STATISM AND THE STATE SECTOR IN THE FORMER SOVIET UNION:

THE COMPETITION LAW PERSPECTIVE

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ABSTRACT

The transition of the former member states of the Soviet Union to a market economy has been challenging. Owing to different reasons, they continue to adhere strongly to the policy of statism, i.e. pro-active government interventionism, by, inter alia, relying heavily on state-owned enterprises. The aim of this thesis is to analyse a negative impact of the practice of using the state sector for varying purposes on the development of region's competitive markets and to identify solutions of a legal character for negating or mitigating this impact.

The research focuses on three countries of the region, which are Russia, Ukraine, and Uzbekistan. Despite seeming significance of the issue for each, there is no much literature that fully and systematically analyses it. This thesis fills the relevant gap in several ways. It first explores historical, economic, and social reasons that contribute to the persistence of the policy of statism. It then analyses how the region's state-owned enterprises operate in a way that harms competition and how the region's competition authorities fail to target relevant distortions. Drawing on relevant experience of other jurisdictions, primarily the EU and its member states facing similar challenges, and studies in the area, it further explores what legislative measures may be taken to deal with the issue.

The research concludes that to improve the situation the studied jurisdictions should strengthen a focus of national legislation on competition and the state sector, improve ownership and corporate governance practices with regard to state-owned enterprises, introduce a policy of competitive neutrality, and reshape involved state institutions. It is, among others, suggested that the regions' competition authorities have an important role to play in tackling the problem through pro-active enforcement, advocacy, and contribution to institutions' capacity building.

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ABBREVIATIONS

ADB	Asian Development Bank
CIS	Commonwealth of Independent States
EAEU	Eurasian Economic Union
EBRD	European Bank for Reconstruction and Development
FAS	Federal Antimonopoly Service of the Russian Federation
FSU	Former Soviet Union
IMF	International Monetary Fund
OECD	Organisation for Economic Co-operation and Development
SOE	State-owned enterprise (as defined in this thesis)
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organisation

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INTRODUCTORY CHAPTER

As time has shown, transitional processes in different post-socialist countries tend to proceed at different speeds. Whereas some countries, including unified Germany, Hungary, and Poland, now being part of the European Union (the 'EU'), have managed to find a functioning formula for effective reform (partially, owing to their preparedness for the transition in both the economic and ideological senses, as will be discussed below), others - mainly, former member states of the Soviet Union (the 'FSU states') [1] – still struggle to shift their economies to market-oriented paths with many markets remaining undeveloped. Hence, as is widely suggested by relevant literature, relying on both economic indicators and results of surveys, (and as will be described in slightly more detail further below) the performance of the regional economies remains underwhelming and prone to rapid changes, the quality of produced goods and services (including social ones) is often inferior to the quality of goods and services produced in economies with long-established market systems, and the general innovative process seems to be sluggish.

In light of the above problems, this research pursues the overall aim to make a contribution to identifying and resolving some specific issues hindering the region's transition. In particular, it looks into the region's continuous adherence to Soviet-styled statism - i.e. the policy of government's deep involvement into the economy to the extent that government maintains close control over all in any way significant economic levers - as is expressed in, specifically, significant reliance on the state sector. It seeks to analyse how such reliance has been negatively affecting the region's competitive environment and explores what legal measures may be taken to mitigate relevant negative effects for developing robust competition in regional markets, which seems an important element of every successful modern economy. In other words, this thesis explores how an alleged tension between the policy for nurturing the state sector and the unaccomplished task to strengthen competition in the FSU states may be addressed for facilitating the FSU region's transition. The completion of this analysis, drawing on a variety of legal, economic, political, and historical factors, will help to fill a gap in the existing transition literature on the FSU region by looking at the transition problem of habitual use of the state sector from the very specific perspective of the necessity to enhance competition. It will also fill a notable gap in region's legal literature on competition policies,

[1] Here and further below, only 13 former republics of the Soviet Union are meant. Estonia, Latvia, and Lithuania, which have relatively successfully integrated into the EU, have been excluded from the ambit of the definition 'FSU states' owing to notable differences in the trajectory of their development and are rather referred to for comparative purposes along with the other Eastern members of the EU.

which often notes the significance of the studied problem, but paradoxically fails to offer any systematised region-specific solutions.

1.1 Background

To explain the above-noted research objective in slightly more detail, assessing particular flaws of the FSU region's bumpy transition, one may note that while certain progress has been achieved in some areas (e.g. the creation of the national tax systems and liberalisation of foreign trade), the development of robust competitive environment through, in particular, the establishment of comprehensive competition law framework does not seem to have got enough attention. A quick look taken at post-Soviet markets reveals that competition in many of them is stagnant with the predominance of monopolistic and oligopolistic structures being evident. Though competition legislation that could have addressed that has been in place since the collapse of the Soviet Union, with some accompanying by-laws having been developed, its actual effectiveness, integration into the overall legal system, and purposefulness are questionable. Likewise, though statements on growing importance and irrevocable commitment to the principles of competition policy are regularly made by regional state officials (being occasionally fixed in government programs and decrees), there seems to be much formalism in the attitude without deep deliberation on why the policy is pursued and how it interplays with other goals of general economic policy. [2]

