Commercial Divisions of Public Entities and the Limits of EU Competition Law

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Competitive behaviour by public entities is generally approached in the literature as concerning the traditional State-owned enterprises pursuing public interest objectives. However, increasingly we see examples of commercial divisions of public entities aiming to generate revenue per-se. Because these commercial divisions can enjoy competitive advantages over their private sector competitors, their behaviour may distort competition. This phenomenon has become prevalent throughout the EU, and Member States tend to approach its anticompetitive effects through various competition law(-related) frameworks. This article points out, however, that a competition law framework may be ill-suited to address anticompetitive effects of commercial divisions of public entities. With an ill-functioning and diverging legal framework across the EU, anticompetitive effects of commercial divisions of public entities lead to an uneven playing field between public and private firms with adverse effects on the internal market.

Keywords: Competition Law, Mixed Markets, State-owned Enterprises

I. Introduction

Consider the following scenario: a national statistics agency produces statistics based on so-called microdata. These are 'raw' data at the level of (anonymised) individuals, companies and addresses that can be used as an intermediate product for research purposes. Under certain conditions firms, such as consultancies, can request access to microdata for analysis and interpretation.

At a certain point the statistics agency starts offering its own for-profit microdata analysis service, which operates in direct competition to the abovementioned consultancies. The statistics agency uses resources from its tax-funded budget to market its microdata analysis services, and allocates its civil servants to analyse microdata part time. Because the agency also has better access to microdata than its competitors, it can realise numerous efficiencies. This allows the agency to undercut the commercial rates of consultancies. Soon, microdata analysis generates a substantial amount of the statistics agency's budget.

The competing consultancies find themselves in a tough spot: they could express disagreement with the statistics agency, but also need the agency for access to microdata. Moreover, where could the consultancies go for a formal complaint and redress—and on what grounds?

Scenarios like the above have become more common in the EU since the financial crisis of the late 2000s. Increasingly, public entities, notably agencies, have instantiated commercial divisions to raise additional revenue. These commercial divisions can enjoy competitive advantages over private competitors that raise questions about the appropriateness, if not lawfulness, of their practices. Various EU Member States have responded to possible adverse effects on markets of commercial divisions by applying com-

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petition law, or by enacting supplementary laws based on competition law principles. Given the increased prevalence of commercial divisions of public entities, and competition law as the most common response to this phenomenon in the EU, the present article documents the phenomenon of commercial divisions of public entities, analyses its possible effects on competition and inquires how well competition law relates to those effects.

This article argues that while Member States tend to use competition law as a remedy for anticompetitive effects by commercial divisions of public entities, this approach may be mistaken. First, these commercial divisions may not qualify as 'undertakings' under competition law to begin with, when applying case law establishing that conduct by public entities falls outside the scope of competition law when connected to its exercise of public power.[1] Second, in case competition law does apply there may be procedural and institutional challenges preventing effective enforcement by competition authorities against commercial divisions. Consequently, conduct that is considered an infringement of competition law by a private firm may escape competition law scrutiny or effective enforcement when perpetrated by a commercial subsidiary of a public entity. This would affect the level playing field on markets with commercial divisions of public entities and harm the internal market.

The article proceeds in the following way. Section II develops the phenomenon of commercial divisions of public entities by reviewing the economic literature on competition between public and private firms, before establishing commercial divisions as distinct from the traditional State-owned enterprises (SOEs). Numerous examples from various EU Member States are introduced, as well as legal responses to this phenomenon across Member States. Then, possible distortions of competition by commercial divisions are explored.

Section III assesses the application of competition law to commercial divisions of public entities. The focus is on competition law, as many (if not all) EU Member States have enacted legal frameworks pertaining to commercial divisions of public entities that either utilise or build upon EU competition law. The possible application of competition law is analysed on a substantive and procedural/institutional level.

Section IV, then, outlines the consequences of the current competition law-related approach to commercial divisions of public entities, and introduces possible remedies to problems associated with this competition law approach. The final Section V discusses limitations of the present research, leading into an agenda for further research.

II. On Competitive Behaviour of Public Entities

This section first explores the ways in which public entities can compete on markets. It then proceeds to single out a hitherto under-studied manifestation of competitive conduct of public entities: commercial divisions of public entities. Finally, this section lays out the ways in which competitive conduct of these commercial divisions could affect competition.

1. Mixed Markets

In some markets private firms face competition from public entities. Typical examples mentioned in the literature are liberalised utility markets with (partially) state-owned incumbents, such as energy, railway and postal markets; markets with (recently) nationalised firms, such as banking; and markets related to the welfare state, such as healthcare, public housing and education.[2] The key difference between a private firm and a public entity in such setting is that the latter is unlikely to go bankrupt and is (partially) funded through taxes.[3]

Public entities can have various non-mutually exclusive motivations for competing in markets: to maintain public service obligations, for various reasons related to political economy, or to raise revenue.[4] Table 1 below distinguishes these 3 motivations further. Note that competitive behaviour by public entities can be by intention or an (unintended) consequence: a public entity could intentionally compete with private firms to raise revenue, or effective-

1 See nn 57-61.

2 Gianni De Fraja, 'Mixed Oligopoly: Old and New' in *The Pros and Cons of Competition in/by the Public Sector* (Swedish Competition Authority 2009).

3 Arvid Fredenberg, 'Introduction' in Arvid Fredenberg (ed), *The Pros and Cons of Competition in/by the Public Sector* (Swedish Competition Authority 2015) 8.

4 OECD, 'Maintaining a Level Playing Field between Public and Private Business' (OECD Publishing 2012).

***Table 1**. Examples of competition by public entities in markets*

Motivation for competitive behaviour	Public service obligations	Political economy	Raising revenue
Examples	Providing health services, transportation, energy, housing, education, etc to citizens	Advancing industrial policy, protectionism, safeguarding civil service status of employees, etc	Trading goods or services in addition to tax-funded revenue

ly end up competing with private firms when maintaining public service obligations or pursuing political economy goals.

Markets with competition between public and private actors are referred to as 'mixed markets' in the economics literature.[5] Theoretical research in industrial organisation demonstrates that both in settings of mixed duopoly and mixed oligopoly, mixed markets can yield higher social welfare outcomes than purely private markets.[6] However, firms' profits are lower in mixed oligopoly markets than in private oligopoly markets.[7] Similarly, it has been demonstrated that in a mixed duopoly price competition is the dominant strategy equilibrium for the public and private firm, both in case of substitute and complimentary products between both firms.[8] Such price competition would then lower profits for firms.

This industrial organisation literature on mixed markets typically concerns the traditional SOEs pursuing public interest or political economy goals.[9] Similarly, in law and economics scholarship a literature on competition law applied to SOEs has developed.[10] Even though this form of State-ownership has progressively been rolled back in Europe by waves of liberalisation and privatisation[11] empirical research shows that SOEs are still a factor in European markets.[12]

Nevertheless, the OECD points out that a broad spectrum of commercial activities is performed by public entities beyond the realm of the traditional SOEs, with the aim of generating revenue.[13] This would concern national or local governments and agencies involved in commercial activities alongside their public interest tasks. Such initiatives have the following characteristics:[14]

- The government charges for a service;
- The government activity is commercial by nature;
- There are no explicit restrictions on profitability;

5 See, eg Tsuyoshi Shinozaki and Minoru Kunizaki, 'Basic Properties of a Mixed Oligopoly Model' in Mitsuyoshi Yanagihara and Minoru Kunizaki (eds), *The Theory of Mixed Oligopoly: Privatization, Transboundary Activities, and Their Applications* (Springer 2017).

6 Stefan Lutz and Mario Pezzino, 'Vertically Differentiated Mixed Oligopoly with Quality-Dependent Fixed Costs' (The Manchester School 2013) 82; Xuan Nguyen, 'On the Efficiency of Private and State-Owned Enterprises in Mixed Markets' (2015) 50 Economic Modelling 130.

7 Nguyen ibid.

8 See Toshihiro Matsumura and Akira Ogawa, 'Price versus Quantity in a Mixed Duopoly' (2012) 116 Economics Letters 174; but see also Marcella Scrimitore, 'Price or Quantity? The Strategic Choice of Subsidized Firms in a Mixed Duopoly' (2013) 118 Economics Letters 337 (demonstrating that in mixed duopoly with a subsidised public firm, competition on quality can be a dominant strategy equilibrium).

9 See, eg Helmuth Cremer, Maurice Marchand and Jacques-Francois Thisse, 'The Public Firm as an Instrument for Regulating an Oligopolistic Market†' (1989) 41 Oxford Economic Papers 283; Stefan Buehler and Simon Wey, 'When Do State-Owned Firms Crowd Out Private Investment?' (2014) 14 Journal of Industry, Competition and Trade 319; Gianni De Fraja and Flavio Delbono, 'Alternative Strategies of a Public Enterprise in Oligopoly' (1989) 41 Oxford Economic Papers 302; Nguyen (n 5); Hiroaki Ino and Toshihiro Matsumura, 'What Role Should Public Enterprises Play in Free-Entry Markets?' (2010) 101 Journal of Economics 213; Matsumura and Ogawa (n 7).

