient auprès des administrations concernées pour qu'elles se mettent en conformité avec les principes de neutralité. Les plaintes officielles sont assez rares. Parallèlement à ce dispositif, l'ACCC peut aussi engager des poursuites en cas d'infraction au droit de la concurrence.

La politique australienne de neutralité concurrentielle a pour but d'empêcher les distorsions de la concurrence que les entreprises publiques, du fait de leur statut, peuvent créer sur le marché. Elle s'applique à tous les marchés, à toutes les activités des entreprises publiques qui revêtent une certaine importance (celles qui engendrent les gains les plus importants), à tous les niveaux d'administration, et seulement dans la mesure où les avantages de sa mise en œuvre l'emportent sur ses coûts. Elle ne s'applique pas aux activités non commerciales et sans but lucratif.

Les principes de neutralité qui s'appliquent dans le domaine de la concurrence sont les suivants : 1) neutralité fiscale : une entreprise publique ne doit pas être avantagée par des exonérations d'impôt ou

d'autres concessions fiscales dont ses concurrents ne peuvent bénéficier ; 2) neutralité en matière de financement : une entreprise publique doit se financer à des taux analogues à ceux que ses concurrents payent sur leurs emprunts ; 3) neutralité réglementaire : une entreprise publique ne doit pas être avantagée par un environnement réglementaire différent de celui dans lequel ses concurrents exercent leurs activités ; 4) rentabilité commerciale : une entreprise publique doit avoir un taux de rentabilité suffisant pour justifier le maintien d'actifs à long terme et le versement de dividendes ; 5) concordance entre les prix et les coûts : une entreprise publique qui exerce des activités commerciales d'une certaine importance dans le cadre d'un ensemble plus vaste de fonctions doit pratiquer des prix qui reflètent intégralement les coûts desdites activités, afin d'éviter que les fonds publics accordés à des activités non commerciales et sans but lucratif ne soient utilisés pour subventionner des activités commerciales.

La politique de neutralité concurrentielle s'attaque aussi au problème des subventions publiques accordées au titre d'obligations de services non commerciaux dans la mesure où elles peuvent donner un avantage concurrentiel aux entreprises publiques qui les utiliseraient pour financer d'autres activités. Elle prévoit que ces missions non commerciales doivent être clairement définies et financées de manière à ce que les prix reflètent intégralement les coûts, à charge pour le National Competition Council de vérifier que ces dispositions sont bien appliquées.

La politique australienne de neutralité concurrentielle a donné de bons résultats pour les raisons suivantes : 1) elle a approfondi la réforme des entreprises publiques ; 2) elle a été appliquée par des entreprises publiques de grande taille qui ont ainsi permis de réaliser des gains d'efficacité significatifs ; 3) elle a supprimé dans une large mesure les avantages attachés au statut d'entreprise publique.

En ce qui concerne la contribution de la Nouvelle-Zélande, le président note que la réforme entreprise dans les années 1980 avait pour but de réduire la présence de l'État sur le marché et d'encourager les organismes ayant conservé des fonctions publiques à fonctionner de la manière la plus efficace et la plus efficiente possible. Cette réforme, qui reposait sur le principe de neutralité concurrentielle entre les prestataires de services publics et privés, marquait l'abandon des mesures sectorielles au profit d'une politique générale destinée à promouvoir la concurrence et des pratiques commerciales loyales. Le président demande au délégué de la Nouvelle-Zélande si ce système diffère de celui qui existe en Australie.

Le délégué de la Nouvelle-Zélande souligne l'importance du contexte dans lequel la réforme a eu lieu dans son pays. Dans les années 1980 et 1990, les autorités néo-zélandaises ont décidé de mettre un terme au régime spécial dont bénéficiaient jusque-là de larges pans de l'économie, et notamment le secteur public, grâce à la réglementation et à d'autres moyens de protection. C'est ainsi que le secteur public a été réformé de manière à en aligner la performance sur les critères appliqués dans le secteur privé. Certaines entités ont été transformées en sociétés commerciales, d'autres ont été privatisées, et l'administration a fait l'objet de restructurations qui ont rationalisé le fonctionnement et l'organisation des services, en instituant notamment une séparation entre les missions d'orientation des politiques, de fourniture des services et de régulation.

Une nouvelle autorité indépendante, la New Zealand Commerce Commission, a été mise sur pied. Certains services ont été confiés à des organismes publics distincts des ministères (les Crown entities) et le gouvernement a créé un groupe d'entreprises publiques à vocation exclusivement commerciale (les SOE) qui sont censées rentabiliser les investissements dont elles ont bénéficié. Il existe à l'heure actuelle 17 entreprises publiques et un petit nombre de sociétés à vocation commerciale dans lesquelles l'État détient une participation majoritaire ou minoritaire (la compagnie aérienne Air New Zealand en fait partie). Des restructurations ont également eu lieu au niveau des administrations régionales et locales, où une séparation a été instituée entre services contestables et non contestables.

A ces mesures sont venues s'ajouter d'autres réformes économiques de plus grande envergure qui ont profondément modifié les conditions de la concurrence en Nouvelle-Zélande. S'il n'existe pas aujourd'hui dans le pays de politique de neutralité concurrentielle à proprement parler, les réformes du secteur public ont été guidées par ce principe qui est strictement appliqué tant au niveau législatif que dans la gestion des SOE.

En matière de concurrence, la neutralité signifie qu'un organisme public ne doit pas bénéficier d'avantages par rapport au secteur privé en vertu simplement de son statut juridique. Cela implique que l'environnement réglementaire, notamment en ce qui concerne les pratiques commerciales et la protection des consommateurs, doit être neutre. En Nouvelle-Zélande, le Commerce Act de 1996 est la pièce maîtresse du cadre législatif de la concurrence. Son but est de promouvoir la concurrence sur le marché dans l'intérêt à long terme des consommateurs néo-zélandais. Ce texte réaffirme le principe de neutralité concurrentielle en stipulant que le droit de la concurrence s'applique aux Crown entities (organismes publics) de la même façon qu'il s'applique aux entités du secteur privé. Le Fair Trading Act reprend la même formulation.

La New Zealand Commerce Commission a enquêté sur plusieurs opérations de fusion concernant des hôpitaux publics, des institutions éducatives, des compagnies de distribution d'électricité et des entreprises appartenant à des collectivités locales. Elle a été saisie d'une demande d'autorisation dans le cadre d'un projet d'alliance entre Air New Zealand et Qantas. L'État, qui détient environ 80 % de la compagnie Air New Zealand, a indiqué explicitement qu'il n'interviendrait pas dans le dossier et que la fusion, pour être avalisée, devrait satisfaire aux critères habituellement appliqués en matière de concurrence et de légalité. L'affaire est actuellement entre les mains des tribunaux en Nouvelle-Zélande et en Australie. Par ailleurs, plusieurs actions ont été engagées en vertu du Fair Trading Act et du Commerce Act à l'encontre de compagnies de distribution d'électricité à capitaux publics, d'Air New Zealand et de plusieurs administrations locales.

Les réformes du secteur public et les réformes économiques générales des années 80 ont diffusé le principe de neutralité concurrentielle dans l'ensemble du secteur public et du secteur privé. Elles ont aussi mis en place le cadre nécessaire pour une application effective et universelle de la législation en matière de concurrence et de protection des consommateurs, rompant ainsi avec l'approche de la réglementation sectorielle. Il existe encore quelques règles propres à certains secteurs, mais la New Zealand Commerce Commission les applique avec souplesse.