At the same time, there is strong adherence to the policy of statism in the FSU region, in many ways, in continuation of the familiar Soviet policy of administrative economic management. There are many manifestations of this economic approach, starting from the adoption of all-encompassing industrial polices and ending with the devising of targeted regulations for particular market players or economic relations. One such manifestation, the pro-active nurturing and utilisation of the state sector, appears especially pronounced. There are a large number of companies owned, controlled, overseen, or subsidised by the state [3]. If to bring

[2] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2019' (24 August 2020) <https://fas.gov.ru/documents/687048>; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (27 September 2019) <https://fas.gov.ru/documents/685806>; Sarah Reynolds, 'Competition Law and Policy in Russia' (2005) 6(3) OECD Journal of Competition Law and Policy 7

[3] To be precise, in this research, the term 'state' is generally used in the meaning 'the totality of state agencies and institutions representing and acting as a single economic and regulatory actor' (i.e. effectively, wider government). Such use of the term makes it more aligned with its analogues in the languages of the studied countries, where the 'state' is often understood as a standalone superstructure acting as a single mechanism rather than something that reflects the collective will of a nation. Probably, that is a consequence of a distinct historical path of the FSU, where state bodies rarely acted in a representative capacity.

some relevant data for, for example, Russia (whose economy tends to significantly outpace economies of the other FSU states), one may note that according to the Federal Antimonopoly Service (the 'FAS'), from 2005 to 2015, the state's share in GDP increased from 35% to 70%, whereas the number of state-owned enterprises (including state-owned and municipal enterprises) almost tripled. More conservative estimates evaluate the currents state's share at 28%-41%; nevertheless, the obvious tendency to increase is noted. It is more revealing that amongst 600 Russian largest companies, the revenue of state-owned enterprises amount to approximately 50%. The state seems to be absolutely dominant in the banking and finance, oil and gas, transportation and power energy industries, not to mention the spheres of mass media, education, healthcare and utilities.[4] Being dominant, some state-owned associations and concerns (for example, Russian Gazprom and Rosneft, being, in turn, controlled by state-owned Rosneftegaz) represent an impressive force capable of dictating policies in the whole sector[5].[6]

In many ways like in the Soviet times, the existence of huge, centralised, and monolithic state sector in the FSU is usually justified by the necessity to achieve multiple public policy goals e.g. performing particular development tasks, ensuring employment, or keeping prices low. It seems that large state-owned enterprises — successors of Soviet state-owned agglomerations and line ministries — are considered more manageable than a scattering of competing private companies and, therefore, more suitable for achieving such goals. In view of such considerations, a state managed economy is effectively re-constructed (often, it seems, despite obvious efficiency losses), where state-owned enterprises control the most precious pieces of industrial facilities (particularly, in so-called 'strategic industries'), being, in turn, controlled

[4] Given that the Russian economy (like the economies of the majority of the other FSU states) is to a notable extent based on these sectors and, especially, the energy sector, traditional dominance of SOEs here is likely to partially inform those high figures of the SOEs' contribution to GDP provided above.
See Alexander Abramov and others, 'Modern Approaches to Measuring the State Sector: Methodologies and Empirical Data' (2018) 13(1) Ekonomicheskaya Politika 36

[5] Besides for that, as discussed in sub-Section 3.3.2, some FSU SOEs are expressly entitled to regulate particular industries and, therefore, resemble line ministries.

[6] Alexey Krivoshapko and Mattias Westman, 'How to Measure the State - 2' *Vedomosti* (14 November 2017) <https://www.vedomosti.ru/opinion/articles/2017/11/14/741701-skolko-gosudarstva> accessed 2 May 2018; Alexander Radigin and Alexander Abramov, 'How to Measure the State' *Vedomosti* (31 October 2017) <https://www.vedomosti.ru/opinion/articles/2017/11/01/740110-kak-izmerit-gosudarstvo> accessed 2 May 2018; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2019' (n 2); Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2); Abramov and others (n 4)

through decisions taken at governmental (ministerial) or semi-governmental (semi-ministerial) levels and setting public objectives.

Given the above, a peculiar economic model has developed in the FSU region, wherein socialist mechanisms and primarily, the reliance on state-owned enterprises have been revitalised, while the development of market-oriented competition policies has been unintentionally (but at the same time, not accidently and somewhat consciously) neglected. As was noted at the beginning, the choice of such a development pattern has not contributed to the successful transition, seeming to represent a major obstacle to creating a robust business environment. As will be described further in this research, unbridled reliance on and support of the state sector are likely to contribute to its uncontrolled growth, to deter potential private players from entering and competing in relevant markets or to cause their exit, and to slow down and gradually subvert the transition processes. Sharing these concerns, many region's researchers lament in their papers that an effective market system has not been designed within the FSU and natural resources exploited by the state remain the main source of welfare. [7] They claim structural reforms are strongly needed (particularly, in the context of the economic crises of the 2010s) especially with more private competition being injected. Governments of the region also appear to recognise this problem [8], but, as mentioned above, remain hostages of their own (uniformed, as appears) choice with no reasonable alternatives being found or elaborated.

In the context of the above transitional problem, taking the tenet that active competition is utterly important for the creation of a functioning market economy as an axiom, this research, as was provided above, looks into the how the FSU region's state sector operates and is managed and supported in the way that harms competition and explores what adjustment (limitation) measures may be taken to address the tension. It appears that the analysis of this specific issue of the transition will be able to a make an important contribution to the understanding of that how the FSU's transition process might be competed.