10 See, eg, David EM Sappington and J Gregory Sidak, 'Competition Law for State-Owned Enterprises' (2003) 71 Antitrust Law Journal 479; David EM Sappington, J Gregory Sidak and John R Lott, 'Are Public Enterprises the Only Credible Predators?' (2000) 67 The University of Chicago Law Review 271; David EM Sappington and J Gregory Sidak, 'Incentives for Anticompetitive Behavior by Public Enterprises' (2003) 22 Review of Industrial Organization 183.

11 Nicola Bellini, 'The Decline of State-Owned Enterprise and the New Foundations of the State-Industry Relationship' in Pier Angelo Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000).

12 See Eleanor M Fox and Deborah Healey, 'When the State Harms Competition — The Role for Competition Law' (2014) 79 Antitrust Law Journal 769, 777–780.

13 OECD, 'Maintaining a Level Playing Field between Public and Private Business' (n 4) 15.

14 Deborah Cope, 'Regulating Market Activities in the Public Sector: Background Note' (2004) 7 OECD Journal of Competition Law and Policy 31, 50.

- There are actual or potential competitors.

An additional difference with the traditional SOEs is the type of market on which revenue-seeking public entities are active. Whereas SOEs tend to be active on liberalised markets that traditionally have a large public presence, revenue-seeking public entities are more common in otherwise purely private markets.[15]

These commercial activities are typically performed by divisions within a public entity. This competitive conduct by commercial divisions of public entities may currently outnumber SOE activity in Europe.[16] While these commercial divisions of public entities have typically been instantiated to generate revenue, this tends not to be the sole aim of the divisions. Rather, aims of revenue generation often coincide with traditional government goals of equity and social welfare.[17]

Even though competitive conduct by non-SOEs seems a common phenomenon, the literature on industrial organisation and law and economics is still predominantly concerned with public interest or political economy pursuing SOEs when studying competitive conduct by public entities.[18] It is for this reason that the present article moves beyond traditional SOEs to focus rather on the competitive behaviour of public entities. Because revenue generation as an explicit goal is the main difference between these commercial divisions and the traditional SOE, this difference will be highlighted in the subsequent analysis. This focus does not exclude the situation in which the commercial division (in)directly also contributes to the public interest.

2. Commercial Divisions of Public Entities

This category of competitive behaviour by public entities applies to unincorporated divisions within public organisations, often without their own legal personality. These divisions then pursue commercial activities beyond public interest tasks or political economy considerations, but rather to generate revenue primarily. Consider the following examples from a variety of EU Member States:[19]

- In Denmark a commercial division of the ministry of foreign affairs offers paid language classes to citizens;
- In Finland divisions of government agencies provide commercial services in statistics, technical research and meteorology. Moreover, divisions of local governments commercially offer welfare services, operate power plants and run harbours;
- A division of the Polish forestry service provide commercial activities, for instance by selling timber;
- Also in Spain commercial divisions of government agencies compete with the private sector, for instance in digital certification;
- In the United Kingdom divisions of various departments of government commercially offer products and services, such as the Ordnance Survey;
- In France a number of government agencies contain divisions engaged in economic activities, such as the national meteorological institute and the national institute for archaeological research;
- A number of Swedish non-incorporated divisions of government agencies are active in markets, for instance in construction and meteorological services. Moreover, local governments offer commercial services in markets as diverse as cleaning, vehicle rental, architecture and building maintenance.[20]

Although not part of the aforementioned OECD survey, the Netherlands offers a number of additional examples concerning commercial activities within government organisations. Its national statistics agency offers high-level statistical analysis of their data to clients,[21] thus directly competing with private economic research firms which offer similar services. The Netherlands' forestry service commercially sells timber and biomass. The Netherlands' National

15 Hans Friederiszick and Jakub Kałużny, 'On the Difficult Relationship between Competition Policy and Public Enterprises: Lessons to Be Learned from Recent Developments in the Field of European State Aid Control' in Arvid Fredenberg (ed), *The Pros and Cons of Competition in/by the Public Sector* (Swedish Competition Authority 2015) 125.

16 OECD, 'Competitive Neutrality in Competition Policy' (2015) DAF/COMP(2015)5 5.

17 OECD, 'A Compendium of OECD Recommendations, Guidelines and Best Practices Bearing on Competitive Neutrality' (OECD Publishing 2012) 26.

18 See nn 8 and 9.

19 For an overview of OECD countries, see OECD, Competitive Neutrality: National Practices (OECD Publishing 2012) 29–30.

20 Swedish Competition Authority, 'WP3 Discussion on Corporate Governance, SOEs and Competitive Neutrality' (Swedish Competition Authority 2009) 3.

21 Clients other than other governments to inform policy or law making.

Forensic Institute has been offering a number of commercial services, such as training of physicians and DNA lab research. The Dutch Chamber of Commerce commercially offers certification services for legal entities. Finally, the Land Registry Bureau of the Netherlands commercially sells aerial pictures, topographic prints and landscape analysis services. Furthermore, in local government a wide array of commercial activities is performed, ranging from construction waste container rental, to operating landscaping services, sports facilities, swimming pools and parking garages.

The proliferation of these commercial divisions of public entities throughout the EU could in some cases be attributed to budget cuts of national governments following the financial crisis of the late 2000s and early 2010s.[22] Funding for many public entities was diminished as part of austerity measures, while public entities were encouraged to balance their budget by independently generating revenue. As local governments are limited and agencies generally unable to independently impose taxes, offering products and services on markets can be the most effective way to raise additional revenue for a public entity. Another possible motivation for public entities to employ commercial divisions is related to cross subsidies within governments.[23] Public entities could generate additional revenue streams for central governments besides tax revenues. Revenue raising by public entities to cross-subsidise the central government may lead to perverse incentives against the organisations' public interest objectives, and could become a proxy for government corruption.

The subset of commercial divisions of public entities that is the focus of the present research thus is particular in two ways. First, this kind of competitive behaviour by public entities takes place outside the realm of the traditional SOEs, by commercial divisions typically without a separate legal personality. Second, the competitive behaviour of these commercial divisions mainly aims to generate revenue, and is typically not primarily driven by public interest or political economy considerations.

3. Distortion of Competition

Now that commercial divisions have been established as a distinct, prevalent, yet little studied manifestation of competitive conduct by public entities, it becomes opportune to address the possible effects on market mechanisms of these commercial divisions.

In general, commercial divisions of public entities can enjoy a number of competitive advantages over private sector rivals. Public entities generally face lower capital costs, are protected against hostile takeovers and bankruptcy, can have better access to (regulatory) information and infrastructure, can enjoy favouritism in public procurement, and could benefit from (tax funded) cross-subsidies.[24] At the same time, traditional competitive disadvantages associated with the inefficiency of the public sector could also apply to commercial divisions of public entities, including restrictive labour practices, bureaucracy, weak management and public service obligations.[25] The literature is unclear on whether, and in what way, these competitive (dis)advantages relate to each other. It is therefore possible that the balance between competitive advantages and disadvantages of commercial divisions of public entities leads to an overall more or less efficient production process compared to private competitors, who can suffer from their own potential inefficiencies in production.[26]

Irrespective of their (relative) efficiency, the activity of commercial divisions on markets can have an effect on actual or latent competition on those markets. First, the presence of public entities can affect actual competition. De Fraja demonstrates that a public competitor will pursue maximisation of total welfare and thus increase output of its products or services accordingly. The public competitor consequently would raise output higher than a private competitor would, leaving less residual demand for these private competitors. Confronted with this rise in output by the public competitor, the private competitor will consequently lower its output, and the producer sur-

22 OECD, 'Maintaining a Level Playing Field between Public and Private Business' (n 4) 21.

23 Muiris MacCarthaigh, 'Managing State-Owned Enterprises in an Age of Crisis: An Analysis of Irish Experience' (2011) 32 Policy Studies 215.

24 OECD, 'Competitive Neutrality in Competition Policy' (n 16) 7, 25. For more background on favouritism between public entities in public procurement procedures, see *Willem Janssen, EU Public Procurement Law & Self-Organisation: A Nexus of Tensions & Reconciliations* (Eleven International Publishing 2018) 123–136.

25 OECD, 'A Compendium of OECD Recommendations, Guidelines and Best Practices Bearing on Competitive Neutrality' (n 17) 7.

26 De Fraja (n 1) 16–17.

plus of the private competitor will diminish.[27] Ultimately, this mechanism could drive private competitors out of the mixed market altogether,[28] possibly as a consequence of predation by the public firm.[29]

Second, competitive behaviour of public entities on markets can affect latent competition by hampering entry. The mere presence of a public competitor on a market can amount to entry barriers for potential competitors because of the (perceived) competitive advantages public entities enjoy.[30] This rationale seems to be premised on a broad definition of entry barriers,[31] over which economists have argued a lot.[32] McAfee et al have since provided a helpful distinction between an economic and an antitrust barrier to entry—the former referring to a cost incurred by entrants but not by incumbents, while the latter refers to a cost of delayed entry relative to immediate, but equally costly entry, thus reducing social welfare.[33] The rationale that the competitive advantages of public entities in a mixed market amount to entry barriers seems to be premised on the concept of antitrust barriers to entry. A market with public firms may still be contestable for entrants, particularly given the above-mentioned competitive disadvantages of public firms. However, the competitive advantages of public firms can delay entry and thereby negatively affect social welfare.