Comparant cette situation avec celle de l'Australie, le président observe que la Nouvelle-Zélande compte davantage sur la législation générale en matière de concurrence, ainsi que sur le Fair Trading Act et les réformes des années 1980 et 1990 pour instaurer l'objectif de neutralité concurrentielle.

S'agissant de la Suisse, le président relève dans la note soumise par le pays que celui-ci n'a pas de politique de neutralité horizontale, mais que le principe de la neutralité concurrentielle est inscrit dans la Constitution fédérale. L'autorité suisse de la concurrence veille donc à ce qu'il en soit tenu compte dans la législation fédérale et cantonales. Cependant, cette action a des limites étant donné que, comme on peut le lire dans la note présentée par la Suisse, la loi sur les cartels ne s'applique au secteur public que « dans une certaine mesure », et les recommandations que l'autorité de la concurrence adresse aux autorités fédérales, cantonales et municipales n'ont pas force d'obligation. Contrairement à la Nouvelle-Zélande, la Suisse fait appel à des réglementations sectorielles pour promouvoir la neutralité concurrentielle. Le président demande au délégué de la Suisse quelles sont les raisons de cette approche et si la Suisse envisage un changement d'orientation dans ce domaine.

Le délégué de la Suisse dit que les activités du secteur public doivent reposer sur des fondements constitutionnels, l'État ne pouvant intervenir que dans les domaines autorisés par la Constitution, c'est-à-

dire notamment les services publics, mais pas l'économie. Pour des raisons historiques, l'État est en fait présent dans le secteur bancaire, les chemins de fer, les transports aériens, la distribution d'eau et l'assainissement, les services postaux, les télécommunications et l'électricité, parce qu'au XIX^e et au XX^e siècles des gouvernements ont estimé qu'il s'agissait de services publics. La banque, par exemple, était considérée au XIX^e siècle comme un service public dans les zones rurales non desservies par les grands établissements financiers. Depuis, les banques sont devenues des entreprises privées, mais elles comptent encore l'État parmi leurs actionnaires. Ces domaines ne sont plus considérés comme des services publics et la question de la neutralité se pose donc en cette période de transition.

Le droit de la concurrence s'applique à l'ensemble des activités économiques, qu'elles soient publiques ou privées, dès lors qu'elles sont exercées par une entreprise dotée de la personnalité juridique. La Cour Suprême fédérale a annulé une décision de l'autorité de la concurrence concernant l'Office de météorologie, reconnu coupable de pratiques discriminatoires en matière de prix, au motif que cette entité n'a pas de personnalité juridique.

Une nouvelle loi, qui entrera en vigueur le 1^{er} juillet, comporte un chapitre sur le changement de statut des institutions de droit public. Elle facilitera la transformation des entités publiques en sociétés commerciales, et rendra techniquement plus facile, par conséquent, leur passage au secteur privé.

En pratique, cependant, le droit de la concurrence est limité par les dispositions du droit public qui établissent un régime dérogatoire. Ainsi, l'autorité de la concurrence n'est plus compétente lorsqu'il existe des réglementations particulières en matière commerciale ou de prix (des réglementations sectorielles s'appliquent à l'agriculture, à la santé publique et à certains aspects de la fourniture d'électricité). Dans un cas où une compagnie refusait d'assurer le transport sur son réseau de l'électricité qu'un client souhaitait acheter à un autre producteur, l'autorité de la concurrence a estimé qu'il y avait abus de position dominante et a ordonné à l'entreprise en infraction d'effectuer le transport requis. Sa décision a été confirmée en appel par la Cour Suprême qui a indiqué que l'activité visée n'était soumise à aucune réglementation dérogatoire recevable, au regard de la Constitution, en matière de commerce et de prix. Le droit de la concurrence ne s'applique pas lorsque l'État remplace le système de concurrence (le marché) par un autre régime (réglementation du marché ou des prix).

En résumé, l'État ne doit pas en principe exercer d'activités commerciales. Dans les domaines où il le fait néanmoins, il est soumis au droit commun de la concurrence, sauf dans les cas où il existe des réglementations particulières.

Le président passe ensuite à la contribution du Royaume-Uni où, comme il le fait observer, il n'existe pas de cadre administratif général applicable aux organismes publics en concurrence avec le secteur privé. Cependant, peut-on lire dans ce document, les mesures prévues par le droit de la concurrence pour lutter contre les pratiques anticoncurrentielles des organismes publics ne suffisent pas à elles seules à régler tous les problèmes de neutralité concurrentielle. Les instructions données par le Trésor et les dispositions du Enterprise Act de 2000 permettent à cet égard d'envisager « *une approche plus volontariste et plus constructive des questions de concurrence* ». Le président demande au délégué du Royaume-Uni d'indiquer quels sont les autres instruments nécessaires, au-delà du droit de la concurrence, pour s'attaquer aux effets que les organismes publics exercent sur les marchés, et comment ils sont utilisés dans son pays.

Le délégué du Royaume-Uni explique pourquoi son pays considère que la politique de la concurrence ne constitue pas à elle seule la bonne solution pour résoudre les problèmes de neutralité concurrentielle. La politique de la concurrence s'occupe de situations a posteriori, alors qu'une action préventive serait peut-être davantage justifiée. Au Royaume-Uni, on la conjugue donc avec les instructions données par le Trésor sur les tarifs que devraient pratiquer les organismes publics.

La situation est très analogue à celles de la Nouvelle-Zélande et de l'Australie, puisque le Royaume-Uni a lui aussi adopté des mesures pour rendre son secteur public plus efficace.

La note du Royaume-Uni évoque plusieurs plaintes déposées en application du Competition Act à propos de la vente d'informations ou du coût des informations vendues par un organisme public, laissant craindre des pratiques telles que compression des marges, fermeture du marché, prix groupés, etc. Trois cas sont examinés : 1) Compagnies House, organisme qui regroupe toutes les informations sur les sociétés enregistrées au Royaume-Uni ; 2) Environment Agency, organisme chargé de l'environnement qui détient des données que lui seul est légalement habilité à collecter ; 3) Ordnance Survey, organisme qui détient les droits sur les cartes et plans du pays. Toutes ces entités détiennent un monopole sur l'information dans leur secteur, et toutes étaient accusées de vendre des informations à des prix trop élevés ou d'avoir un comportement déloyal sur le marché.

Ces affaires sont très difficiles à résoudre dans le cadre du droit de la concurrence. Premièrement, on a du mal à cerner les coûts car ils ne sont pas clairement indiqués dans les comptes, ce qui rend les imputations beaucoup plus difficiles que dans une société du secteur privé. Malgré la directive de l'UE sur la vente d'informations, qui stipule que les prix doivent refléter les coûts, les entreprises publiques ne tiennent pas une comptabilité assez claire pour que l'on puisse vérifier ce critère. Deuxièmement, certaines plaintes portent plus sur des propositions que sur des faits, ce qui ne relève pas du droit de la concurrence. Dans ce cas, c'est à l'autorité qu'il appartient d'intervenir auprès des entreprises pour les inciter à modifier leurs politiques et leurs pratiques tarifaires.