1.2 Methodology

Methodologically, it is three FSU states – Russia, Ukraine, and Uzbekistan – that have been chosen as the main subjects of the described analysis, as the most populous and, seemingly,

[7] Alexey Kudrin and Evsey Gurvich, 'A New Growth Model for the Russian Economy' (2015) 1(1) Russian Journal of Economics 30; Yevgeny Yasin, Natalia Akindinova and Yaroslav Kuzminov, 'The Russian Economy at a Turning Point' (2014) 6 Voprosy Ekonomiki 4; Yevgeny Yasin and others, 'Will a New Model of Economic Growth Take Place in Russia?' (2013) 5(1) Voprosy Ekonomiki 4

[8] See, for example, Vladimir Putin, 'We Need a New Economy' *Vedomosti* (30 January 2012) <https://www.vedomosti.ru/politics/articles/2012/01/30/o_nashih_ekonomicheskih_zadachah> accessed 18 May 2018

economically promising countries of the region. In this regard, though all the FSU states are relatively homogeneous in their economic governmentality and have very similar legal systems, references to the FSU in text of the research primarily refer to these three countries. No post-socialist countries from other regions were included into the scope of this thesis. First, such inclusion would have required much more prolonged analysis, as conditions of the transition were different in each socialist region, as will be briefly discussed in Chapter 2. Secondly and more importantly, it is the FSU states that were once bastions of the socialist ideology, including the socialist economic policy, and, thus, smooth transition in them is likely to be more important and problematic than in other regions – in that sense, they represent more challenging and interesting case studies. Despite this focus, however, the legal experience and approaches to statism - the state sector and competition in the three chosen countries will still be compared and contrasted to those of other countries and regions, namely of the EU member states, particularly, the Eastern members[9], as well as other countries partially experiencing similar difficulties (e.g. Australia, China, South Korea, etc.). This is primarily done in Chapter 4 of the thesis for extracting possible solutions to address the studied tension between statism and competition polices.

To better understand the nature and sources of the studied transition problem, though being essentially legal, this research, as noted above, tries to look into and to combine all the totality of legal, economic, historical, and political factors related to the research question, as observed in the above three countries. Qualitative and, occasionally, quantitate data derived from primary sources (legislation, official state reports, state registers, statistics, etc.) and secondary sources (region's and foreign publications on the FSU) are used for that[10]. Given that it is issues

[9] It seems necessary to note why the Eastern members of the EU have been chosen as the main objects for the comparison. There are two main (and, as appears, obvious) reasons. The first reason is close cultural, economic, political, and social ties with the FSU region, similar historic experience and similar (though not quite the same, as noted above) challenges in the transition from socialism to a market economy. The second reason is that these counties have made a notable progress in the transition and have relatively successfully integrated into the EU, having advanced competitive markets and a strong competition law regime, being a model and a point of reference around the world.

[10] Speaking of primary sources used for this research, which are mainly legal acts of different levels, it should be noted that there is some degree messiness in large mass of legal acts being currently in force in the FSU states. This is partially explicable by the lack of due systematisation and thoroughness in the legislative process and the overconcentration of legislative power in the hands of the region's executive authorities. For example, there are a number of legal acts of the President, Government, and Ministries adopted in the late Soviet times and during the 90s that continue to remain in force in the absence of a clear object of regulation. There are also a notable number of legal acts, adopted both long ago and quite recently (particularly in Uzbekistan), containing vague proclamations (e.g. 'the practice of establishing SOEs is unreasonable'), setting abstract objectives and tasks, and taking the form of strategies and 'road maps' of unclear legal significance (i.e. it is unclear whether their provisions have

related the region's prolonged post-socialist transition that are studied, there is much reliance on retrospective and empirical analysis in the thesis.

While looking for possible solutions for the explored conflict, besides for employing the aforementioned comparative analysis (implying, *inter alia,* analysis of foreign states' legislation and official reports), the thesis carefully studies relevant theoretical approaches, as elaborated by scholars and practitioners from all over the world. In this regard, a number of relevant studies of the Organisation for Economic Co-operation and Development (the 'OECD'), offering some sets of structured measures, are extremally helpful. There are also, as explained further below, some interesting and useful papers on the subject produced by well-known competition law researchers, such as Thomas Cheng, Deborah Healey, William Kovacic, Ioannis Lianos, Daniel Sokol, and others.

A brief note of the terminology used in the thesis should also be made. First, the concepts of the state sector and state-owned enterprises ('SOEs') are used interchangeably, albeit the concept of the 'state sector' is slightly broader in its meaning (implying the entire ecosystem of state business in a given country). Secondly, the concept of an 'SOE' used in this research should, in turn, be understood in a way it is defined by the World Bank and in a number of publications of the OECD [11] i.e. SOEs are (i) corporate entities recognised by national law as enterprises (ii) whose activities are of a largely economic nature i.e. involve offering goods or services on a given market, which could, at least in principle, be carried out by a private operator in order to make profits, and (iii) that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of its voting shares or otherwise exercising an equivalent degree of control (e.g. by virtue of holding a so-called 'golden share'). Oftentimes, in the FSU, public establishments come close to being SOEs, but the problematics

binding legal force or just outline some plans for further reforms). In this regard, a reservation has to be made that the author of the research bases his conclusions only on those legal acts that are clearly and reasonably interwoven, both theoretically and practically, into the legal system of the studied FSU states or, if targeted at the future, are reasonably clear in terms of relevant implementation deadlines and the order of the implementation.