The (static) welfare effects of the driving out mechanism or the entry barriers in these settings can be positive: because the foreclosing, entry-deterring firm is public, monopoly prices will remain low. De-Fraja, however, remarks that these positive welfare effects are premised on circular reasoning: because (and only if) the public firm in a mixed oligopoly pursues total welfare, will its monopolisation yield positive effects on total welfare.[34] Indeed, much of the economic literature on mixed oligopoly is premised on the public firm's incentive to pursue total welfare.[35] For commercial subsidiaries of public entities, however, at the very least total welfare is no longer their only aim. After all, these commercial subsidiaries are at least partially driven by revenue maximisation. There is some proof in the literature of how an objective function of a public firm combining profit maximisation and public interest concerns leads to predation with negative effects on welfare.[36]

In terms of dynamic competition, both foreclosing private competitors and hampering market entry of private competitors by commercial divisions of public entities could negatively affect innovation.[37] Consequently, better and more efficient production of goods and services would not be brought to the market,[38] with a negative effect on welfare in the long run.

It should be mentioned at this point that mixed markets could also yield more efficient outcomes than purely private markets, whereby the existence of public firms would have procompetitive effects. The economics literature has mentioned, for instance, that social[39] or total[40] welfare can be enhanced by the presence of a public firm on a market. Recall, however, that the models on which these papers are based tend to model the public firm as solely pursuing social welfare.[41]

Beyond effects on competitors, there are additional potential effects associated with competitive con-

27 ibid 19.

28 Swedish Competition Authority (n 19) 2.

29 John R Lott, 'Predation by Public Enterprises' (1990) 43 Journal of Public Economics 237.

30 Fredenberg (n 2) 8; Swedish Competition Authority (n 19) 2; OECD, 'Competitive Neutrality in Competition Policy' (n 16) 13.

31 This broad definition is ultimately based on the work of Joe Bain, who defined entry barriers as any factor allowing abnormal profits of an incumbent firm without attracting entry. See Joe S Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Harvard University Press 1956).

32 See, eg Dennis W Carlton, 'Why Barriers to Entry Are Barriers to Understanding' (2004) 94(2) The American Economic Review 5.

33 R Preston Mcafee, Hugo M Mialon and Michael A Williams, 'What Is a Barrier to Entry?' (2004) 94 AEA Papers & Proceedings 5, 463.

34 De Fraja (n 1) 20.

35 See, eg Cremer, Marchand and Thisse (n 8); Kenneth Fjell and John S Heywood, 'Mixed Oligopoly, Subsidization and the Order of Firm's Moves: The Relevance of Privatization' (2004) 83 Economics Letters 411; Lutz and Pezzino (n 5); Nguyen (n 5); Corrado Benassi, Alessandra Chirco and Caterina Colombo, 'Mixed Spatial Duopoly, Consumers' Distribution and Efficiency' (2017) 156 Economics Letters 74.

36 Sappington and Sidak, 'Competition Law for State-Owned Enterprises' (n 9).

37 Daniel Sokol, 'What Role for Government Ownership in Business and What Is the Best Form of Oversight?' in Arvid Fredenberg (ed), *The Pros and Cons of Competition in/by the Public Sector* (Swedish Competition Authority 2015) 61 <http://www.konkurrensverket.se/publications-and-decisions/the-pros-and-cons-of-competition-inby-the-public-sector/> accessed 5 September 2019.

38 Office of Fair Trading, 'Competition in Mixed Markets' (2010) OFT1242, 14.

39 Nguyen (n 5); Lutz and Pezzino (n 5).

40 Cremer, Marchand and Thisse (n 8).

41 De Fraja (n 1) 20.

duct by commercial divisions of public entities. The presence of public competitors in an otherwise private market could lead to an inefficient redistribution between buyers and tax payers, as the buyers of the goods and services provided by a public entity may receive a discount on its real cost, subsidised by tax revenue.[42] More broadly, competitive behaviour of public entities potentially blurs boundaries between public and non-public interest tasks of governments. Such blurred boundaries undermine the supposed impartiality of government and ultimately the rule of law.[43] Raising revenue through competitive endeavours could incentivise government corruption and cronyism.

III. The Limits of Competition Law

As has been demonstrated above, competitive conduct by commercial divisions of public entities can distort actual or latent competition in markets, mainly by driving out firms and hampering entry. When the commercial division is focused on revenue generation rather than improving social welfare, this could negatively affect consumer welfare from a static and dynamic perspective.

Many EU jurisdictions that recognise these actual or potential distortive effects on markets by public competitors, have instantiated corrective legal frameworks based on competition law principles.[44] In some countries, notably the United Kingdom, competition law in and of itself has been applied towards public entities with some regularity.[45] Other Member States have added on to their competition acts provisions pertaining to competitive behaviour of public entities. For instance, Sweden has enacted a law stipulating that cases can be brought against a public entity offering goods or services when allegedly distorting or impeding competition by object or effect.[46] Similar laws have been enacted in Finland and Denmark. In the Netherlands a chapter has been added to the competition act regulating economic activity by public entities, requiring such entities to charge prices equal to marginal cost and operate under functional separation, while prohibiting favouritism or sustaining information advantages over private competitors.[47] This reliance on competition law or competition law principles throughout the EU warrants a substantive analysis of the application of this field of law to commercial divisions of public entities.[48]

1. The Application of Competition Law

It has been long established in the case law of the European courts that any 'undertaking' falls under the ambit of EU competition law, irrespective of its legal personality.[49] The defining characteristic of an undertaking is engagement in 'economic activity,' which comprises the offering of goods or services on a given market.[50] Competition law would therefore generally apply to a public entity offering goods or services. Note that this applies even when—in case of (unincorporated) commercial divisions—the entity

42 OECD, 'Competitive Neutrality in Competition Policy' (n 16) 4. Please note that inefficient welfare distributions can also occur in purely private markets, for instance between consumers and investors.

43 ibid 4.

44 OECD, 'Competitive Neutrality: National Practices' (n 19) 5.

45 See, eg *Bettercare Group Ltd v The Director General of Fair Trading* [2001] CAT 6; *London Borough of Newham v Khatun & Ors* [2004] EWCA Civ 55

46 Swedish Competition Authority, 'Utvärdering Av Reglerna Om Konkurrensbegräsende Offentlig Säljverksamhet (English Summary)' (Swedish Competition Authority 2016) 2016–9.

47 See ch 4b of the Netherlands Competition Act. For an example of practical application, see Autoriteit consument en markt, 'Unfair Competition between Government Organizations and Private Businesses Is Not Allowed' (30 June 2014) <https://www.acm.nl/en/publications/publication/13172/Unfair-competition-between-government-organizations-and-private-businesses-is-not-allowed > accessed 17 July 2019.

48 For reasons of scope this research does not concern the broader field of competition policy, which would have included State aid law. Research on the application of State aid law to commercial divisions of public entities would certainly be pertinent, yet more appropriate in a separate study. For a more detailed analysis in the relation between competition law and state-aid law in the EU, see Herwig Hofmann, 'Administrative Governance in State Aid Policy' in Herwig Hofmann and Alexander Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006).

49 Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para 21 ('in the context of competition law ... 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"). See also Joined cases C-159-60/91 *Poucet & Pistre v Assurances Générales de France* [1993] ECR I-637, para 17; Joined cases C-180-84/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I6451, para 74.

50 Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para 36; Case C-205/03 *FENIN v Commission* [2006] ECR I-6295, para 25. Note that the European Courts have deemed the (not) for-profit status of an entity immaterial in this respect, see Case C-244/94 *Fédération Française des Sociétés d'Assurance, and others v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-0401 and C-180-84/98 *Pavlov* (n 49) paras 110-119.

performing economic activity has no distinct legal personality as part of a government.[51]

A string of cases by the Court of Justice of the European Union (CJEU) has further refined the extent to which commercial activities by public entities constitute economic activity. The Court advanced a factual, case-by-case approach to determine whether or not a public entity could be engaged in economic activity.[52] This case-by-case approach has factored in if the activity was also performed by private firms competing with each other,[53] if the activity is provided for remuneration,[54] and whether the public entity bears financial risk in its endeavour.[55]

For the purposes of this research, when determining if a commercial division of a public entity performs economic activity, it is crucial whether or not the entity offers goods and services as a part of exercising its public powers. Distinguishing commercial activities by public entities that fall outside of the exercise of public power stems from the doctrine of restrictive state immunity in international law. Responding to the increasingly untenable concept of absolute state immunity, international law scholars developed the distinction between *acta jure imperii* (public conduct) and *acta jure gestionis* (commercial conduct) in the late 19th century, excluding the latter from state immunity.[56]