De manière générale, il est très difficile de s'y retrouver dans les comptes des entreprises publiques et il faut beaucoup d'efforts pour les amener à modifier leur système comptable. Il serait plus facile de répondre aux plaintes déposées si ces entreprises appliquaient correctement les principes de répartition des produits et des charges. On peut se demander si les organismes du secteur public ont réellement un comportement anticoncurrentiel ou bien si le problème ne tient pas plutôt au fait qu'ils n'ont pas une vision très claire de leurs coûts ni de la façon dont ils sont imputés. Au-delà des possibilités qu'offre le Competition Act pour régler les cas particuliers, l'idée est d'améliorer les règles applicables aux organismes publics afin de mettre en place un système d'analyse des coûts qui permette à l'avenir de prendre conscience des problèmes et de les éviter. L'Office of Fair Trading (OFT) envisage d'effectuer une étude sur les informations nécessaires pour les achats et les ventes de biens immobiliers, domaine dans lequel des problèmes de concurrence sont signalés. Ce travail s'efforcera de tirer des conclusions de portée générales qui pourraient s'appliquer plus largement dans l'avenir.

L'OFT s'intéresse également de façon générale à l'impact que les activités des organismes publics ont sur le marché, par exemple lorsqu'ils établissent des règles ou des réglementations ou qu'ils les interprètent. Une étude sur les services de taxis a montré que la réglementation en vigueur dans ce secteur entraîne une restriction de la concurrence et de l'offre. L'étude de l'OFT sur les subventions publiques soulève la question des effets que peut avoir la législation dans ce domaine sur la concurrence. Elle ne remet pas en cause le droit qu'ont les administrations publiques d'accorder des subventions, mais pose la question de savoir si c'est là le moyen le plus efficace d'assurer les services d'intérêt collectif.

4. Pays qui ont principalement recours au droit de la concurrence pour résoudre les problèmes de neutralité concurrentielle (faute d'un autre instrument)

Le **président** aborde ensuite la situation d'un groupe de pays qui s'appuient essentiellement sur le droit de la concurrence pour résoudre le problème de neutralité concurrentielle. Au Taipei chinois, la législation générale en matière de concurrence est le principal instrument utilisé pour promouvoir la neutralité concurrentielle, aux côtés de la loi sur les entreprises d'État qui énonce l'obligation pour celles-ci de se comporter comme des sociétés commerciales. Deux cas sont exposés dans la contribution soumise

par le pays. Le premier concerne l'opérateur historique de télécommunications, auquel il était reproché d'avoir utilisé les recettes tirées de ses activités de monopole public pour financer ses activités concurrentielles. Dans le second cas, mettant en cause la compagnie pétrolière publique Chinese Petroleum Corporation, la commission de la concurrence a estimé que cette entreprise « *fait indûment obstacle à la libéralisation du marché du GPL en pratiquant des prix discriminatoires à l'égard des distributeurs de GPL qui s'approvisionnent auprès d'autres importateurs de GPL* ». Le président demande à la délégation du Taipei chinois d'expliquer comment fonctionne le système de neutralité concurrentielle en vigueur dans son pays et aussi de répondre à la question soulevée par le délégué du Royaume-Uni selon lequel le droit de la concurrence ne permet pas à lui seul de garantir le principe de neutralité concurrentielle puisque les problèmes qui se posent dans ce domaine ne relèvent pas toujours de l'abus de position dominante.

Le délégué du Taipei chinois dit que dans une situation idéale, une législation suffisamment ample et efficace en matière de concurrence devrait permettre de régler tous les problèmes que peuvent poser dans ce domaine les entreprises du secteur public comme du secteur privé. Cependant, si la loi prévoit des exemptions ou s'il existe des réglementations spéciales (par exemple, la loi sur les télécommunications), cela peut faire obstacle à l'exercice de la concurrence. Le document soumis par le Taipei Chinois cite deux exemples. Le premier concerne la décision de la compagnie de télécommunications d'augmenter la tarification des appels locaux pour pouvoir subventionner ses activités sur le marché très concurrentiel de la téléphonie mobile. Même dans un cas classique de subventions croisées comme celui-ci, il n'a pas été facile de régler toutes les questions liées au monopole naturel et à la réforme structurelle du marché des télécommunications, et de déterminer le tarif de connexion approprié. On peut être confronté à ce genre de difficultés quand l'autorité de la concurrence n'a pas toutes les compétences techniques requises ou quand la législation prévoit des exemptions. D'autres instruments sont alors nécessaires. Le cas du gaz de pétrole liquéfié posait lui aussi un problème de subvention interne, mais il a été plus facile à régler parce que l'autorité de la concurrence avait surveillé de près ce secteur et que la législation était donc plus adaptée. Il considère séparément chaque secteur ou chaque activité.

Lorsque l'activité économique n'est pas entièrement privatisée, il est difficile de créer ou d'encourager la création d'un environnement concurrentiel. Il y a des mesures dérogatoires, des réglementations spéciales ou d'autres dispositifs, par exemple le droit des sociétés et la législation bancaire, dont les entreprises publiques peuvent exploiter les failles. Il y a aussi des barrières invisibles, comme les prérogatives et les directives administratives. Les avantages qui en découlent sont parfois occultes et de très grande portée, de telle sorte qu'il est très difficile de s'y attaquer avec les seuls moyens de la réglementation, aussi complète soit-elle.

Promouvoir la neutralité concurrentielle, c'est vouloir créer les mêmes conditions pour tous, ce qui est très difficile et demande de se placer dans une perspective à long terme. Il y a quelques années, le marché pétrolier du Taipei chinois a été ouvert à la concurrence, de sorte que les opérateurs privés sont à présent autorisés à exploiter des raffineries et à importer du gaz pour le revendre aux distributeurs. Pourtant, les consommateurs continuent de s'adresser à la compagnie publique, car l'État leur paraît moins susceptible de leur faire des coups tordus ou de se livrer à des pratiques douteuses. Il faudra des années avant que les compagnies de gaz privées parviennent à gagner la confiance des consommateurs, car le gaz est un produit dont la qualité est difficile à observer.

Le président relève deux points dans l'intervention du délégué du Taipei chinois. Premièrement, il est extrêmement difficile de changer la perception des consommateurs et par conséquent de parvenir à faire prévaloir le principe de neutralité concurrentielle, et deuxièmement, contrairement à ce qu'ont déclaré les orateurs précédents, l'approche sectorielle se justifie parce les problèmes ne sont pas partout les mêmes.

Le président se tourne vers le cas de l'Allemagne et observe que ce pays ne s'est pas doté d'une politique globale et systématique de neutralité concurrentielle. Au contraire, comme on peut le lire dans le

document qui lui est consacré, elle fait appel à un large dispositif législatif, notamment aux dispositions de la loi sur les communes, de la loi sur les marchés publics et de la loi régissant les activités économiques des municipalités. Cette approche contraste avec les autres systèmes. Le président demande à la délégation de l'Allemagne d'expliquer comment elle fonctionne.

Le délégué de l'Allemagne explique tout d'abord qu'il existe tout un arsenal de moyens légaux pour régler les problèmes de neutralité concurrentielle. Il prend quatre grands exemples à titre d'illustration.

Premièrement, les subventions allouées aux entreprises publiques sont strictement réglementées par les dispositions de l'UE relatives au financement des entreprises publiques et aux aides d'État. Ainsi, les banques des Länder, qui jouissent de la garantie de l'État et peuvent donc lever plus facilement des capitaux, vont devoir bientôt fermer leurs portes suite aux actions engagées sur cet aspect de leur fonctionnement par l'UE. Les dispositions de l'UE s'appliquent également en matière de répartition des coûts et de transparence.