[11] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (19 November 2015) 14–16 <https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm>; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (20 September 2010) DAF/COMP(2009)37 26–27 <http://www.oecd.org/daf/competition/46734249.pdf>; World Bank, 'Bureaucrats in Business: The Economics and Politics of Government Ownership' (1 September 1995). Policy Research Report 15037 263–264

of that will be separately noted below.[12] An important reservation should also be made that it is medium-sized and large SOEs that are mainly of interest for this research, as their impact on competitive environment seems to be more pronounced.

1.3 Literature Review

If to expand a little bit on the latter matter of used sources, the below literature was mainly used for the purposes of this research.

1.3.1 Historical analysis of the FSU region's transition processes

Since, as explained below, a part of this research analyses the history of the transition of the chosen FSU states with the focus on transformations of the state sector and the development of competition policies, literature related to the economic organisation of the late Soviet Union, the reasons for its collapse, and further economic changes within the former socialist republics was studied. Some of the most interesting foreign works on the Soviet period, roughly ended in 1992, have been written by such experts on the region s as Philip Hanson[13], Paul Joskow with co-authors[14], and Jeffrey Sachs with co-authors[15]. Local works of interest are those of Russia's former Prime Minister and economist Egor Gaidar[16], competition law scholar Irina Knyazeva[17], and historian and political scientist Roy Medvedev[18]. There are also some relevant research papers produced by international and regional development institutions,

[12] For the purposes of this thesis, public or state establishments (in line with the relevant terms used in laws of the FSU states) are state entities created for, as will be explained further below, performing particular non-commercial functions of a public nature, while having no administrative or controlling powers e.g. hospitals, schools, road repair services, jails, etc. They are distinguished from state or public institutions (agencies) – entities being vehicles of state governance and having specific administrative and control powers – various ministries, agencies, committees, inspections, etc. Occasionally, the terms 'state authorities' or 'state actors' are used; a nuanced difference from state institutions (agencies) is that a wider class of bodies of the state is generally meant - not only institutions entrusted with specific administrative functions, but also with general powers to govern e.g. central or local governments.

[13] Philip Hanson, *The Rise and Fall of the Soviet Economy: An Economic History of the USSR from 1945* (Postwar World, Longman 2003)

[14] Paul Joskow and others, 'Competition Policy in Russia during and after Privatisation' [1994] Brookings Papers on Economic Activity Microeconomics 301

[15] Jeffrey Sachs and others, 'Structural Factors in the Economic Reforms of China, Eastern Europe, and the Former Soviet Union' (1994) 9(18) Economic Policy 101

[16] Egor Gaidar, *Russia: A Long View* (MIT Press 2012); Egor Gaidar, *Collapse of an Empire: Lessons for Modern Russia* (Brookings Institution Press 2007)

[17] Irina Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy: Historical and Economic Retrospective' (2016) 10(5) Modern Competition; Irina Knyazeva, *Antimonopoly Policy in Russia* (5th edn, Omega-L 2011)

[18] Roy Medvedev, *The Soviet Union: The Last Years of Existence* (Webkniga 2015); Roy Medvedev and George Shriver, *Post-Soviet Russia: A Journey through the Yeltsin Era* (Columbia University Press 2002)

including the International Monetary Fund (the 'IMF'), the OECD, and the World Bank [19]. Though the majority of the named authors and institutions mainly focus on economic aspects of the subject, it is fair to say that disciplinary boundaries are to an extent blurred in relevant papers – they also cover, to a varying degree, legal, political, and social matters, in some way in reflection of the Soviet political economy vision, implying the domination of a single set of ideological doctrines over all the relevant domains.

As for the period of the post-Soviet transition, there is much literature on the transition in Russia, lesser on that in Ukraine, and even lesser on that in Uzbekistan. For Russia, aside for works of the abovementioned experts and institutions, the majority of who have been considering Russia as the main successor of the USSR, and, thus, have been looking at with particular attention for analysing the collapse and post-collapse processes, there are noteworthy works of such foreign researchers as Marshall Goldman [20] and Pekka Sutela [21] and such local researchers as Alexander Muravyev [22] and Yevgeny Yasin [23]. There is also a relatively large amount of works on particular aspects of the transition of other authors and various institutions [24]. With the increase in the complexity of Russia's economic system, disciplinary borderlines became much more visible and much more narrowly focused legal, economic, and political science papers began to be written. It is of interest that foreign studies gradually became more interested in analysing Russia's economic transition (and, in particular, the return to the Soviet governmentality) from purely the political science perspective rather than through the economic or legal lens; a persistent opinion seems to have appeared that in Russia,

[19] World Bank, 'Russian Economic Reform: Crossing the Threshold of Structural Change' (30 September 1992). Country Study 11207 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/674381468759009825/russian-economic-reform-crossing-the-threshold-of-structural-change>; International Monetary Fund and others, *A Study of the Soviet Economy* (International Monetary Fund 1991)

[20] Marshall Goldman, *Petrostate: Putin, Power, and the New Russia* (Johns Hopkins University Press 2011); Marshall Goldman, *The Piratisation of Russia: Russian Reform Goes Awry* (Routledge 2003)