To determine whether or not offering goods or services falls within a public entity's exercise of public power, the courts can consider the aim of activities, their nature and the rules to which they are subject.[57] Whether or not the activity by the public entity is provided for remuneration has not been deemed decisive by the CJEU.[58] Rather, offering goods and services by a public entity constitutes economic activity when it can be *separated* from the exercise of public powers.[59] What actually constitutes a separate activity from the exercise of public power has not been defined clearly by the CJEU, yet it appears the Court looks for a 'close link' between the contested activity and the public power entrusted to an entity.[60] An activity need not be indispensable or essential to the public power of the entity in question—also optional or non-mandatory activities by public entities may be considered inseparable from the exercise of an organisations' public power.[61]

Therefore, competition law would apply to commercial divisions of public entities inasmuch as the commercial activities of these divisions can be separated from the exercise of public power according to the CJEU standard. Concerning many of the examples mentioned in Section II.2 above, this would be a matter for debate. A case could be made both ways whether or not, for instance, commercial logging can be separated from the public power of a national forestry service. Similarly, it would have to be determined to what extent, for instance, a national statistics agency's statutory task of producing statistics can be considered separate from the analysis or interpretation of statistics by the agency for commercial purposes. The Netherlands' Competition Authority has recently applied the above-mentioned CJEU case law to determine that the activities of a payrolling service for self-employed healthcare professionals could not be separated from the exercise of public power of the national social security administrator under which it operated. Consequently the payrolling was not considered economic activity by an undertaking, thereby rejecting an predatory pricing claim from a competing payrolling service.[62] Although this is just one example, it demonstrates that it is not purely hypothetical to situate commercial divisions of public en-

51 *Spanish International Express Courier Services* Commission Decision 90/456/EEC [1990] OJ L 233/19, Case C-138/11 *Compass-Datenbank GmbH v Austria* [2012] ECLI:EU:C:2012:449, para 35

52 Erik Kloosterhuis, 'Defining Non-Economic Activities in Competition Law' (2017) 13 European Competition Journal 117, 123.

53 Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECLI:EU:C:2001:577, para 20; Case C-327/ 12 *Ministero dello Sviluppo Economico v Organismo di Attestazione SpA* [2013] ECLI:EU:C:2013:827, para 35.

54 See, eg C-35/96 *Commission v Italy* (n 50) para 37; Case C-309/99 *Wouters and others v Nederlandse Orde van Advocaten* [2002] EU:C:2002:98, para 48; Case C-1/12 *OTOC v Autoridade da Concorrencia* [2013] ECLI:EU:C:2013:127, para 37.

55 C-35/96 *Commission v Italy* (n 50) para 37; C-327/ 12 *Ministero dello Sviluppo Economico* (n 53) para 17; C-159-60/91 *Poucet & Pistre* (n 49) para 12.

56 For further background, see Peter D Trooboff, 'Clarifying the Distinction between Jure Imperii and Jure Gestionis', Collected Courses of the Hague Academy of International Law, vol 200 (Brill | Nijhoff 1986); Matteo Sarzo, 'The Dark Side of Immunity: Is There Any Individual Right for Activities Jure Imperii?' (2013) 26 Leiden Journal of International Law 105, 108.

57 Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-00043, paras 19-30.

58 See *SAT Fluggesellschaft* ibid paras 28-30 and Case C-343/95 *Diego Cali & figli v SEPG* [1997] ECR I-1547, paras 22-25.

59 See Case C-113/07 P *SELEX v Commission* [2009] ECR I-02207, paras 72-77, C-138/11 *Compass-Datenbank* (n 51) para 38.

60 *SELEX* ibid para 76.

61 ibid para 79.

62 Besluit van Autoriteit Consument en Markt naar aanleiding van een aanvraag tot het nemen van een besluit in de zin van artikel 70c, eerste lid, aanhef en onderdeel a en onderdeel b, van de Mededingingswet, ACM/18/032642

tities outside the realm of competition law because they cannot be separated from the exercise of public power of their parent organisation.

Of additional relevance to the application of the concept of 'undertaking' is Article 106(2) TFEU. This article states that undertakings performing Services of General Economic Interest (SGEI) or being revenue-producing (State) monopolies are only subject to the rules of the EU treaties, particularly competition law provisions, 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 concept of SGEI is complex and has been established through a myriad of CJEU cases[63] and Commission Communications.[64] In short, SGEI provide in the public interest what the market will not (sufficiently) provide—strict competition law enforcement would indeed be ill-suited under such circumstances. Another array of cases has been developed on what exactly constitutes an obstruction of the SGEI's assigned tasks by competition law provisions.[65]

It should be noted at this point that the concepts of SGEI and revenue-producing monopoly may very well apply to the traditional SOEs competing on (often liberalised) markets, for instance in utilities, transportation or (social) housing. The commercial divisions of public entities that the present research focuses on, however, are different from SOEs and will likely not be considered an SGEI or revenue-producing State monopoly. This is because the commercial divisions typically are not entrusted with a public interest task in absence of private alternatives in a market, but rather pursue revenue generation irrespective of private alternatives. As explained above,[66] commercial divisions of public entities tend to be active on otherwise private markets, rather than the liberalised markets with a traditional large presence of public firms. The examples of commercial divisions mentioned above in Section II.2 typically concern non-essential activities, ancillary to or resulting from public interest tasks. SGEIs, conversely, follow from situations in which 'certain obligations are imposed on [an undertaking] by the State in the general economic interest.'[67]

So far this article has established that a number of EU jurisdictions approach competitive conduct of public entities by means of competition law—including competitive conduct by commercial divisions of public entities. Furthermore, it has been outlined that commercial divisions of public entities would not automatically fall under the ambit of EU competition law. Even though the concepts of 'undertaking' and 'economic activity' have generally been defined broadly by the Court, the economic activity of a public entity has to be separate from its exercise of public power to be considered subject to competition law. Whether or not this separation can be established would have to be determined on a case-by-case basis.

Given this case-by-case basis, it can be assumed that some activities of commercial divisions of public entities would fall under the ambit of competition law, whereas others would not. Concerning the activities that would be considered separate from the exercise of public power, the next step, then, would be to analyse how competition law would apply to these commercial divisions of public entities.

2. Substantive Analysis

This sub-section covers the application of substantive EU competition law when applied to commercial divisions of public entities.

a. Collusion (Article 101 TFEU)

It would be possible for a commercial division to form a cartel with direct competitors. Examples in and outside of the EU have long been reported in which public entities participated in private or export cartels, sometimes even as ring leaders.[68] Fox

63 For an expansive summary of the relevant case law, see Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6 edn, Oxford University Press 2016) 629.

64 The latest one being: Communication from the Commission to Parliament, Council, etc, 'A Quality Framework for Services of General Interest in Europe' (2011) COM(2011) 900 final, 3 ('SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention.")

65 See Jones and Sufrin (n 63) 633–642 for an overview of the development in CJEU cases.

66 See s II.1.

67 Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECLI:EU:C:1998:316, Opinion of AG Jacobs, para 103.

68 Raymond Vernon, 'Uncertainty in the Resource Industries: The Special Role of State-Owned Enterprises' in David W Pearce, Horst Siebert and Ingo Walter (eds), *Risk and the Political Economy of Resource Development* (Palgrave Macmillan 1984).

and Healey mention enforcement against SOEs for initiating cartels in milk production and postage in Spain.[69] Cartel cases have been (unsuccessfully) brought against the public Canadian Crown corporations since the 1980s.[70] Moreover, the presence of a public sector competitor might incentivise the private actors on a given market to collude.[71]

It thus seems that in the circumstances that competition law applies to a commercial division of a public entity, Article 101 TFEU could be invoked when this commercial division allegedly participated in collusive agreements. In this case the Commission, a national competition authority or a private claimant could argue that such an agreement would fall under the scope of Article 101(1) TFEU, which prohibits agreements or concerted practices that may affect trade between Member States by undertakings with the object or effect of preventing, restricting or distorting competition on the internal market. Subsequently, it would have to be determined if the cumulative conditions of Article 101(3) TFEU would constitute an exception to the prohibition of Article 101(1).

It should be noted at this point however that the participation in a cartel by a commercial division of a public entity does not relate to the distortion of competition that was outlined in Section II.3 above. The negative effects on static or dynamic competition caused by foreclosure or entry deterrence mentioned here concern unilateral conduct by the commercial division, and collusion as a concept relies on multilateral conduct by a number of firms.[72] Moreover, no examples of commercial divisions of public entities participating in a cartel have been reported—at least to the author's knowledge.

