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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES

-- Poland --

20 October 2009

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 20 October 2009.

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1. The definition and importance of SOEs

1.1 Please describe any legal definition of SOEs in your jurisdiction. What forms have state ownership (e.g. portfolio investment, capital investment, total or partial ownership, important minority shareholding) taken in your country? Please describe recent state involvement in your country's economy and the role played by SOEs. In which sectors are SOEs particularly important?

1. The legal basis for state owned enterprises' activity is the act of September 25, 1981 on state owned enterprises or a separate laws granting a particular enterprise legal personality. State-owned enterprise is defined as an independent, self-governing and self-funded entrepreneur having legal personality. The bodies of SOEs take their own business decisions and organize their activities in all business matters, in accordance with the law and aiming to perform SOE tasks effectively. State authorities can take decisions regarding SOEs' business activity exceptionally and only in the cases provided by the law.

2. An enterprise is established by the founding body: central public administration bodies (e.g. minister or a voivode), the National Bank of Poland or other national bank. State owned enterprises can be created either on general principles or as a public utility enterprise. (Public utility enterprises are intended primarily to meet the continued needs of the population. In particular, production or services in the field of transportation, the supply of electricity, heat and gas. Most of these companies are currently managed by local governments).

3. SOEs are entered in the commercial register of the National Court Register and the entry is equal to granting it legal personality.

4. Apart from the enterprises wholly owned by the State Treasury (e.g. Porty Polskie [Polish Ports]), there are public companies with the Treasury as a sole or majority shareholder. Minority shareholding by the state may also result in control over an enterprise by giving the state entities the right to designate board members. (e.g. PKN Orlen, a petroleum company dominant in the Polish market).

5. The state's ownership of SOEs is being significantly reduced. In the last few years progress in privatization and restructuring of state-owned enterprises has been observable in Poland. Many of the state-owned companies have already been sold, while those remaining are frequently in financial difficulty or are otherwise politically sensitive. These include state-owned companies in the coal, electric power, gas, chemical, and defense industries.

6. The most visible transactions were the sales of minority stakes in PKO BP, the largest Polish bank, LOTOS, the oil group and PGNiG, the gas company. A number of large state-owned companies had to initiate significant restructuring and labour reduction plans in order to adapt to increasingly competitive economic conditions.

7. SOEs' role in the Polish economy remains important, especially in a few strategic sectors. State-owned (or controlled) entities still dominate, most notably, in postal services, infrastructure, coal, chemicals, petrol production and utilities. Polish law identifies special obligations imposed on SOEs whose primary function is public utility, especially in the case of SOEs that hold a monopolistic position in the Polish market.

2. Rules applicable to SOEs

2.1 Do the rules in your country applicable to private enterprises differ for SOEs? If so, how? Do SOEs enjoy any special treatment which would grant them competitive advantages over private firms?

8. Generally, the same standards are applied to both private and public companies with respect to access to markets, credit and other business operations, such as licenses and supplies. SOEs used to enjoy special treatment regarding public levies. Tax authorities might not press troubled state-owned enterprises to pay taxes, to avoid forcing those enterprises into bankruptcy. Nevertheless, since EU accession, government activity favoring state-owned firms has received careful scrutiny from Brussels.

9. The commercial companies with state ownership are generally not exempt from general laws applicable to business organizations. Competition law, procurement law, and general bankruptcy laws apply to SOEs.

10. Although state enterprises are not favoured by the law, it is quite common for municipal undertakings to receive preferential treatment from municipalities (see next paragraph).

3. Antitrust enforcement and SOEs

3.1 Have activities of SOEs raised any competition concerns? Please describe examples of competition problems in those markets where SOEs compete with the private sector. Please describe any competition investigations or cases involving SOEs and any issues that emerged from the application of competition law to them. How has advocacy been used to address distortions of competition by SOEs?

11. According to the act on competition and consumer protection the definition of an enterprise is wide and also includes enterprises that provide public service. In fact, a large part of the decisions concerning abuses of dominant positions, relate to such entities. A majority of the Office of Competition and Consumer Protection's (OCCP) decisions in abuse of dominance involve local government (enterprises within the meaning of the act) and those enterprises whose sole owner is a district council (communal or municipal enterprises) such as: town refuse collection firms, waste storage sites, town water supply and sewerage networks, sewage treatment plant, cemeteries, and municipal public transport firms. The municipal services market is characterized by many enterprises which possess dominant positions in small, local markets. Typical cases involve municipalities (directly or through subsidiaries):

- refusing to grant "outsiders" access to a local waste collection market, raising their costs and shielding municipal waste collection companies from competition,

- forcing firms active in the local waste collection market to use exclusively the municipal deposition site, even though there are cheaper sites in the area,

- raising barriers to providing funeral services in a municipal cemetery by introducing discriminatory fees or outright bans on the activity of "outsiders"(it is also very often the behavior of private funeral services providers, entrusted with the management of cemeteries by municipalities),

- forcing customers seeking access to a local water supply network to use services of a municipal company with respect to necessary piping/construction works.