[21] Pekka Sutela, 'The Financial Crisis in Russia' in Joseph Bisignano, William Hunter and George Kaufman (eds), *Global Financial Crises: Lessons from Recent Events* (Springer Verlag 2013); Pekka Sutela, 'Privatisation in the Countries of Eastern and Central Europe and of the Former Soviet Union' (World Institute for Development Economics Research, 1998). WIDER Working Paper 1998/146

[22] For example, Alexander Muravyev and Paul Hare, 'Privatisation in Russia' in David Parker and David Saal (eds), *International Handbook on Privatisation* (Edward Elgar 2003)

[23] Yasin, Akindinova and Kuzminov (n 7); Yasin and others (n 7)

[24] For example, a strong comprehensive study of Russia's post-collapse privatisation processes was done by the State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation, 'Analysis of Processes of Privatisation of State Property in the Russian Federation during the Period from 1993 to 2003' (2004)

political processes once again became the main driver of all economic processes; a view not quite shared by local researchers.

With respect to Ukraine, there is a scattering of studies analysing one or another aspect of the transition. Most interesting works in the area include economic and legal papers of Marek Dabrowski [25], David Snelbecker [26], and Pekka Sutela [27], legal papers of William Kovacic [28], and political science papers of Taras Kuzio [29]. The abovementioned development institutions also prepared a number of insightful publications, looking at how Ukraine's transition has been progressing from different perspectives. [30]

With respect to Uzbekistan, owing to relative isolationism under Islam Karimov's presidency, which lasted from the moment of the Soviet collapse till 2016, sources of objective analysis are fairly limited. Papers providing a more or less unbiased assessment of the country's transition include economic and legal works of Harry Broadman [31], economic works of Michael Kaser [32], and political science works of Andrew March [33]. There are also several evaluation reports of the

[25] Marek Dabrowski, 'Ukraine's Unfinished Reform Agenda' (Bruegel, September 2017). Bruegel Policy Contribution 24 <https://www.bruegel.org/wp-content/uploads/2017/09/PC-24-2017-1.pdf>; Marek Dabrowski, Stanislaw Gomulka and Jacek Rostowski, 'Whence Reform? A Critique of the Stiglitz Perspective' (2001) 4(4) The Journal of Policy Reform

[26] David Snelbecker, 'The Political Economy of Privatisation in Ukraine' (Center for Social and Economic Research, 1 December 1995). CASE Network Studies and Analyses 59 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476267>

[27] Pekka Sutela, 'The Underachiever: Ukraine's Economy Since 1991' (Carnegie Endowment for International Piece, 9 March 2012) <https://carnegieendowment.org/2012/03/09/underachiever-ukraine-s-economy-since-1991-pub-47451>

[28] William Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' [1996] American University Journal of International Law and Policy 437

[29] Taras Kuzio, 'Impediments to the Emergence of Political Parties in Ukraine' (2014) 34(4) SAGE Journals: Politics 309; Taras Kuzio, 'Regime Type and Politics in Ukraine under Kuchma' (2005) 38(2) Communist and Post-Communist Studies 167

[30] World Bank, *Transition, the First Ten Years: Analysis and Lessons for Eastern Europe and the Former Soviet Union* (World Bank 2002); Organisation for Economic Co-operation and Development, 'Progress in Investment Reform in Ukraine' (1 July 2002). OECD Investment Policy Review <http://dx.doi.org/10.1787/9789264175969-en>

[31] Harry Broadman, 'Competition, Corporate Governance, and Regulation in Central Asia: Uzbekistan's Structural Reform Challenges' (World Bank, May 2000). Policy Research Working Paper 2331 <https://openknowledge.worldbank.org/handle/10986/21585>

[32] Michael Kaser, 'Stabilisation and Reform: Experience of Five Central Asian States' (Universities of Birmingham and Oxford, 1998) <https://www.imf.org/external/np/eu2/kyrgyz/pdf/kaser.pdf>

[33] Andrew March, 'From Leninism to Karimovism: Hegemony, Ideology, and Authoritarian Legitimation' (2003) 19(4) Post-Soviet Affairs 307; Andrew March, 'State Ideology and the Legitimation of Authoritarianism: The Case of Post-Soviet Uzbekistan' (2003) 8(2) Journal of Political Ideologies 209

Asian Development Bank (the 'ADB'), which is the main development institution proactively studying the country. [34]

It should be noted that to better highlight specifics of the transition of the chosen FSU states, the thesis briefly compares their transition with the transition of the EU Eastern members (the reasons for that why this region is the main point of reference were noted above). Besides for some general studies of the World Bank [35], individual works of Marek Dabrowski (with co-authors) [36], Dalibor Roháč [37], Andrei Shleifer and Daniel Treisman [38] were particularly useful for this.

1.3.2 Current tension between competition and statism - state-sector oriented policies in the FSU region

Generally, there are not many studies touching upon the subject of the region's current tension between competition and state sector policies and it is fair to note that available studies are not quite comprehensive, systemised, and solution-oriented. As in case with the transition literature, there are a number of relevant materials for Russia, a fewer number for Ukraine, and almost none for Uzbekistan (though the subject has been attracting some interest lately).