Therefore, while the application of Article 101 TFEU to commercial divisions of public entities is possible substantively, this research will further investigate the relation between the observed potentially anticompetitive effects of commercial divisions of public entities and competition law provisions focused on unilateral conduct.

b. Abuse of Dominance (Article 102 TFEU)

There is a strong body of EU case law on abuse of dominance of (former) SOEs, particularly in network industries.[73] A variety of hypothetical examples can be construed in which a commercial division, deliberately or effectively, abuses a dominant position. For instance, when the subsidiary lowers prices to enhance social welfare or because of sheer limitless cross-subsidies, this could amount to predatory pricing for its competitors. Some anecdotal evidence of such practices has been documented. For instance, the French Competition Authority enforced against a commercial division of the French Meteorological Institute for (potentially) abusing its dominance by means of predatory pricing.[74] Similar examples have been found outside of the EU, in Australia.[75]

Alternatively, when a commercial division competes with private firms downstream, an essential facility upstream supplied by the 'parent' public entity could be leveraged for discriminatory purposes, refusal to supply or a margin squeeze.[76] This could happen when, for instance, a statistics bureau would selectively grant access to unedited statistical data to data analytics firms, and at the same time operate a commercial division that would offer data analysis services in direct competition with those firms. There is some anecdotal evidence of abuse of dominance in a vertical setting. Again in France, the National In-

69 Fox and Healey (n 12) 779.

70 See, eg *R v Eldorado Nuclear Ltd, 1* [1983] 2 SCR 551; *R v Uranium Canada Ltd* [1983] 2 SCR 55; *Industrial Milk Producers Assn v British Columbia Milk Board, 5* [1989] 1 FC 463; *Hughes v Liquor Control Board of Ontario* [2018] ONSC 1723 (CanLII).

71 Giovanni De Fraja and Flavio Delbono, 'Game Theoretic Models of Mixed Oligopoly' (1990) 4 Journal of Economic Surveys 1; Stefano Colombo, 'Mixed Oligopolies and Collusion' (2016) 118 Journal of Economics 167.

72 Hans Friederiszick and Frank Maier-Rigaud, 'The Role of Economics in Cartel Detection in Europe' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The more economic approach to European competition law* (Mohr Siebeck 2007) 180.

73 See Case C-202/07 *France Télécom v Commission* [2009] ECR I-2369 and Case C-209/10 *Post Danmark v Konkurrenceråd*t [2012] EU:C:2012:172 (predatory pricing); Case C-280/08 *Deutsche Telekom v Commission* [2010] ECR I-955 and Case C-52/09 *Konkurrentsverket v Teliasonera* [2011] ECR I-527 (margin squeeze).

74 Décision du 23 janvier 2012 relative à des pratiques mises en œuvre dans le secteur de la fourniture d'informations météorologiques aux professionnels, 12-D-04 [2012] English press release available at: <https://bit.ly/2ktcEff> accessed 5 September 2019.

75 Cope mentions an example from Australia, in which the national meteorological institute lowered its prices for newspapers to zero upon entry of a new firm providing enhanced graphical material for the daily weather pages. See Cope (n 14) 40.

76 Even though it is unlikely for a commercial division downstream to concoct a margin squeeze together with its upstream (public) supplier, the cost advantages that the commercial division enjoys over competitors could amount to what in practice would be a margin squeeze.

stitute for Preventive Archaeological Research was investigated by the French Competition Authority for allegedly leveraging market power in the (upstream) archaeological diagnostics market to the (downstream) excavation market where its commercial division was active.[77] In the UK, a case has been litigated where the Ordnance Survey (OS) was accused to leverage its market power in the upstream mapping market onto the downstream aerial imagery market where a commercial division of the OS was competing with private firms.[78]

However, for the abuse of dominance of commercial divisions of public entities to be established, actual market dominance would have to be demonstrated first. Dominance is generally defined as the ability for a firm to behave independently of competitors, customers or consumers, thereby preventing effective competition.[79] Effectively, this amounts to independently raising prices, lowering output or negatively influencing innovation or quality.[80] Dominance is established on a case-by-case basis, and involves a two-pronged test in which, first, the relevant (product and geographic) market is defined.[81] Second, the degree of market power is established based on market shares,[82] entry barriers[83] and countervailing buying power.[84]

Given the considerable variety of commercial divisions of public entities, and the various markets on which they are active, no overall conclusions can be drawn on their degree of market dominance. Dependent on the particular market definition, it would however be possible for some of these commercial divisions to hold a market share of 40% or more, which is the Commission's lower limit for market power.[85] Moreover, as has already been established above, various competitive advantages that public entities enjoy could amount to entry barriers for the private competitors of the commercial divisions.

At the same time, anecdotal evidence suggests that market definition might be steep hurdle to take for public competitors in abuse of dominance cases. The Swedish Competition Authority mentions that Swedish courts have been reluctant to accept market definitions and accompanying market shares of public competitors in proceedings, and that several cases consequently have not proceeded to the assessment of competitive restrictions.[86]

Moreover, it is not altogether clear to what extent abuse of dominance by a commercial division of a public entity would have the same negative effects on consumer welfare as when perpetrated by a private firm. The Commission's 2009 guidance paper has elaborated on the term 'anticompetitive foreclosure' to explain the relation between abuse of dominance and consumer welfare. The abusive conduct should negatively affect consumers 'whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.'[87]

As has been pointed out above in Section II.1, even when public entities are active on markets with the express aim of generating revenue, traditional social welfare objectives of the public sector may still influence their behaviour on markets.[88] Therefore, when commercial divisions of public entities also pursue social welfare when offering their goods or services, it would be highly unlikely for prices to be raised by a dominant firm after having forced private competitors out of the market by sub-competitive pricing. After all, the commercial division will keep prices low for consumers to maximise social welfare, also after foreclosure. When a commercial division offers goods or services with the aim of raising revenue for

77 Décision du 1er juin 2017 relative à des pratiques mises en oeuvre par l'Institut national de recherches archéologiques préventives dans le secteur de l'archéologie préventive, 17-D-09 [2017].

78 *Getmapping PLC v Ordnance Survey* [2002] EWHC 1089 (Ch).

79 See Case 27/76 *United Brands v Commission* [1978] ECR 207, para 65; Case 85/76 *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, para 38. See generally Commission Communication, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) OJ C 45/7, para 10.

80 See Commission Communication ibid para 11.

81 See 27/76 *United Brands v Commission* (n 79) paras 19-35; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paras 23-28, 37-45; Case T-30/89 *Hilti v Commission* [1991] ECR II-439, paras 66-68; Case T-219/99 *British Airways v Commission* [2003] ECRII-5917, paras 110-116.

82 85/76 *Hoffmann-La Roche* (n 79) paras 39-41; T-219/99 *British Airways* ibid paras 212-225.

83 27/76 *United Brands v Commission* (n 79) paras 121-129, 322/81 *Michelin* (n 81) paras 53-61.

84 *Prokent/Tomra* (COMP/E-1/38.113) Commission Decision (2006) OJ C 219/11, para 89.

85 Commission Communication (n 79) para 14.

86 See Swedish Competition Authority (n 45) 10.

87 Commission Communication (n 79) para 19. Please note that the conception of 'consumer' in consumer welfare is at best best, ambiguous. See Pinar Akman, '"Consumer" versus "Customer": The Devil in the Detail' (2010) 37 Journal of Law and Society 315.

88 OECD, 'A Compendium of OECD Recommendations' (n 17) 26.

itself or the central government, it would become more likely to raise prices post foreclosure. If this latter scenario were to occur, the as-efficient-competitor test outlined by the Commission[89] would likely be met. Given the general inefficiency of the public sector as compared to the private sector (see Section II.2), it would be probable that in these circumstances competition is hampered with private firms considered as efficient as the dominant commercial division.[90]

In any event, it has been pointed out in the literature that a focus on short-term (static) pricing effects has been a decisive factor in enforcement of abuse of dominance cases. However, the more long-term aspects of quality and consumer choice need to be factored in as well.[91] Even if a commercial division were to keep prices low after effectively forcing private competitors out of the market, consumer welfare could still be affected negatively. In absence of competitive pressure post foreclosure product innovation could be hampered, and consumers would generally have fewer products or services to choose from.

Based on the above, it would be possible in principle to establish market dominance of a commercial division of a public entity, and to determine abuse of such a dominant position. Because of both the various case-specific factors in the abuse of dominance case law, and the variety in which commercial divisions can operate, little can be said at this point about the possible outcome of such cases before the European Commission and courts, or national competition authorities and national courts. Anecdotal evidence from Sweden suggests that market definition might be problematic in such proceedings. Moreover, commercial divisions that operate to enhance social welfare are less likely to abuse a dominant position than commercial divisions aiming to generate revenue per-se.

3. Procedural and Institutional Analysis

The European Commission tends to focus on the large abuse of dominance cases with an appreciable effect on the internal market at large.[92] Consequently, it would be unlikely for the Commission to bring proceedings against commercial divisions of public entities, who would typically impact markets on a national level. National competition authorities, however, would be more inclined to bring proceedings. For instance, in France the Competition Authority has established a somewhat of a track record on competitive conduct by public entities.[93]

Were a competition authority to bring proceedings, commitment decisions or fines could be issued to commercial divisions found to be abusing a dominant position in a market. This decision could then be appealed before the national and eventually European courts. There would, however, be procedural aspects complicating this process.

a. Institutional Constraints

As the legality principle requires government activity to be prescribed by law, it is likely for commercial divisions of public entities to perform their commercial activities on the basis of a statutory or administrative provision.[94] For instance, the Netherlands Chamber of Commerce, a government agency, performs a number of commercial activities premised on a statutory provision allowing it to initiate non-essential services alongside its statutory tasks.[95] Moreover, legislative provisions may be in effect that regulate the behaviour of commercial divisions of public entities, for instance related to pricing. Some Member States have sectoral provisions

89 Commission Communication (n 79) para 23.

90 With its landmark ruling in the *Intel* case, and by reversing a General Court ruling, the CJEU has affirmed the standard of *Post Danmark 1* (n 73) claiming that 'it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.' See Case C-413/14 P *Intel v Commission* [2017] ECLI:EU:C:2017:632, para 133. For an overview of the possible ramifications of this case on the goals and scope of art 102 TFEU, see Nicolas Petit, 'The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases' (SSRN, 2017) 13–15 <https://papers.ssrn.com/abstract=3086402>.