Deuxièmement, les marchés publics relèvent eux aussi de la réglementation de l'UE. En vertu des directives européennes qui ont été transposées en droit allemand, les marchés publics doivent obéir à des règles de mise en concurrence, de transparence et de non-discrimination. Ils sont soumis au contrôle d'organismes indépendants, dont trois sont hébergés par l'Office fédéral des cartels.

Troisièmement, les activités économiques des entreprises du secteur public sont encadrées par le droit privé. Même si les règles appliquées aux entreprises publiques sont différentes, elles ne leur confèrent pas beaucoup d'avantages par rapport à leurs concurrents privés. Une autre raison pour laquelle cet aspect pose moins de problèmes en Allemagne est que les privatisations y sont plus développées. En outre, les activités traditionnellement dévolues à l'État sont maintenant assurées par des entreprises privées qui comptent toujours l'État parmi leurs actionnaires mais qui fonctionnent selon les règles du droit civil ordinaire.

Quatrièmement, la loi allemande sur la concurrence s'applique à toutes les activités économiques – privées et publiques – mais elle prévoit de larges exemptions. Dans les années 90, le nombre de secteurs exemptés a diminué, et de nos jours, les télécommunications, les chemins de fer, les services postaux et même les activités économiques des collectivités locales sont soumis à des règles identiques.

Le président passe à la note de la Hongrie et fait remarquer que le gouvernement hongrois reconnaît l'importance du principe de neutralité concurrentielle, en particulier en ce qui concerne la réglementation des entreprises d'État. Cependant, il n'existe pas dans le pays de politique générale qui ferait obligation aux entreprises publiques de se comporter, sur le plan de la concurrence, de la même façon que les entreprises privées. Une loi relative à la transparence, inspirée des dispositions de l'UE en la matière, est entrée en vigueur lorsque la Hongrie est devenue membre de l'Union européenne le 1^{er} mai 2004. Le Conseil de la concurrence semble jouer un rôle utile en contribuant à promouvoir le principe de neutralité concurrentielle dans le cadre de l'application du droit de la concurrence. La contribution des autorités hongroises évoque deux affaires : d'une part, le refus d'un conseil municipal d'autoriser l'implantation d'un nouveau réseau de télévision câblée sur son territoire afin de protéger le réseau déjà mis en place par la municipalité elle-même ; d'autre part, le cas du service postal hongrois. Le président demande au délégué hongrois d'expliquer le cas du réseau de télévision câblée et de préciser si la loi sur la concurrence s'applique aux administrations municipales et ce que le Conseil de la concurrence peut faire dans ce genre de situation.

Le délégué hongrois explique que s'il n'y a pas de politique générale de neutralité concurrentielle en Hongrie, cela résulte davantage d'une évolution historique que d'une intention délibérée, et que la situation pourrait changer dans l'avenir.

Les problèmes de concurrence que peut poser l'action des municipalités sont de trois types. Premièrement, les administrations municipales peuvent édicter des règles qui sont contraires aux dispositions de la loi sur la concurrence ou qui enfreignent le principe de la neutralité concurrentielle. Dans ce cas, l'autorité de la concurrence peut saisir la Cour constitutionnelle pour faire abroger la réglementation en cause. Ensuite, les municipalités peuvent prendre des décisions qui influent sur le marché. Pour remédier à cette situation, l'autorité de la concurrence peut tout d'abord adresser un avertissement formel visant à faire modifier la décision, puis, si la municipalité n'obtempère pas, déposer un recours en annulation devant le tribunal. Enfin, les municipalités sont aussi des acteurs économiques (chargés, par exemple, de gérer les biens municipaux) dont les opérations sont soumises à la loi sur la concurrence et aux procédures ordinaires de l'autorité de la concurrence.

Dans le cas de la télévision par câble, un premier réseau avait été installé grâce à des subventions de la municipalité qui assurait ainsi aux habitants un service sans but lucratif. Plus tard, un concurrent désireux d'entrer sur le marché avait demandé à la municipalité les autorisations nécessaires pour occupation de l'espace public. Ces autorisations lui ayant été refusées, le nouvel opérateur ne pouvait pas non plus obtenir la licence d'exploitation délivrée par les autorités de régulation du secteur. Saisi de l'affaire, le Conseil de la concurrence a estimé que le refus de la municipalité n'était pas justifié, que c'était une décision à caractère commercial et qu'elle n'était pas du ressort de l'autorité publique municipale. Il a donc contraint la municipalité à annuler sa décision et à réexaminer l'offre soumise par l'opérateur en jugeant uniquement de ses qualités intrinsèques. Si la municipalité ne fait pas ce qui lui est demandé, le Conseil de la concurrence pourra alors lui infliger une sanction pécuniaire.

Le président passe à la Corée et note que ce pays ne dispose d'aucun dispositif particulier pour garantir le principe de neutralité concurrentielle. Au niveau central comme au niveau local, c'est le droit de la concurrence qui est invoqué contre les activités anticoncurrentielles des administrations et organismes publics, ou contre les avantages indus dont ils peuvent bénéficier. Le président demande au délégué de la Corée si le droit de la concurrence est un instrument efficace pour régler les problèmes de neutralité concurrentielle au niveau local et si d'autres moyens ne seraient pas nécessaires.

Le délégué coréen que la FTC effectue régulièrement des enquêtes sur les entreprises publiques locales et qu'elle ordonne des mesures correctives chaque fois qu'une infraction au droit de la concurrence est détectée. Au niveau des administrations locales, les infractions les plus courantes sont les pratiques déloyales, les achats forcés, les prix de vente imposés et les contrats uniformes abusifs. Si le problème de concurrence est lié à une restriction institutionnelle locale et non au comportement d'une entreprise publique, le droit de la concurrence ne peut être invoqué contre cette dernière. C'est typiquement le cas lorsque l'administration locale avantage ses entreprises par voie de réglementation et d'ordonnance.

Dans un cas, par exemple, une administration locale empêchait le secteur privé d'entrer sur le marché de la gestion et de l'entretien des routes pour protéger sa propre entreprise. Ailleurs, une autre administration modifiait ses ordonnances de manière à imposer des restrictions sur les horaires d'ouverture et les conditions de vente au détail des commerces de poissons privés qui faisaient concurrence au marché local qu'elle avait elle-même installé.

La FTC a demandé aux ministères concernés de faire pression sur les administrations locales pour qu'elles abrogent les réglementations incriminées. En dehors des mesures qu'elles prennent a posteriori pour remédier aux dispositions institutionnelles anticoncurrentielles et améliorer l'application du principe de neutralité concurrentielle, elle examine les projets de lois ou d'amendements et donne son avis sur les restrictions à la concurrence qu'ils peuvent contenir. La FTC contribue à garantir le principe de neutralité concurrentielle en menant des enquêtes, en faisant des recommandations aux administrations locales et en remplissant sa mission d'information et de consultation auprès des ministères.

Le président note qu'il y a apparemment une grande différence entre la Hongrie et la Corée, dans la mesure où la FTC n'a pas le pouvoir d'imposer directement ses décisions aux administrations locales mais doit passer par l'intermédiaire des ministères qui contrôlent leurs activités. D'autre part, le statut de l'autorité de la concurrence et le fait que sa direction se situe au niveau ministériel lui donnent plus de poids dans les efforts qu'elle fait pour convaincre les autres ministères d'appliquer ses recommandations.