In Russia, it has mainly been the Russian FAS who has been regularly raising the problem of the conflict, bringing it up in its annual reports to the Russian Government (published since 2006) and its press-releases and other communications, albeit being quite cautious in describing specifics and offering solutions. [39] Besides for those general FAS reports and communications,

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[34] Asian Development Bank, 'Evaluation Study: Uzbekistan' (31 July 2011) UZB 2011–17 <https://www.adb.org/documents/country-assistance-program-evaluation-uzbekistan-2011>; Asian Development Bank, 'Country Assistance Program Evaluation for Uzbekistan' (30 January 2006) UZB 2006-02 <https://www.adb.org/sites/default/files/evaluation-document/35034/files/cape-uzb.pdf>; Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (15 September 2005) OAR-005933 <https://www.adb.org/documents/private-sector-assessment-uzbekistan>

[35] Jan Svejnar, 'Assistance to the Transition Economies: Were There Alternatives?' (World Bank, 2002). Publication 20232 <https://openknowledge.worldbank.org/handle/10986/20232>; World Bank, *Transition, the First Ten Years* (n 30)

[36] Marek Dabrowski, Oleksandr Rohozynsky and Irina Sinitsina, 'Poland and the Russian Federation: A Comparative Study of Growth and Poverty' (2004). Scaling Up Poverty Reduction: A Global Learning Process and Conference, Shanghai, 25–27 May 2004; Dabrowski, Gomulka and Rostowski (n 25)

[37] Dalibor Roháč, 'What are the Lessons from Post-Communist Transitions?' (2013) 33(1) Economic Affairs 65

[38] Andrei Shleifer and Daniel Treisman, 'Normal Countries: The East 25 Years After Communism' (2014) 93(6) Foreign Affairs 92

[39] See, for example, Igor Artemev, 'Report of the Head of the Federal Antimonopoly Service on the State of Competition in the Russian Federation' (Federal Antimonopoly Service 2020) <https://plan.fas.gov.ru/external/news/30354/> accessed 7 November 2020; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in

the issue has been regularly noted in economic papers attempting to evaluate the presence of the state sector in the Russian economy, as written by local and, occasionally, foreign researchers (for example, those of Alexander Abramov and Alexander Radigin [40], Carsten Sprenger [41]) and research institutions (for example, those of the Analytical Centre under the Government of the Russian Federation [42] and the Centre for Strategic Development [43]). However, their focus is on the efficiency of the country's economy as a whole and the state sector in particular, rather than on the matter of interrelations of SOEs and competition policies. There are occasional legal and economic studies that try to look at the tension more attentively, but, as noted above, they do not appear to be very profound.

There is obviously some amount of economic and legal literature dedicated to one or another aspect of Russia's competition policies (relatively much) or the functioning of SOEs (a more moderate volume) and this is where some interesting and important ideas related to the subject may also be found, as relevant references given throughout this paper indicate. [44]

For Ukraine and Uzbekistan, it is mainly legal and economic works on the functioning of the state sector and its impact on a respective country's economy, as produced by international development institutions and local researchers (those mostly, who work abroad), that are of

2019' (n 2); Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2)

[40] Alexander Abramov and others, 'State Ownership and Efficiency Characteristics' (2017) 3(2) Russian Journal of Economics 129; Abramov and others (n 4)

[41] Carsten Sprenger, 'State Ownership in the Russian Economy: Its Magnitude, Structure and Governance Problems' (International College of Economics and Finance, 11 February 2010). ICEF Working Paper <https://ssrn.com/abstract=1311223>

[42] Tatiana Radchenko and Elena Kovaleva and others, 'The State Sector in the Russian Economy' (Analytical Centre under the Government of the Russian Federation, March 2019). Competition Development Bulletin 25 <https://nangs.org/analytics/download/3473_bf85fd9d6e06097c5bbafcc4b7f3ca29>; Tatiana Radchenko and Elena Parshina and others, 'State Participation in the Russian Economy: State-Owned Companies, Public Procurement, Privatisation' (Analytical Centre under the Government of the Russian Federation, March 2016). Competition Development Bulletin 13

[43] Centre for Strategic Researches, 'Effective Management of State Property in 2018–2024 and until 2035' (January 2018) <https://www.csr.ru/uploads/2018/02/Doklad_effektivnoe_upravlenie_gossobstvennostyu_Web.pdf>

[44] For example, Diana Antonyan and Olga Belomitseva, 'Dividend Policies of Russian Joint-Stock Companies with the State Participation: Development and Peculiarities' (2016) 1 Journal of the National Research Tomsk State University

relevance. For Ukraine, relevant reports of the OECD[45] and the World Bank[46] are particularly useful. For Uzbekistan, the aforementioned evaluation reports of the ADB and works of Umidjon Abdullaev[47] are of interest. As in case of Russia, there are also a number of papers covering specifics and problems of the competition policy in Ukraine[48] and Uzbekistan (much fewer)[49], wherein some relevant insights may be located. Nevertheless, given the general scarcity of corresponding literature for these two jurisdictions, relevant primary sources were mostly relied upon for this research and, also, findings and observations of relevant studies on Russia were to some extent (after some check of relevance) transposed to these countries.