91 Svend Albæk, 'Consumer Welfare in EU Competition Policy' in Caroline Heide-Jørgensen and others (eds), *Aims and Values in Competition Law* (DJØF Publishing 2013) 83; Jan Sviták and Jarig van Sinderen, 'Economic Impact of Competition Policy: A Look Beyond Consumer Surplus' (2018) 166 De Economist 23.

92 Jones and Sufrin (n 63) 268.

93 See, for instance, Decision 12-D-04 (n 74) and Decision 17-D-09 (n 77).

94 OECD, 'Inventory of Competitive Neutrality Distortions and Measures' (2015) DAF/COMP(2015)8, 12–13.

95 See arts 30-31 Wet Kamer van Koophandel ('Chamber of Commerce Act'), BWBR0034331.

to this end,[96] while others, such as the Netherlands, require this on a blanket ex-ante basis.[97] Such legal bases for commercial activities, however, could lead to a conflict between regulation and competition law that competition authorities have a hard time to resolve.

Consider the example of a commercial division of a public entity that is required by law to sell its products or services at least at marginal cost. As the state of perfect (Bertrand) competition in which price is equal to marginal cost is quite rare in real markets,[98] pricing at marginal costs by the commercial division could drive private competitors out of the market. A competition authority could open proceedings, establish predatory pricing, and issue commitment decisions or fines in such a case.[99] The institutional problem here is that the competition authority will only be able to address individual anticompetitive conduct and not the overarching law allowing this conduct.

Regulation that enables anticompetitive behaviour typically cannot be voided by a competition authority, leading to inefficient ex post enforcement on a case-by-case basis.[100] Granted, regulation that enables anticompetitive conduct in some Member States, such as Italy, Spain and Sweden could be challenged by a competition authority before court,[101] which would allow the legislation in question to ultimately be voided by a constitutional court. Proceedings leading to voidance of laws before constitutional courts—generally courts of last resort—tend to take several years. In the meantime, private competitors may already have been driven out of the market entirely.

Alternatively, it should be noted, the European Commission or private litigants could challenge legislation allowing for anticompetitive conduct by commercial divisions of public entities by relying on Article 106(1) in conjunction with 102 TFEU. Article 106(1) applies to (public) undertakings or undertakings that are granted exclusive rights, concerning which Member States may not enact legislation contrary to the TFEU, particularly the competition policy of Articles 101-109 TFEU.[102] When a commercial division of a public entity would qualify as a (public) undertaking,[103] the substantive application of Article 106(1) would be relevant when 'a measure imputable to a Member State gives rise to a risk of an abuse of a dominant position'.[104] In such cases, private or Commission enforcement could indeed provide an alternative route towards voidance of legal provisions that allow anticompetitive conduct by commercial divisions of public entities.

b. Behavioural Constraints

Besides the institutional constraints, competition authorities can also be faced with behavioural constraints during proceedings involving public entities. There may be various implicit or explicit factors that prevent a competition authority from acting neutrally vis-a-vis alleged violations of competition law by public entities.

A competition authority may prioritise private offenders over public offenders and could be more restrained in its treatment of alleged public offenders. There could be political or managerial pressure to treat alleged public offenders more leniently. Alternatively, a competition authority could be subject to internalised self-restraint out of a moral obligation not to turn on other civil servants, or out of fear for retaliation. Petit has argued that such unequal treatment between alleged private and public competition law offenders can manifest during all stages of

96 OECD, 'Summary of the Discussion' (2004) 7 OECD Journal of Competition Law and Policy 286, 293.

97 See art 25 Mededingingswet ('Competition Act'), BWBR0008691.

98 In microeconomics, this situation is referred to as the 'Bertrand Paradox,' see, eg Martin Dufwenberg and Uri Gneezy, 'Price Competition and Market Concentration: An Experimental Study' (2000) 18 International Journal of Industrial Organization 7; Klaus Abbink and Jordi Brandts, 'Price Competition Under Cost Uncertainty: A Laboratory Analysis' (2005) 43 Economic Inquiry 636; Lisa V Bruttel, 'Group Dynamics in Experimental Studies—The Bertrand Paradox Revisited' (2009) 69 Journal of Economic Behavior & Organization 51.

99 More on this in s III.3.c (the regulated conduct defence).

100 OECD, Competitive Neutrality: National Practices (n 19) 5.

101 OECD, 'Competitive Neutrality in Competition Policy' (n 16) 15–16; Swedish Competition Authority (n 45).

102 See, eg Case 18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM* [1991] ECR 5941; C-41/90 Höfner (n 49); Case C-260/89 *Elliniki Radiophonia Tiléorassi and others v Dimotiki Etairia Pliroforissis* ERT [1991] ECR I-5941; Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR 5889.

103 See s III.1.

104 Case C-553/12 P *Commission v DEI* [2014] EU:C:2014:2083, para 42. For background, see Damian Chalmers, Gareth Davies and Giorgio Monti, 'State Regulation and EU Competition Law' in *European Union Law: Cases and Materials* (Cambridge University Press 2012); Kelyn Bacon, 'State Regulation of the Market and EC Competition Rules' (1997) 18 European Competition Law Review 283.

the proceedings.[105] Both in case selection, investigation, decisions and sanctioning the competition authority can be subject to the biases mentioned above that amount to preferential treatment of public entities.

To be clear: national competition authorities in the EU tend to be independent agencies on both a functional and a structural level, and this independence tends to be enshrined in law. EU competition authorities typically do not operate under direct control of politicians.[106] At the same time, it has been pointed out that complete independence from government and politics is hard to achieve for agencies in general, and competition authorities in particular.[107] Moreover, there can be a difference between independence de jure and de facto.[108] Indeed, competition authorities' independence can be vulnerable at certain 'pressure points,' such as the (political) appointment of commissioners, funding, and the legislative process on laws affecting competition authorities.[109] Moreover, recent challenges to the Rule of Law in Poland and Hungary demonstrate that independent competition law enforcement and adjudication is brittle.[110] Maintaining independence from government, therefore, may be hard enough in and of itself for competition authorities,[111] let alone while at the same time investigating or sanctioning parts of government.

Enforcement against anticompetitive behaviour by public entities, therefore, may point out a weak spot in the otherwise independent status of competition authorities. Even when there is a legislative framework in place controlling for anticompetitive behaviour by public entities, the fact that public entities are the perpetrator makes enforcement less straightforward as compared to enforcement against private firms.[112]

In practice reports on actual public enforcement against anticompetitive behaviour by public entities have been mixed. Most of the (few) countries in which a designated agency is in place to enforce against anticompetitive behaviour by governments, report both a prevalence of undesirable behaviour and a general lack of public enforcement thereof.[113] At the same time Spain reports a strong enforcement practice, with multiple cases having been adjudicated by the designated enforcement agency.[114] At this point it is unclear which circumstances have led to the situation in which enforcement against for-profit government initiatives is present in some and absent in other countries.

c. Regulated Conduct Defence

As mentioned above, commercial divisions tend to perform their commercial tasks supported by statutory or regulatory provisions, possibly leading to conflicts between regulation and competition law. A legal basis for de facto anticompetitive conduct would however also allow the commercial division to invoke the 'regulated conduct defence' upon appeal before a court.

The regulated conduct defence has been established in both Article 101 and 102 TFEU case law. It stipulates that when a law or regulation requires un-

105 Nicolas Petit, 'Implications of Competitive Neutrality for Competition Agencies: A Process Perspective' (2015) SSRN Electronic Journal <http://www.ssrn.com/abstract=2620735> accessed 20 June 2018.

106 Stephen Wilks, 'Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement' (2007) 3 European Competition Journal 437.

107 See, eg Johan W Van de Gronden and Sybe A De Vries, 'Independent Competition Authorities in the EU' (2006) 2 Utrecht Law Review 32.

108 Tay-Cheng Ma, 'Competition Authority Independence, Antitrust Effectiveness, and Institutions' (2010) 30 International Review of Law and Economics 226.

109 William Kovacic, 'Competition Agencies, Independence, and the Political Process' in Josef Drexl, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing 2011).

110 Maciej Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law' (2019) SSRN Electronic Journal <https://papers.ssrn.com/abstract=3431631> accessed 30 August 2019; Tamás M Horváth and Ildikó Bartha, 'EU-Compatible State Measures and Member States Interests in Public Services: Lessons from the Case of Hungary' (2018) 16 Central European Public Administration Review 137.

111 Sofia Alves, Jeroen Capiau and Ailsa Sinclair, 'Principles for the Independence of Competition Authorities' (2015) 11 Competition Law International 13.