5. Propositions de réforme

Le président aborde le cas des pays qui voudraient changer leur système. A cet égard, la contribution des Pays-Bas explique que le projet de loi sur le marché et le secteur public présenté au Parlement en 2001 s'est heurté à de nombreuses critiques. Un second projet, reposant sur une autre approche, est actuellement à l'étude. Le président demande aux délégués des Pays-Bas de décrire les différences entre ces deux textes et la relation entre la seconde version du projet et la loi sur la concurrence.

Un délégué des Pays-Bas explique que le premier texte sur le marché et le secteur public était destiné à devenir une loi spécifiquement consacrée à cette question. Il contenait deux types de dispositions. Premièrement, des règles relatives à l'entrée sur le marché – pour les organismes publics, l'entrée sur le marché devait faire l'objet d'une décision officielle justifiée par des considérations liées à l'intérêt collectif, et le secteur privé pouvait faire objection à cette décision.

Deuxièmement, le texte prévoyait cinq règles relatives au comportement sur le marché : 1) interdiction de subventionner des activités économiques par des fonds publics. Par exemple, les municipalités n'auraient pas eu le droit de lever des impôts pour financer leurs activités économiques déficitaires ; 2) interdiction d'utiliser les données recueillies dans le cadre d'un service public aux fins d'activités commerciales si les autres entreprises n'ont pas accès dans les mêmes conditions à ces données ; 3) interdiction de mélanger responsabilités publiques et commerciales au sein d'une même structure ; 4) interdiction d'accorder un traitement préférentiel aux entreprises publiques. Les administrations ne devaient pas avantager leurs entreprises au-delà de ce qui est considéré normal dans la pratique commerciale (par exemple en autorisant l'utilisation sans contrepartie financière de moyens appartenant au secteur public) ; 5) dissociation de la gestion des services publics et de celle des services économiques selon les prescriptions de la directive de l'UE relative à la transparence.

Le Parlement a abondamment critiqué ce projet de loi, en particulier en ce qui concerne les règles d'entrée sur le marché applicables aux organismes publics. Le but de ces dispositions n'était pas clair, et on a craint qu'elles restreignent trop la liberté des autorités publiques de décider d'entrer ou non sur un marché donné. On a pensé également que l'administration risquerait de pâtir des actions intentées par toutes les entreprises privées qui verraient d'un mauvais œil l'arrivée d'un concurrent issu du secteur public. Le gouvernement actuel propose maintenant de laisser tomber les règles relatives à l'entrée sur le marché pour ne conserver que les dispositions régissant le comportement des entreprises, reprises du premier projet de loi. Ces dispositions seraient insérées dans la loi sur la concurrence et mises en œuvre dans ce cadre-là.

Les Néerlandais s'intéressent aussi à trois autres questions : 1) le traitement à appliquer aux entreprises privées qui exercent des activités pour le compte et avec les fonds de la collectivité. A partir du moment où la rémunération d'un service public peut être supérieure à son coût d'exploitation, rien n'empêche une entreprise d'utiliser cette rémunération sur un autre marché ouvert à la concurrence, créant ainsi une distorsion ; 2) l'autorité de la concurrence devrait-elle être habilitée à infliger des sanctions pécuniaires aux organismes publics en cas d'infraction à la réglementation de la concurrence ? 3) une interdiction des subventions internes qui n'entrave pas l'accomplissement par un organisme d'une mission d'intérêt général, ce qui pose la question de savoir qui doit déterminer la portée de cette mission, quels sont les critères à utiliser pour évaluer s'il y a entrave ou non et à qui confier cette évaluation.

A propos de la Finlande, le **président** note tout d'abord que l'autorité finlandaise de la concurrence exerce une grande influence sur les lois et réglementations qui risquent de fausser la concurrence. Elle a largement contribué à la libéralisation du système de production de l'État et des municipalités, et aux améliorations apportées en termes de transparence. Cependant, la note de la Finlande ne cache pas que des problèmes de neutralité concurrentielle peuvent se poser même lorsque les entreprises publiques ne sont pas en position dominante. Avant le 1^{er} mai 2004, l'autorité de la concurrence avait le droit d'intervenir même si les faits portés à sa connaissance ne révélaient pas de pratiques prohibées par la loi relative aux restrictions à la concurrence, mais cette prérogative lui a été retirée pour cause d'harmonisation avec la législation de l'UE. Le président demande à la délégation de la Finlande d'exposer les autres problèmes.

Le délégué finlandais indique que la suppression du paragraphe 9 n'empêche pas de remédier aux distorsions que les activités des entreprises publiques peuvent éventuellement provoquer sur le marché, car ce paragraphe n'a pratiquement jamais été utilisé. En fait, il n'est pas nécessaire de disposer de tout un arsenal juridique pour garantir le principe de neutralité concurrentielle, car au bout du compte, il s'agit surtout de faire un travail d'information et de sensibilisation. Or, comme on peut le lire dans la note de la Finlande, l'autorité de la concurrence possède toutes les attributions et tous les outils nécessaires pour cette tâche. La loi qui a présidé à sa création lui donne notamment pour mission de prendre des initiatives pour promouvoir la concurrence et pour faire annuler les dispositions législatives et réglementaires qui entravent son libre exercice.

L'un des projets importants de l'autorité de la concurrence concerne le secteur public et les marchés. Il a fait prendre conscience aux responsables politiques nationaux et locaux que l'interface entre production privée et production publique doit constamment être surveillée et que la concurrence est une source d'efficacité lorsque les finances municipales sont en train de se dégrader. Il faudrait adopter une loi spécifique ou bien ajouter un nouveau paragraphe à la loi sur la concurrence pour faire en sorte que l'autorité de la concurrence soit assurée de disposer de toutes les attributions et de toute la liberté nécessaires pour poursuivre l'action qu'elle mène auprès des municipalités pour les convaincre d'ouvrir leurs marchés à la concurrence. Il conviendrait également, dans le cadre d'un autre projet, de s'intéresser de plus près à certaines questions fondamentales touchant le secteur public.

Dans la contribution de la Suède, le président note que « la législation existante, notamment les lois sur la concurrence et sur la régulation des administrations locales se sont en réalité révélées insuffisantes pour remédier aux distorsions qu'entraînent, sur le plan de la concurrence, les activités d'acteurs publics qui bénéficient de conditions plus favorables que les entreprises du secteur privé ». La Suède envisage actuellement d'ajouter un volet à sa loi sur la concurrence afin d'interdire à tout organisme public d'entraver le fonctionnement de la concurrence sur le marché. L'autorité de la concurrence est chargée de suivre la question et de proposer des moyens pour améliorer la concurrence entre les entreprises du secteur public et du secteur privé. Le président demande à la délégation de la Suède quels sont les principaux problèmes en suspens, quelles nouvelles dispositions pourraient être envisagées pour y remédier et quel pourrait être à cet égard le rôle de l'autorité de la concurrence.

Le délégué de la Suède fait savoir que le 1^{er} octobre l'autorité suédoise de la concurrence remettra un rapport au gouvernement recommandant des réformes législatives dans ce domaine. Il précise qu'il est indispensable d'assurer le strict respect de la réglementation, en recourant si nécessaire à des sanctions, en particulier pour la loi sur les administrations locales qui définit le champ d'intervention économique des municipalités. L'expérience montre clairement que la réforme passe avant tout par la loi, plutôt que par l'adoption de codes de conduite dont l'application reste facultative.