Making a brief note of conclusions made in all the above works, it is fair to note that the majority of them are expressly negative in assessing the current influence of the state sector on the competition environment in the given countries, owing to one or another aspect of the SOEs' functioning. Those works that generally support the reliance on the state sector do not deny its negative influence on competitive processes, but generally highlight that in sectors where SOEs are active, public policy positives of their functioning outweigh negatives of relevant distortions of competition.[50]

[45] Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (11 May 2021) <https://www.oecd.org/corporate/soe-review-ukraine.htm>

[46] World Bank, 'The System of Financial Oversight and Management in State-Owned Enterprises in Ukraine' (22 February 2011). Report 59950-UA <https://openknowledge.worldbank.org/handle/10986/12472>

[47] Umidjon Abdullaev, 'State-Owned Enterprises in Uzbekistan: Taking Stock and Options for the Future' (Asian Development Bank Institute, January 2020). ADBI Working Paper 1068 <https://www.adb.org/publications/state-owned-enterprises-uzbekistan-taking-stock-reform-priorities>

[48] For example, Georgiana Pop and others, 'Reducing Market Distortions for a More Prosperous Ukraine' (World Bank, 1 March 2019). Working Paper 135463 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/368301553112891891/reducing-market-distortions-for-a-more-prosperous-ukraine-proposals-for-market-regulation-competition-policy-and-institutional-reform>; Organisation for Economic Co-operation and Development, 'OECD Reviews of Competition Law and Policy: Ukraine' (2016) <https://www.oecd.org/daf/competition/UKRAINE-OECD-Reviews-of-Competition-Law-and-Policy_WEBENG.pdf>

[49] For example, Broadman (n 31)

[50] For example, Yuri Saakyan, 'State Planning for Saving the Machine-Building Industry' (Institute of Problems of Natural Monopolies 18 April 2007) <http://ipem.ru/news/publications/281.html> accessed 18 March 2019

1.3.3 Experience of other countries in resolving the tension and relevant theoretical approaches

As discussed in Chapter 4, the studied tension between statism and competition polices has been experienced not only in the FSU, but also in other countries and regions, including Australia, China, and the EU, particularly, its Eastern European members, albeit the specificity of it varies. In this regard, there is a layer of out-of-FSU literature of an empirical and theoretical nature studying the problem. Though relevant studies focus on different jurisdictions, it is a general trend that the relevant experience and approaches from within the EU, including, to a varying extent, its Eastern members, are a common point of reference.

The OECD seems to lead the research in the area – there is a notable volume of its economic and legal papers addressing the matter directly or indirectly. Some of the most relevant OECD papers relate to the so-called 'competitive neutrality' – a policy presuming that SOEs and private entities should be treated equally by the state for the purpose of maintaining competition. [51] The papers provide for a theoretical overview of what the policy represents and how it may be implemented and consider to what extent it is already applied in particular OECD member states, including the majority of the EU member states. Other OECD papers of relevance include papers on good practices for owning and managing SOEs and relevant institutional relations between the state and the state sector [52], on state aid [53], on good practice

[51] Organisation for Economic Co-operation and Development, 'Competition Law and State-Owned Enterprises: Background Note by the Secretariat' (30 November 2018) DAF/COMP/GF(2018)10 <https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf>; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (30 August 2012) <https://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm>; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (20 December 2011) <https://www.oecd.org/daf/ca/50250966.pdf>; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11)

[52] Organisation for Economic Co-operation and Development, 'Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices' (2018) <http://www.oecd.org/corporate/ca/Ownership-and-Governance-of-State-Owned-Enterprises-A-Compendium-of-National-Practices.pdf>; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (16 December 2005) <https://www.oecd-ilibrary.org/governance/corporate-governance-of-state-owned-enterprises_9789264009431-en>; Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11)

[53] Organisation for Economic Co-operation and Development, 'Competition, State Aids and Subsidies' (19 May 2011) DAF/COMP/GF(2010)5 <http://www.oecd.org/daf/competition/sectors/48070736.pdf>

principles for regulatory policies [54], and on interactions between sectoral regulators and competition authorities [55]. These and some other OECD papers have in many ways framed and directed this research.

Other development institutions have also produced papers relevant to the problem, though their assessment is not as comprehensive and targeted as in the OECD studies. Thus, there are, among others, papers on the subject of the IMF [56] and the World Bank [57].

Some of the most active individual researchers working on the problem (though with the focus on different sets of jurisdictions) include abovementioned Thomas Cheng, Deborah Healey, William Kovacic, Ioannis Lianos, and Daniel Sokol. Cheng [58], Kovacic [59], and Sokol [60] provide good analysis of how SOEs are owned and managed in a way that harms competition (with some references to China in particular) and discuss relevant adjustment measures. Healey explores how the policy of 'competitive neutrality' operates in Australia, its country of origin, and other jurisdictions [61] and analyses problems of enforcing competition laws against SOEs. [62] Lianos and

[54] Organisation for Economic Co-operation and Development, 'OECD Framework for Regulatory Policy Evaluation' (June 2014) <https://www.oecd.org/regreform/framework-for-regulatory-policy-evaluation.htm>

[55] Organisation for Economic Co-operation and Development, 'The Relationship Between Competition Authorities and Sectoral Regulators' (June 2015) <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/34375749.pdf>