112 Deborah Healey, 'Competitive Neutrality and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific' (2019) 7 Revista de Defesa da Concorrência 51, 66.

113 Lars Meindert et al, 'Evaluatie Wet Markt En Overheid 2012-2015' (Ecorys, Bird & Bird 2015) ROO/OV NL202-29839rap <https://www.rijksoverheid.nl/documenten/rapporten/2015/08/06/valuatie-wet-markt-en-overheid-2012-2015> accessed 5 September 2019; Australian Government, 'Review of the Commonwealth Government's Competitive Neutrality Policy' (2017) <https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/supporting_documents/CN%20Review%20Consultation%20Paper.pdf> accessed 5 September 2019.

114 Carlos Padrós Reig and José María Macías Castaño, 'Los instrumentos administrativos de garantía de la unidad de mercado' (2014) Revista de Administración Pública 113.

dertakings to behave in a way that is de facto anticompetitive, such behaviour is not attributable to the undertaking itself.[115] It should be noted, though, that the courts have defined the scope of a regulated conduct defence narrowly: the statutory or regulatory provision should leave the undertaking no other option but to act anticompetitively.[116] Both approval by a regulatory authority of anticompetitive behaviour to which the undertaking took initiative and (tacit) encouragement by a regulatory authority do not fall under the penumbra of the regulated conduct defence.[117]

Commercial divisions of public entities could operate under a variety of legal provisions, yet it seems that anticompetitive conduct will generally be on the commercial divisions' own initiative. Consider, for instance, a branch of the national forestry service acting under a legal provision to sell biomass, and then deciding to lower prices to force out competitors. In this example the anticompetitive behaviour takes place on the subsidiary's own initiative, and the regulated conduct defence will likely not be upheld by a court.

Things would be less clear-cut when, as mentioned above, the branch of the forestry service were required by law to sell its biomass at marginal cost. The commercial division has no other choice here but to price sub-competitively, effectively driving private competitors out of the market. In this scenario it seems more plausible for the regulated conduct defence to hold up in court: the branch of the forestry service did not take the initiative to set its prices at an anticompetitive level, but was required to do so by law.

IV. Consequences for Competition and the Internal Market

The previous sections have established (1) that commercial divisions of public entities are prevalent in the EU, and can have an appreciable negative effect on competition; (2) EU Member States generally have stated to approach competitive behaviour by public entities through a competition law framework, even though the commercial division may not qualify as an undertaking and thus fall outside of the scope of competition law; (3) under the circumstances in which EU competition law would apply, anticompetitive behaviour of these commercial divisions would likely fall under the abuse of dominance regime; and (4) while abuse of dominance may be established on a substantive level, competition authorities face numerous procedural challenges when enforcing against commercial divisions of public entities.

This situation could be problematic on various levels, raising concerns about the effectiveness of competition law when commercial divisions of public entities are active on markets.

First of all, it is problematic that anticompetitive behaviour by a commercial division would altogether fall outside the scope of competition law, when inseparable from a public entity's exercise of public power according to established case law.[118] This situation creates an uneven playing field between public and private competitors, where competition law applies to only the latter and not to the former. Conduct that is considered abuse of a dominant position by a private firm may escape competition law scrutiny or effective enforcement when perpetrated by a commercial subsidiary of a public entity. Moreover, a public entity with a commercial division even could informally influence the legislative process of the (re)definition of its own statutory tasks, to make sure that its commercial activities are explicitly related to its exercise of public power.

Second, under the above circumstances commercial divisions could be subject to different competition law scrutiny across EU Member States. Throughout the EU there are various competition law-related regimes applicable to commercial divisions of public entities. France and the UK, for instance, rely on generic competition law. Sweden, Finland, Denmark and the Netherlands have added on specific, competition law-inspired, legal provisions for anticompetitive behaviour by public entities. This situation could be problematic for private firms active in multiple Member States, where they face multiple public competitors.

For example, a firm offering meteorological services throughout the EU will face competition from commercial divisions of national meteorological in-

115 See, mainly, Joined Cases C 359/95 P and C 379/95 P *Commission and France v LadbrokeRacing* [1997] ECR I 6265, para 33; Case T-271/03 *Deutsche Telekom v Commission* [2008] ECLI:EU:T:2008:101, paras 85-89.

116 C-280/08 P *Deutsche Telekom* (n 73) para 56,

117 T-271/03 *Deutsche Telekom* (n 115) paras 87 and 117.

118 See nn 55-59.

stitutes in multiple Member States and will have to compete with these public competitors under various competition law-related regimes. In the Netherlands, the meteorology firm will face a public competitor required to price at marginal cost, while in Member States no so such requirements exists. In some Member States, such as France, European competition law would apply, while in Denmark and Finland specific legal provisions pertaining to public firms would apply. In Spain, the meteorology firm could lodge a complaint before the competition authority, while in others, such as Sweden, it will have to go to a court directly. For the private competitor, this leads to different levels of the playing field across Member States, both in substantive and procedural application of competition law-inspired frameworks.

While the competition law framework pertaining to private markets is highly harmonised, there thus seems to be less harmonisation on mixed markets. Drawing from the literature on regulatory convergence in governance studies, it turns out that such divergence in legal regimes applying to the same firm across countries can raise transaction costs in two ways. First, firms cannot maintain a single economic process to offer their goods or services, and rather have to differentiate their operation to facilitate different legal requirements.[119] Second, a divergent regulatory regime also obfuscates the political process by which regulatory standards can be changed.[120] Moreover, divergence in the application of competition law, in this case to public firms, could increase market power of those firms.[121]

It seems plausible, furthermore, that the first and second problematic consequences outlined above are related. Because legislators in various Member States, such as the Netherlands, Denmark, Sweden and Finland, may have deemed EU competition law ill-equipped to adequately address anticompetitive behaviour by public entities, they have enacted additional legislation on top of EU competition law. This, however, may have led to a fragmentation of the legal framework for firms competing with public entities across the EU, and could even affect the competitive playing field itself.

Third, in all Member States, private competitors of commercial division of public entities may experience negative consequences from the procedural constraints outlined above.[122] Irrespective of the application of competition law provisions, private competitors could be disadvantaged by conflicting regulatory and competition law provisions and by implicit or explicit biases of competition authorities. Even when private firms are able to challenge anticompetitive behaviour by competing commercial divisions of public entities, they would face procedural disadvantages before competition authorities and courts.

1. Possible Remedies

Commercial divisions of public entities thus both complicate the application of competition law on a substantive and procedural level, and can have a fragmenting effect on the internal market because of the various competition law-related regimes that apply across the EU. In what follows, remedies for some of these challenges are discussed.

a. Competition Law Harmonisation

Harmonisation could relate to both substantive EU competition law and the enforcement thereof. The substantial application of EU competition is considered to be highly harmonised across Member States, while because of the various legal systems in the EU there is more divergence in enforcement.[123] Harmonisation could remedy two challenges outlined above.

First, the variety of competition law-related regimes with respect to commercial divisions of public entities seems to be caused by addenda to EU competition law provisions that some Member States have enacted. Sweden, Finland, Denmark and the Netherlands for instance have instantiated additional competition law provisions pertaining to public competitors on markets. Other Member States, such as France and the UK, rely on generic application of Article 102 when approaching commercial divisions

119 David Lazer, 'Regulatory Interdependence and International Governance' (2001) 8 Journal of European Public Policy 474.

120 Daniel W Drezner, 'Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence' (2005) 12 Journal of European Public Policy 841.

121 Barbara Gabor, 'Regulatory Competition in Competition Law' in *Regulatory Competition in the Internal Market: Comparing Models for Corporate Law, Securities Law and Competition Law* (Edward Elgar Publishing Limited 2013).

122 See s III.3.

123 Bogdan M Chiriţoiu, 'Convergence Within the European Competition Network: Legislative Harmonization and Enforcement Priorities' in Adriana Almăşan and Peter Whelan (eds), *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Springer International Publishing 2017).

of public entities. As outlined above, this divergence of legal regimes can lead to increased transaction costs for firms and to entry barriers.

As of yet it is unclear which of the various competition law-related regimes works optimally as regards to commercial divisions. If an optimal approach could be determined, this approach could be harmonised on an EU level by Commission guidelines, an EU legal instrument or even an amendment to the TFEU. There is precedent for such harmonisation of competition law, for instance relating to the SGEI.[124] While the application of competition law to SGEI has been part of the EU Treaties since the founding of the Treaty of Rome, the concept of SGEI has been further defined by Article 14 TFEU, Protocol 29 and Article 36 of the European Charter. The Commission has taken considerable effort to harmonise the application of competition law to SGEI through non-legislative guidelines.[125]

At the same time, it is unclear whether it is practically feasible to determine an optimal EU-wide competition law approach to commercial divisions of public entities to begin with. While many EU countries have reported issues related to anticompetitive behaviour by commercial divisions of public entities,[126] market structures, administrative law frameworks and applicable sector-specific regulation can differ widely across Member States. Even when an optimal substantive approach could be determined, autonomous factors across Member States can complicate the practical viability of such harmonisation.