En première analyse, l'autorité suédoise de la concurrence estime qu'il convient de préférer l'approche horizontale à la réforme sectorielle. C'est pourquoi l'élaboration de la législation est aussi importante. Apporter un amendement à la loi sur la concurrence ne suffit pas. Il faut non seulement

modifier cette législation ou adopter une réglementation spécifique, mais aussi amender d'autres textes de loi que l'autorité de la concurrence et les juridictions administratives pourront faire appliquer. Et le système devra être assorti de sanctions efficaces.

Le président se saisit de la contribution du Mexique et note que les entreprises publiques représentent encore une bonne part de l'économie. La Commission de la concurrence s'emploie activement à promouvoir le principe de neutralité concurrentielle par les avis qu'elle publie sur les projets d'amendement de la législation et de la réglementation, et par les séminaires qu'elle organise pour essayer de développer une culture de la concurrence et de créer un environnement réglementaire favorable. Comme on peut le lire dans le document : *« pour parvenir à une véritable neutralité concurrentielle, il est nécessaire que les entreprises publiques soient confrontées aux mêmes forces que leurs homologues du secteur privé en ce qui concerne leur performance individuelle, ce qui dépasse le simple cadre de la législation sur la concurrence »*. Le président invite le délégué mexicain à exposer les principales dispositions jugées nécessaires pour garantir la neutralité en matière de concurrence dans son pays.

Le délégué du Mexique indique que le principal problème que pose la participation des entreprises publiques à l'activité économique tient à la position dominante qu'elles occupent sur le marché et dont elles peuvent se servir pour réaliser des profits monopolistiques ou pour évincer ses concurrents de certains secteurs. Certaines entreprises du secteur public, en particulier dans le secteur pétrolier, ont pour but de maximiser leurs bénéfices et les rentes monopolistiques tirées du pétrole servent à financer l'État. Le ministère des finances fixe les prix sans nécessairement se préoccuper de considérations d'efficacité et ces prix affectent la compétitivité de l'économie. Dans ces cas-là, la politique de la concurrence ne peut pas faire grand-chose.

L'autre problème est que les entreprises publiques se servent de leur position monopolistique ou dominante sur certains marchés pour restreindre l'accès à d'autres activités où elles sont en concurrence avec le secteur privé (par exemple, dans le secteur du gaz naturel, la distribution et le transport sont concentrés entre les mains de l'État qui se sert de cette position dominante pour réduire la concurrence sur le reste du marché). Même si la Commission de la concurrence est habilitée à intervenir dans cette situation, il lui est très difficile d'agir. Il est difficile d'établir les faits et les entreprises qui pâtissent du comportement de l'entreprise publique se refusent généralement lorsqu'il s'agit de porter plainte contre une puissante compagnie qui leur fournit un produit par ailleurs indispensable à leurs autres activités.

Pour que le Mexique connaisse un degré raisonnable de neutralité concurrentielle, il faudrait mettre fin à l'exclusivité dont jouit le secteur public dans des domaines stratégiques, mais il est probable que le législateur s'y refusera. D'autre part, le recours à une réglementation spécifique a peu de chances d'être efficace dans la mesure où les entreprises publiques ont souvent une telle position de force dans les secteurs stratégiques qu'il est très difficile pour quiconque de les attaquer en justice pour violation du droit de la concurrence, et, dans le cas de l'énergie, parce que l'État utilise les recettes engendrées par ce secteur pour financer le budget. Dans ces conditions, on voit mal comment mettre en place une politique transparente de neutralité concurrentielle.

En outre, les entreprises publiques ont des syndicats très puissants et leurs coûts ne sont pas nécessairement compétitifs. Si les tarifs de l'électricité, pour prendre un exemple, devaient refléter fidèlement les coûts, ils comporteraient des distorsions résultant des négociations syndicales et d'une surabondance de main-d'œuvre, et ils atteindraient un niveau excessif car ils ne correspondraient pas au véritable prix de revient du service. Il faudrait alors subventionner ce dernier, ce qui est infaisable. Par conséquent, la seule solution consisterait à supprimer les restrictions qui entravent la participation du secteur privé à ces activités stratégiques et à appliquer les principes de la concurrence.

Le président note que dans certains pays il existe des forces solidement établies contre lesquelles la législation ne peut rien et dont on ne pourra sans doute venir à bout que par un profond changement d'attitude.

A propos de la Turquie, le président observe que ce pays ne s'est pas doté d'une politique générale de neutralité concurrentielle, même si les privatisations et l'application du droit de la concurrence tendent vers le même objectif. La législation turque en matière de concurrence s'applique sans réserve aux entreprises publiques. L'autorité de la concurrence s'efforce de promouvoir le principe de neutralité concurrentielle par le biais de ses attributions contentieuses et consultatives, et elle encourage aussi le Parlement à amender la loi sur la concurrence *« afin de renforcer les pouvoirs dont dispose l'autorité de la concurrence pour réduire au minimum les mesures prises par les organismes publics qui ont pour effet de fausser le jeu de la concurrence »*. Le président demande à la délégation de la Turquie de décrire le rôle de l'autorité de la concurrence et son action pour promouvoir le principe de neutralité concurrentielle.

Un délégué de la Turquie confirme que son pays n'a pas adopté de politique générale en matière de neutralité concurrentielle, mais qu'il reconnaît l'importance de la concurrence. Par son action, l'État joue d'ailleurs un rôle essentiel à cet égard. Les activités économiques du secteur public sont soumises aux règles de la concurrence. Cependant, en dehors du champ économique, il existe des mesures qui peuvent aussi fausser le jeu de la concurrence et qui échappent à ces règles. Ce sont elles qui posent surtout un problème. Un projet récent envisage d'élargir les attributions de l'autorité de la concurrence, mais il doit être approuvé par le Parlement. Dans un pays qui est en train de bâtir une culture de la concurrence, il n'est pas toujours facile de convaincre les organismes publics de se conformer aux règles qui en découlent. Si l'autorité de la concurrence avait le droit de saisir la justice pour faire sanctionner le comportement des entreprises publiques, cela jouerait en faveur de la concurrence. Il n'est pas facile de convaincre un organisme public de changer d'attitude, même si les mesures qu'il prend ne sont pas dans l'intérêt de la collectivité. Donner à l'autorité de la concurrence le pouvoir de s'attaquer aux pratiques anticoncurrentielles du secteur public pourrait aider à vaincre cette résistance. En Turquie, la Constitution pose certains principes en matière de concurrence, mais pour qu'ils aient un sens, encore faudrait-il qu'ils soient étayés par des dispositions officielles en vue de leur application.

Passant au cas d'Israël, le président note que la note soumise par ce pays évoque à la fois le droit de la concurrence, le rôle des autorités de la concurrence et le programme de privatisations. Les intervenants ont été nombreux à dire que le droit de la concurrence et les privatisations sont des conditions nécessaires, mais pas suffisantes, pour instaurer une situation de neutralité concurrentielle. Le président demande à la délégation israélienne si elle estime que des moyens juridiques ou constitutionnels supplémentaires sont nécessaires pour promouvoir le principe de neutralité concurrentielle ou si, en Israël, la démarche actuelle fondée sur les privatisations et le droit de la concurrence est suffisante.

Un délégué d'Israël fait remarquer que si le droit de la concurrence et les privatisations ne peuvent à eux seuls résoudre tous les problèmes, cela ne veut pas dire que l'autorité de la concurrence ne s'active pas de son côté pour promouvoir la neutralité concurrentielle. Il présente M. Ben-Hamo, responsable du service des restructurations au sein de l'autorité israélienne des entreprises publiques, service qui a pour mission de procéder à tous les aménagements nécessaires sur le marché afin de permettre notamment à la concurrence de s'exercer avant que n'aient lieu les opérations de privatisation.

