For Official Use **DAF/COMP/WP3/WD(2009)40**

Organisatiti
Organisation for Economic Co-operation and Development **12-Oct-2009**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

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

1. The commercial activities in which various levels of government in the United States – federal, state, and local – are involved traditionally have been quite limited. Competition among private entities has been and remains the current norm for the U.S. economy. It is through this competitive market-based economy that consumers receive the best, most innovative products at the lowest prices. At the same time, however, there is and has been a limited role in certain circumstances for so-called "state-owned enterprises."

2. The term "state-owned enterprise" (SOE) is not used in U.S. law or legislation. A range of entities linked to the federal government exists, however, with varying degrees of government ownership, control, and participation in governance and funding. Most of these entities have responsibilities that are nearly indistinguishable from traditional government functions or pursue governmental policies where a

7. Third, there should be a clear separation between the state's ownership function and other state functions that influence market conditions, particularly with regard to market regulation. To the maximum extent consistent with an SOE's public service responsibilities, government regulatory authorities should treat SOEs and their private sector competitors equally and the overall business framework (including antitrust laws) should apply equally as well. To that end, the government's ownership rights should be clearly identifiable, separated from any regulatory authority, divorced from day-to-day management of the SOE, and should not intrude on the SOE board's independent exercise of authority. To evaluate compliance with such principles, SOEs should be subject to an annual independent external audit and should be subject to the same accounting and auditing standards as publicly traded companies.[2]

8. Finally, government investment in private corporations necessitated by exigent circumstances should be transitory in nature and limited to the taking of investment positions that do not compromise the independent direction and management of the company. The United States has pursued these kinds of self-limiting policies during similar crises in the past. "In 1917 and 1918, Congress created, among others, the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation. These entities were dissolved after the war ended."[3] Similarly, during World War II, the U.S. Government seized enemy-owned assets by taking controlling interests in the U.S. subsidiaries of German and Japanese corporations such as the predecessors of General Aniline & Film Corporation, Rohm & Haas Company, and Schering-Plough Corporation.[4] The government's policy and practice was to sell the firms and return them to the private sector as soon as possible.[5]

2. Federal government enterprises and the applicability of antitrust rules

9. A series of recent Congressional Research Service (CRS) reports have classified existing federal government enterprises. Different types of federal government enterprises include "federal government corporations," so-called "quasi government" entities such as government-sponsored enterprises and

10. The CRS defines a "federal government corporation" as "an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures."

13. As a general matter, agencies and instrumentalities of the U.S. government (*e.g.*, National Science Foundation, Small Business Administration) are not subject to liability under the federal antitrust laws, even when engaging in commercial activity.[14] But the situation with respect to federal government corporations depends heavily on the facts and circumstances of the case. In 2004, for example, the U.S. Supreme Court held that the federal antitrust laws did not apply to the U.S. Postal Service (USPS).[15] The Court's opinion in *Flamingo* noted that the USPS by statute was "an independent establishment of the executive branch of the Government of the United States."[16] It discussed the USPS's monopoly over carriage of certain letters and its "significant governmental powers," along with Congress's explicit waiver

17. The CRS reports refer to another category of "federally related entities that possess legal characteristics of both the governmental and private sectors" as "quasi government" entities.[28] These entities can vary widely in their structure, rang

government.'"[34] The state action doctrine immunizes acts of the highest levels of the state government itself, acting as sovereign; this includes actions of a state legislature and probably of the governor.[35] Application of the doctrine to subordinate instrumentalities of the state, on the other hand, such as political sub-divisions, agencies, and business enterprises, depends on whether the challenged restraint is undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and a clear delegation of that power to the subordinate entity.[36]

20. The Supreme Court therefore held that the state action doctrine did not immunize a municipal electric utility from federal antitrust law in *City of Lafayette v. Louisiana Power & Light Co*.[37] The U.S. Department of Justice (DOJ) and FTC subsequently have challenged several mergers involving locally managed hospitals, and the DOJ successfully challenged a tying arrangement involving a city and its development authority that provided both electricity and water/sewer service.[38] The DOJ and FTC have also filed amicus briefs opposing application of the state action doctrine in cases involving state-level enterprises.[39]

21. A 2003 FTC Staff Report[40] recommended that litigation, *amicus curiae* briefs, and competition advocacy be used to further clarify the state action doctrine and preclude it from being misapplied to grant overly broad antitrust immunity. In particular, the FTC State Action Report urged that quasi-governmental entities be subject to a requirement of active supervision by the state, in addition to requiring clear articulation of their powers. A supervision requirement will help ensure that any anticompetitive actions taken by such entities are truly in furtherance of state policy. Specifically, according to the Report, "[t]he category of entities subject to the active supervision requirement [sh]ould include either: (a) any market participant, or (b) any situation with an appreciable risk that the challenged conduct results from private actors' pursuing private interests, rather than from state policy."[41]

22. The conduct of state government businesses is also governed by the Commerce Clause of the U.S. Constitution. "[B]y reading the Commerce Clause as a general charter for a free internal trade system, the Supreme Court decided very early that it implicitly forbade the states from enacting any legislation that either discriminated against interstate commerce or that placed an undue burden on interstate commerce. ... One would think, based on this theory, that a state would also be forbidden to use a

---

34 City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 370 (1991).

35 ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007) 1279.

36 California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Antitrust Law Developments, *supra* n. 35, at 1273-83.

37 435 U.S. 389 (1978).

38 United States v. City of Stilwell, Oklahoma, and Stilwell Area Development Authority, No. CIV 96-196-B (E.D. Okla., filed April 26, 1996), *see* http://www.usdoj.gov/atr/cases/stilwe0.htm.

39 *See, e.g.*, Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish, 171 F.3d 231 (5th Cir. 1999)(en banc); Jackson, Tennessee Hosp. Co. LLC v. West Tennessee Healthcare, Inc., 414 F.3d 608 (6th Cir. 2005) for antitrust cases involving state-affiliated hospitals where DOJ and FTC filed joint amicus briefs.

40 Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) ("FTC State Action Report") *available at* http://www.ftc.gov/ os/2003/09/stateactionreport.pdf.

41 *Id*. at 3.