Second, harmonisation could play a role regarding the behavioural constraints that competition authorities face when dealing with alleged public offenders of competition law. In fact, the European Commission has proposed a Directive to, amongst others, strengthen the independence of Member States' competition authorities.[127] While this Directive does not specifically address competition authorities' enforcement regarding public entities, it does recognise and address behavioural and institutional constraints to national competition authorities' independence. Amongst others, the Directive strengthens independence from political or external influence,[128] harmonises the reach of investigative and remedial powers,[129] and cements the position of competition authorities before national courts.[130] It is an open question, however, whether these measures will have an actual effect on the behavioural restraints that competition authorities seem to experience when enforcing against public entities. Stronger codified safeguards may contribute to more independent enforcement practices, but institutional structures outside of competition law will remain.

Harmonisation may thus counter the negative effects of various competition law-related regimes concerning public commercial divisions and mitigate behavioural constraints of national competition authorities. At the same time, it should be pointed out that harmonisation will not be able to address possible conflicts between regulation and competition law.[131] Moreover, harmonisation as a recommendation may only be attractive on a theoretical level, as there are too many practical factors hindering effective harmonisation in the markets and legislative frameworks of the Member States.[132]

Finally, harmonisation of competition law assumes that competition law is at least part of the solution to mitigate anticompetitive behaviour by commercial subsidiaries of public entities. Given the issues with the substantive application of competition law towards commercial divisions,[133] it is debatable if harmonisation of competition law would be the appropriate way forward.

b. Regulatory Harmonisation beyond Competition Law

Competition law may be, at best, limited in its application to anticompetitive behaviour by commercial divisions of public entities. In many cases the com-

124 See s III.1.

125 See Communication from the Commission (n 64).

126 OECD, 'Inventory of Competitive Neutrality Distortions and Measures' (n 93).

127 Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2017] COM(2017) 142 final, 2017/0063 (COD).

128 ibid arts 4-5.

129 ibid arts 6-11; 12-15.

130 ibid art 28.

131 See s III.3.a.

132 For a critical assessment on the feasibility of harmonization, see Paul B Stephan, 'Global Governance, Antitrust, and the Limits of International Cooperation' [2005] Cornell International Law Journal 173. For a more optimist view on the feasibility of harmonisation, see Diane P Wood, 'International Harmonization of Antitrust Law: The Tortoise or the Hare' [2002] Chicago Journal of International Law 391.

133 See s III.1.

mercial division will not qualify as an undertaking under competition law. If then a commercial division would substantively be found to abuse its dominance, its private competitors face a number of procedural disadvantages.

Besides harmonisation of competition law, another remedy could lie outside the realm of competition law altogether. Indeed, among the many OECD recommendations to level the playing field between public and private competitors only few relate to competition law principles.[134] While distortions of competition by public entities are mainly addressed through competition law in OECD countries,[135] the OECD rather recommends a standalone regulatory framework overseen by a designated enforcement agency.[136] The only OECD country that acts according to this recommendation is Australia, which has had codified principles of 'competitive neutrality' starting in the 1990s and has instantiated a complaints office with investigative (though no enforcement) powers.[137]

Similar efforts within the EU would in all likelihood be inefficient on a Member State level, as differences between regulatory frameworks of individual Member States would fail to create conditions that would satisfy internal market goals. A harmonised regulatory framework could address all matters of competition between public and private actors on markets, including anticompetitive behaviour by commercial divisions of public entities. Such a framework could incorporate a level playing field between public and private competitors on a level of costs structure, structural separation, the limits of public service obligations, as well as equality conditions in taxation, credit and debt, public procurement and enforcement. Given the current state of EU harmonisation on some of these conditions, notably taxation, such harmonisation does not seem viable in the short term.

V. Conclusion

This article has been explorative in nature. It has established commercial divisions of public entities as a relatively new and little-studied phenomenon, and pointed towards possible motivations for commercial divisions to compete on markets. These motivations concern internal purposes: mainly the intention to balance budgets after cuts by the central government, or external purposes to raise revenue at the request of the central government.

Furthermore, the paper has outlined possible distortions of competition by commercial divisions. These distortions concern hampering entry to markets by private competitors and driving existing private competitors out of the market. They follow from advantages in regulation, taxation, information and general cross-subsidies.

Next, the article outlined how anticompetitive practices by public entities are generally approached through competition law(-inspired) frameworks in the EU, and explored to what extent competition law would be suitable to address these practices.

As it turns out, competition law may be limited in its application to anticompetitive practices by commercial divisions of public entities. When connected to the parent organisation's exercise of public power, a commercial division will most likely not be considered an undertaking and would fall outside of the scope of competition law altogether so that anticompetitive behaviour goes unchecked. If the public entity's commercial activities are sufficiently separate from the organisation's exercise of public power according to doctrine, the abuse of dominance regime could be applied to the commercial division. Negative effects on consumer welfare could be recognised related to (for instance) predatory pricing, refusal to supply or margin squeeze. Naturally dominance would have to be established before such abuse would be considered unlawful.

While abuse of dominance could thus be established on a substantive level for those commercial divisions that qualify as an undertaking, private competitors could face procedural disadvantages in the subsequent investigation and enforcement. These disadvantages follow from institutional constraints (competition authorities generally cannot void laws enabling anticompetitive practices by commercial divisions), behavioural constraints when a competition

134 See OECD, Maintaining a Level Playing Field between Public and Private Business (n 4) 23–24: separating commercial and public activities; identifying and separating direct costs of commercial activities; achieving commercial rates of return; defining size and scope of public service obligations; establish tax equality; establish regulatory neutrality; establish debt neutrality; establish neutral public procurement.

135 See (n 26).

136 OECD, 'Maintaining a Level Playing Field between Public and Private Business' (n 4) 88.

137 OECD, 'Competitive Neutrality: National Practices' (n 19) 17.

authority enforces against a public entity, and from the regulated conduct defence invoked by the commercial division.

Finally, this article outlined problematic consequences of the apparent limits of EU competition law to tackle anticompetitive conduct by commercial divisions of public entities. First, an unequal playing field follows from the different treatment of private and public competitors in the application and enforcement of competition law. Second, the various competition law-inspired approaches towards commercial divisions across the EU hamper the internal market. The article concludes by suggesting possible remedies to these consequences: harmonisation of competition law relating to anticompetitive behaviour by commercial divisions, or enacting a standalone regulatory framework beyond competition law.

The austerity measures after the global financial crisis that seem to have incentivised public entities to raise additional revenue through commercial divisions are up to ten years behind us. Even in the current period of near-global economic growth, commercial divisions of public entities remain active on markets. This suggests that the phenomenon is here to stay.

The findings of this research suggest that the existing legal framework has a hard time catching commercial divisions of public entities; as a concept it seems to elude traditional legal demarcations. Their commercial, revenue-driven focus over public interest objectives and presence on otherwise private markets leads beyond the framework of Article 106(1) and (2) TFEU, which was instantiated to cover market activities by public sector actors. At the same time, commercial divisions' activities on markets can be similar enough to the public organisation's exercise of public power,[138] so that competition law does may not apply either. This creates a subset of anticompetitive behaviour by commercial divisions of public entities that may go unchecked by law. The same conduct that would constitute abuse of a dominant position by a private firm, could not be caught by competition law when perpetrated by a commercial division of a public entity — resulting in an uneven playing field on mixed markets.

Given the (potentially) negative effects of commercial divisions on markets and the rule of law, and the apparent ineffectiveness of the existing legal framework, it is relevant to pursue follow-up research on the topic. Such further research could focus on a number of aspects.

First, the effect of commercial divisions on market structure and performance has only been studied theoretically, and evidence of distortion of competition by commercial divisions is largely anecdotal. Further empirical and experimental research would be appropriate in order to better establish the actual and potential distortion of competition by commercial divisions.

Second, more thorough comparative legal research has to be conducted to definitively map the prevalence of commercial divisions of public entities in the EU, and outline the different legal regimes across the EU and beyond pertaining to these commercial divisions. Such comparative legal research would allow for best-practice examples of regulatory responses.

Third, the welfare effects of anticompetitive behaviour by public commercial divisions need to be studied more elaborately in relation to the abuse of dominance doctrine. At this point it is unclear how welfare enhancing price effects relate to welfare decreasing effects on quality and consumer choice in case of alleged abuse of dominance by a commercial division. Such scholarship in competition law could inform future enforcement or litigation endeavours.

Fourth, it would be worthwhile to branch out from competition law to competition policy, and investigate how commercial divisions of public entities relate to State aid law. Like in competition law, a literature has developed on the application of State aid law and SOEs,[139] but not so much on commercial divisions.

Fifth, beyond the realm of competition or even economic law, it would be appropriate to further explore the ramifications on general rule of law principles of anticompetitive behaviour by commercial divisions. These practices could blur boundaries between the state and the private sector, and introduce revenue streams financing political corruption and cronyism. Further study related to constitutional and administrative law could shed light on these issues more substantially.

138 See nn 55-59.

139 See, eg Friederiszick and Kałużny (n 15); Thomas Jaeger, 'Distinguishing State and Private Subsidies: A Closer Look at the State Character Test' in Josef Drexl (ed), *State-Initiated Restraints of Competition* (Edgar Elgar 2015).