D'après M. Ben-Hamo, les privatisations et le droit de la concurrence ne sont pas suffisants pour garantir la neutralité concurrentielle. C'est la raison pour laquelle le ministère des finances a créé le service qu'il dirige, afin de restructurer les monopoles publics. L'idée de base est que ces restructurations sont bonnes pour la concurrence, et qu'il faut donc qu'elles aient lieu avant la privatisation. La législation antitrust, les restructurations et les privatisations sont les principaux garants d'un environnement neutre du point de vue de la concurrence.

M. Ben-Hamo évoque le cas de deux entreprises publiques. Premièrement, celui de l'autorité qui contrôle aujourd'hui la totalité des ports du pays. Cet organisme va être démantelé et chaque port sera ensuite doté de son propre gestionnaire de droit public, appelé à terme à être privatisé. Le deuxième cas est celui de la compagnie d'électricité israélienne, à l'heure actuelle en position de monopole absolu sur le marché. Le gouvernement a décidé de scinder la compagnie en quatre ou cinq entreprises de production et un nombre identique d'entreprises de distribution et de commercialisation, avec une seule entreprise de transport, le tout chapeauté par une holding. Au niveau de la production et de la distribution/commercialisation, les différents opérateurs seront encouragés à se faire concurrence. A l'étape suivante, chacune des entreprises de production et de distribution/commercialisation sera privatisée.

Le président invite ensuite les pays à participer au débat général.

Un délégué du BIAC fait remarquer que les avantages de la neutralité concurrentielle sont évidents, comme le montre la note de référence, et qu'il est possible de réaliser des gains d'efficacité dans le secteur public et dans le secteur privé. Si le bon fonctionnement du marché est entravé à cause de la protection dont bénéficie une entité du secteur public, ce sont toutes les règles du jeu qui se trouvent faussées et cela nuit à la capacité des entités du secteur privé d'améliorer leur efficacité. Les autres avantages se situent sur le plan de l'équité et du bien-être du consommateur. En fait, les règles applicables aux entités du secteur public comme du secteur privé devraient reposer sur trois principes fondamentaux. Tout d'abord, elles devraient être transparentes et claires pour tous. La transparence est particulièrement importante pour les organismes du secteur public, par exemple dans les domaines de la fiscalité et des comptes. Ensuite, elles devraient exclure toute discrimination, comme au Canada où la loi fédérale sur la concurrence a été amendée en 1996 afin de s'appliquer sans réserve ni exception à tous les organismes et toutes les entreprises du secteur public qui exercent des activités marchandes en concurrence avec le secteur privé. Enfin, il y a le principe de responsabilité, dans le domaine de la concurrence et plus généralement. Les interventions publiques (de l'autorité de la concurrence auprès des autres organes de réglementation et son travail d'information et de sensibilisation) peuvent faire prendre conscience au public des avantages que peuvent apporter aux consommateurs et à l'industrie un environnement rigoureusement non discriminatoire et des règles du jeu équitables.

Le délégué du Danemark déclare que l'autorité danoise de la concurrence dispose des attributions spécifiques pour assurer la neutralité concurrentielle et joue aussi un rôle d'information et de sensibilisation. Les distorsions commerciales créées par le comportement des entités publiques se rangent dans deux catégories : 1) les distorsions cachées qui ne résultent pas d'un choix politique délibéré, mais qui s'apparentent plutôt à des effets secondaires ; 2) les distorsions qui résultent de la volonté délibérée du Parlement. Elles sont sans doute très nombreuses dans un cas comme dans l'autre, mais on peut penser que la première catégorie est plus importante. Si tel est le cas, alors la meilleure solution devrait consister à renforcer les règles de transparence et les pouvoirs spécifiques des autorités de la concurrence. Si le problème le plus important est celui des choix peu avisés mais délibérés des parlements, alors il faut faire un plus gros effort d'information et de sensibilisation.

Le délégué allemand dégage deux approches différentes parmi les participants à la table ronde. Premièrement, il y a les pays qui n'ont pas de politique spécifique en matière de neutralité concurrentielle et qui pensent que la politique de la concurrence suffit. Ces pays estiment généralement que les entreprises privées et les entreprises publiques devraient être placées sur un pied d'égalité. Sous réserve de ne pas être en position dominante, les entreprises privées devraient avoir la liberté de fixer les prix, de différencier leurs clients et de procéder à des subventions croisées entre leurs diverses activités. Toutes les entreprises ne sont pas identiques. Les petites et moyennes entreprises privées n'ont pas du tout le même accès aux ressources financières qu'une entreprise qui fait partie d'un grand groupe bancaire. L'article 82 des règles concernant l'abus de position dominante s'applique indistinctement aux entreprises privées et aux entreprises publiques. Il en va de même dans les pays comme l'Allemagne.

Deuxièmement, il y a les pays qui appliquent une politique de neutralité, ceux qui veulent réduire la liberté des entreprises publiques sur le marché par rapport à la liberté dont jouissent les entreprises privées. Cela pose deux questions : 1) est-il justifié d'appliquer aux entreprises publiques des règles plus sévères qu'aux entreprises privées sur le marché ; 2) l'autorité de la concurrence est-elle la mieux placée pour réglementer les activités des entreprises publiques au regard du principe de neutralité. Étant donné les difficultés qu'il y a à contrôler le comportement unilatéral des entreprises en position dominante, il n'est pas judicieux de vouloir mettre en place un régime spécifique en la matière pour les entreprises publiques. Il faut certes contrôler les pratiques indésirables des entreprises publiques, mais, de toutes les institutions, les autorités de la concurrence ne sont peut-être pas les mieux placées pour se charger de cette tâche.

Un délégué du Mexique souligne que la distinction que font les spécialistes entre contraintes budgétaires minimales ou rigoureuses est très importante dans l'optique de la neutralité concurrentielle. Les pays sont souvent confrontés à la question de savoir s'il est possible de laisser les entreprises publiques faire faillite ou non. Par conséquent, même si les subventions ou les subventions croisées sont interdites, la fait que les entreprises publiques ne puissent pas faire faillite constitue un obstacle majeur à la concurrence. Prenons par exemple le cas des compagnies aériennes publiques qui font faillite et qui sont ensuite renflouées par les pouvoirs publics. Toute la question est de savoir dans quelle mesure les entreprises publiques sont soumises à de véritables contraintes budgétaires, sans exclure la possibilité de faire faillite.

Il est également important pour la conception d'une politique de neutralité concurrentielle de penser à la structure du marché parce que ce n'est pas la même chose de réglementer les activités d'une entreprise en position dominante et celles de n'importe quelle autre entreprise. Il est en effet beaucoup plus facile d'appliquer les principes de la neutralité concurrentielle lorsque les entreprises publiques ne sont pas en position dominante sur le marché.

Le délégué de l'Australie voit une certaine convergence entre deux principes fondamentaux sous-jacents à la notion de neutralité concurrentielle, principes qui ont été appliqués en Australie, en particulier depuis les réformes Hilmer de 1995. Le premier est que les mêmes règles doivent s'appliquer à toutes les entreprises, qu'elles soient du secteur public ou du secteur privé. Le second est qu'il convient de permettre à tous les acteurs de lutter à armes égales. Le simple fait d'être une entreprise publique ne doit conférer aucun avantage particulier.