12. What those practices have in common, is shielding municipal companies from competition, by leveraging municipalities' position as a natural monopoly (supply of water) or an entity organizing a market (cemetery services, waste collection). Another important strand of cases against municipal companies involves imposing terms and conditions in contracts (usually concerning provision of water), which allow the municipal undertakings to obtain unfair gains at the cost of their customers.

13. Insufficient knowledge of competition law can also work the other way around – local governments fall victim of practices of businesses, such as bid-rigging. Therefore, adequate education of these market participants is of a crucial importance.

14. Cases concerning non-municipal SOEs are usually similar to those pursued against private undertakings. Majority of such cases involve state monopolies (actual or former), abusing their dominant position, typically by treating their customers in a discriminatory way.

15. One of the state monopolies which was prosecuted by the competition authority is the "State Forests" undertaking, which manages forests belonging to the state. It is a virtual monopolist in the wholesale supply of wood and was found several times to have abused its market position. Recent case involved the rules under which the wood was sold. There were two ways of obtaining wood from the State Forests: Internet negotiations and open Internet auctions. Internet negotiations were a primary way of obtaining wood for industrial purposes – as much as 80% of the wood was allocated on this basis - while the rest (usually lower quality wood) was sold via Internet auctions. The rules under which the wood was provided made it difficult for new firms to enter the market. The supplies of wood sold via Internet negotiations were allocated on the basis of past sales (usually a firm could not ask for more than it bought during the previous year), so entrepreneurs found it difficult to expand and outsiders were all but blocked from entering the market, as they had no history of past purchases and thus could only buy the leftover wood on the open auction. At the moment State Forests are changing their rules, considering moving most of their wood supply to open auctions.

16. Another case concerned imposing discriminatory airport charges by the State Undertaking Airports (PP Porty Lotnicze), the state-owned airport operator. As a result of the proceedings initiated upon a complaint from IATA, the undertaking was found to have abused its dominance in the market of "paid services related to making infrastructure of the airports available", i.e. in the market for access to airport infrastructure. Airports had been groundlessly imposing different airport charges (landing, passenger, parking and special services charges) and navigation charges on the national and international carriers. The practice had been discontinued in the course of the proceedings.

17. Although some competition evolved as a result of organizational and structural changes which took place on the postal services market, Polish Post (Poczta Polska), public enterprise still holds a dominant position. Antimonopoly proceedings have been conducted against Poczta Polska for imposition of onerous agreement terms and conditions yielding unjustified profits. The practice consisted in obliging senders to pay an additional monthly fee for handling operations in regard to postal services paid in the form of a credit. The fees were calculated arbitrarily by the Post due to the lack of definition of "handling fees". It was also shown that the charges which, according to the Polish Post, were additional/optional, in fact were standard and charged without proper analysis. A financial fine was imposed on the Polish Post.

18. Electricity market, majority of which is still in state hands, also witnessed several cases of anti-competitive behaviour. Several SOEs active in the distribution and sale of electricity were found to have abused their dominant positions in local markets. The cases concerned exploitative abuses (unlawful distribution and access fees), as well as exclusionary ones (raising costs of firms active in municipal lightning maintenance market by charging them unreasonable fees for access to infrastructure).

19. Finally, several abuse of dominance cases were pursued against the National Health Fund (NFZ), a public health insurance fund. Since it is an entity organizing public services, it has been recognized by the courts as an undertaking, which allows competition authority to control some of its activities. In most of the cases involving NFZ the competition authority came to a final conclusion that there was no infringement of the competition law. Majority of the cases where infringement was found, concerned applying discriminatory or unfair conditions to health-care contracts.

20. SOEs conflicts with competition law are not limited to abuse of dominance. In 2007 two petroleum companies: Grupa Lotos (state-owned) and PKN Orlen (state-controlled) were found to have concluded an anti-competitive agreement. The documentation gathered by the authority, mainly during an inspection carried out at the headquarters of both companies, showed that in light of decreasing demand for universal petrol U-95 (containing lead and used with older cars) and the consequent unprofitability of its production, PKN Orlen decided to withdraw it from the market, but considered it necessary to take this step simultaneously with the Lotos Group, in order to avoid customers' dissatisfaction and possible defection. U-95 was replaced with a special addition, which when mixed with unleaded petrol, made the latter a reasonable substitute of U-95. Lotos did not stand fully by the agreement and continued to sell U-95 petrol after the agreed date, which could be due both to a prompt reaction by the competition authority, and to a desire to liquidate inventories. The OCCP found that the explicit objective of the agreement was to prevent competition in the U-95 market and imposed fines on both companies.

4. Antitrust exemptions applicable to SOEs

4.1 Please discuss any exemptions that SOEs enjoy from the application of antitrust law in your jurisdiction. Under what conditions can SOEs benefit from the so called "state action doctrine"? Are there any specific exemptions which apply to non-commercial activities of SOEs (e.g. public service obligations, universal services, services of general economic interest, etc.) and under which conditions these exemptions apply?

The SOEs generally do not enjoy any special exemptions from the application of antitrust law. State action doctrine can shield SOEs if their anti-competitive behaviour was expressly mandated by the state and the SOE had no sufficient freedom of action to avoid acting in an anti-competitive manner.