La question des contraintes auxquelles pourraient être soumises les entreprises publiques s'est posée récemment en Australie, lorsque plusieurs monopoles publics ont été ouverts à la concurrence. Dans une situation comme celle-là, il est nécessaire d'imposer des contraintes aux entreprises publiques face à leurs nouveaux concurrents, non pas en raison de leur statut de droit public, mais pour faciliter la transition vers un environnement plus concurrentiel. Lorsqu'il y a une entreprise en place, comme dans le cas des télécommunications, de l'électricité ou du gaz, il peut être justifié d'encadrer ses pratiques commerciales pour favoriser cette transition, c'est-à-dire pour permettre aux opérateurs privés d'entrer sur le marché. Ainsi, les règles sont les mêmes pour tous, mais, pendant la transition, des règles supplémentaires peuvent s'avérer nécessaires pour créer un environnement plus favorable à la concurrence.

Un délégué de la Suisse estime que, pour des raisons à la fois théoriques et pratiques, la meilleure solution est de faire en sorte que les autorités de la concurrence réglementent elles-mêmes les activités des entreprises publiques. Une entreprise publique peut elle aussi se trouver en position dominante, donc il est évident que les mêmes règles doivent s'appliquer. Il est plus efficace, mais aussi plus juste que la même autorité applique les mêmes règles aux entreprises publiques et aux entreprises privées. Les activités économiques du secteur public qui sont soumises au droit de la concurrence doivent être définies sans ambiguïté. Il peut y avoir des raisons qui imposent de sortir du cadre de la régulation économique et de la concurrence, mais le simple fait d'être une entreprise publique n'en est pas une suffisante. Dans ce cas,

l'État pourrait être obligé de faire voter un régime spécial au parlement, ce qui serait moins efficace, mais aurait au moins le mérite d'être démocratique.

Il demande au délégué australien si la transformation des entreprises publiques en sociétés commerciales constitue une mesure de transition. Si cette opération ne s'accompagne pas d'une privatisation, elle peut rendre les choses plus faciles, mais elle ne peut pas résoudre les problèmes de concurrence. A court ou à moyen terme, la situation sera sans doute tout aussi difficile à gérer. Le cas de Swisscom, société commerciale partiellement privatisée, dont l'État détient une large part du capital (60 %) en offre un bon exemple. Il est toujours tentant pour les gouvernements de trancher en faveur d'une entreprise dont l'État est un actionnaire majoritaire. A moyen terme, la transformation en société commerciale devrait donc être suivie d'une privatisation.

Le délégué turc observe que le problème principal est d'éliminer les activités des entreprises publiques qui faussent le fonctionnement du marché. Dans une perspective libérale, le marché devrait être laissé aux entreprises privées. Par conséquent, la privatisation devrait être la première des priorités. Cependant, quand il n'est pas possible de privatiser les entreprises publiques, l'adoption d'une politique de neutralité concurrentielle peut se justifier. L'exemple de l'Australie offre un ensemble très complet de principes que les autres pays pourraient vouloir adopter. On pourrait donc peut-être préparer, sous forme de lignes directrices, des recommandations sur les pratiques optimales inspirées du modèle australien.

Le délégué du Brésil souligne l'importance des questions de neutralité concurrentielle. Le Brésil rencontre à cet égard des problèmes dans trois secteurs : le pétrole, le gaz et l'électricité/énergie, qui dépendent tous du ministère de l'énergie et où les principales entreprises appartiennent au secteur public. De ce fait, certaines lois ont été amendées pour préserver la position des entreprises publiques et, bien que le droit de la concurrence s'applique aux opérateurs publics, l'autorité de la concurrence n'a rien pu faire. à cet égard. Le Brésil est actuellement sur le point de réaménager son dispositif en matière de concurrence, et il est probable qu'il va se doter d'un organe spécialisé chargé de fonctions d'information et de sensibilisation dans les secteurs réglementés.

Le délégué australien explique pourquoi la transformation des entités publiques en sociétés commerciales est l'un des axes de la politique de son pays. C'est un moyen de garantir la transparence et de faire prévaloir les règles du marché, car les entreprises commerciales du secteur public ont les mêmes préoccupations que leurs homologues du secteur privé, y compris celle de rentabiliser le capital investi. Dans le climat politique actuel, les privatisations ne figurent pas parmi les options privilégiées.

En fin de compte, si certains produits et/ou services sont fournis par le secteur public, il est tout à fait normal de la part des pouvoirs publics d'exiger que les entreprises commerciales publiques se comportent de façon à servir l'intérêt collectif. La privatisation est donc la seule façon d'isoler définitivement les entreprises publiques des enjeux politiques. Et on peut ensuite recourir à la législation pour instaurer des obligations de service collectif.

Le président conclut qu'il y a différentes façons d'envisager la question de la neutralité concurrentielle. Dans certains pays, on constate une volonté délibérée de défendre le secteur public. Dans d'autres, les avantages concurrentiels dont bénéficient le secteur public ne sont pas le fruit de mesures gouvernementales intentionnelles. Il y a les pays qui se sont dotés d'une politique générale pour promouvoir la neutralité concurrentielle, et ceux qui ne l'ont pas fait. Autre distinction à noter, alors que le Mexique, le Taipei chinois et la Turquie se heurtent à de nombreux problèmes, l'Allemagne, les États-Unis, la Hongrie et la Nouvelle-Zélande sont assez satisfaits de la situation actuelle, et la Finlande, les Pays-Bas et la Suède s'emploient activement à chercher de nouvelles solutions.

La table ronde a permis d'aborder plusieurs points importants. On sait maintenant que la question de la neutralité a quelque chose à voir avec la façon dont les marchés fonctionnent et avec la concurrence. Ensuite, on s'est demandé ce qui serait nécessaire ou suffisant pour que les marchés fonctionnent mieux, ce que l'on entend par la notion d'égalité en matière de concurrence, dans un monde fait d'inégalités. L'idée d'offrir les mêmes conditions à tous est attrayante, mais le sens qu'on lui donne peut changer rapidement, et il varie suivant les pays. Aussi la question est-elle la suivante : offrir les mêmes conditions à tous veut-il dire qu'il faut traiter différemment les entreprises publiques, c'est-à-dire les désavantager parce qu'elles tirent un pouvoir de leur statut, ce qui n'est pas et ne pourra jamais être le cas des entreprises privées ; ou bien les conditions dans lesquelles elles exercent leurs activités doivent-elles être exactement les mêmes que celles que connaissent les entreprises privées ?

Le rôle de l'autorité de la concurrence, bien placée pour intervenir, revêt aussi une importance capitale. Le sentiment qui se dégage de la discussion est que les autorités de la concurrence devraient intervenir sur toutes les questions qui ont un rapport avec la concurrence et aussi parce que dans bien des cas il n'y a pas d'autre institution qui puisse le faire. Sur les questions de neutralité concurrentielle, l'autorité de la concurrence devrait au moins se conduire comme un porte-drapeau.

Il n'y a aucune réponse définitive à ces questions. Leurs aspects techniques tout comme le contexte socio-politique plus large dans lequel elles s'inscrivent sont parfaitement connus. Certaines propositions concrètes sont particulièrement intéressantes, par exemple habiliter l'autorité de la concurrence à saisir la justice lorsque les administrations locales entravent le jeu de la concurrence et ne respectent pas le principe de neutralité. Les règles exposées par les Pays-Bas méritent également d'être prises en compte. Le président propose de revenir ultérieurement sur ces réflexions et de voir alors comment aura évolué la situation.