[56] Jacques Miniane and others, 'Reassessing the Role of State-Owned Enterprises in Central, Eastern and Southeastern Europe' (International Monetary Fund, 18 June 2019). IMF Departmental Paper No.19/11 <https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2019/06/17/Reassessing-the-Role-of-State-Owned-Enterprises-in-Central-Eastern-and-Southeastern-Europe-46859>; Uwe Bower, 'State-Owned Enterprises in Emerging Europe: The Good, the Bad, and the Ugly' (International Monetary Fund, 30 October 2017). IMF Working Paper WP/17/221 <https://www.imf.org/en/Publications/WP/Issues/2017/10/30/State-Owned-Enterprises-in-Emerging-Europe-The-Good-the-Bad-and-the-Ugly-45181>

[57] World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia: A Survey' (23 December 2020) <https://openknowledge.worldbank.org/handle/10986/35011>; Alexandre Arrobbio and others, 'Corporate Governance of State-Owned Enterprises: A Toolkit' (World Bank, 6 October 2014) 978-1-4648-0222-5 <https://openknowledge.worldbank.org/handle/10986/20390>

[58] Thomas Cheng, 'Competition and the State in China' in Thomas Cheng, Ioannis Lianos and Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014)

[59] William Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16(4) World Trade Review 693

[60] Daniel Sokol, 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' [2009] Brigham Young University Law Review 1713

[61] Deborah Healey, 'Competitive Neutrality and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific' (2019) 7(1) Revista De Defesa Da Concorrência 51; Deborah Healey, 'Australian Experience with Competition Law: The State as a Market Actor' in Thomas Cheng, Ioannis Lianos and Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014)

[62] Deborah Healey, 'Competition Law and State-Owned Enterprises: Enforcement' (30 November 2018). 17th Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2018)11/en/pdf>

Sokol[63] interestingly look at the problem more broadly, analysing whether it is within the ambit of competition law to target SOEs and associated industrial and social policies at all and how relations between competition authorities and state actors may be reconsidered to allow for more competition.

There are also a number of specific studies that are worth noting as having provided some particularly useful ideas for this research. Hence, in their work dedicated to competitive neutrality, Hans Christiansen with co-authors explore the policy from a general theoretical perspective, advocating its wider application.[64] Iraj Hashi[65] and Jens Hölscher with co-authors[66] look into that how state aid related polices have been evolving in Eastern Europe. Albert Graells analyses how the policy of competitive neutrality may be applied in the area of public procurement.[67] Besnik Pula[68], Daniel Dechev[69], and researchers of the European Commission's Directorate-General for Economic and Financial Affairs[70] study the application of privatisation-like and restructuring measures to SOEs within the EU generally and in its

[63] Ioannis Lianos, 'Towards a Bureaucracy Theory of the Interaction between Competition Law and State Action' (University College London, March 2012). CLES Working Paper <https://www.ucl.ac.uk/cles/sites/cles/files/cles-3-2012new.pdf>; Daniel Sokol, 'Limiting Anticompetitive Government Interventions that Benefit Special Interests' (2009) 17 George Mason Law Review 119; Thomas Cheng, Ioannis Lianos and Daniel Sokol, 'Introduction' in Thomas Cheng, Ioannis Lianos and Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014)

[64] Hans Christiansen, 'Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises' (Organisation for Economic Co-operation and Development, 18 January 2013). OECD Corporate Governance Working Paper 6 <https://www.oecd-ilibrary.org/governance/balancing-commercial-and-non-commercial-priorities-of-state-owned-enterprises_5k4dkhztkp9r-en>; Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options' (Organisation for Economic Co-operation and Development, 1 May 2011). OECD Corporate Governance Working Paper 1 <https://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises_5kg9xfgjdhg6-en>

[65] Iraj Hashi, 'The Comparative Analysis of State Aid and Government. Policy in Poland, Hungary and the Czech Republic' (Centre for Social and Economic Research, 28 January 2004) <http://www.case-research.eu/sites/default/files/18.%20The%20Comparative%20Analysis%20of%20State_0.pdf>

[66] Jens Hölscher, Nicole Nulsh and Johannes Stephan, '10 Years after Accession: State Aid in Eastern Europe' (2014) 2 European State Aid Law Quarterly 305

[67] Albert Sanchez-Graells, 'Competitive Neutrality in Public Procurement and Competition Policy: An Ongoing Challenge Analysed in View of the Proposed New Directive' (24 January 2012). 5th International Public Procurement Conference <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991302>

[68] Besnik Pula, 'Whither State Ownership? The Persistence of State-Owned Industry in Post-Socialist Central and Eastern Europe' (2017) 23(4) Journal of East West Business 309

[69] Daniel Dechev, 'Public-Private Partnership - A New Perspective for the Transition Countries' [2015] Trakia Journal of Sciences 228

[70] European Commission, 'State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context' (European Commission, 16 July 2016). Institutional Paper 31 <https://ec.europa.eu/info/publications/economy-finance/state-owned-enterprises-eu-lessons-learnt-and-ways-forward-post-crisis-context_en>

Eastern members in particular. Eva Barrett[71], Nevena Byanova[72], Philip Lowe with co-authors[73], and Christian Schülke[74] are among the researchers who provide an interesting outlook on how the unbundling of vertically integrated incumbents in formerly state-dominated sectors of the EU has been affecting the competitive environment in the region.

In the institutional dimension, Sean Ennis[75], Johannes Bauer[76], and Donato de Rosa[77] look at that how granting more independence to regulators in regulated (and, usually, state dominated) sectors improves competition within them (since, among others, state-controlled regulators tend to favour SOEs). Frederic Jenny explores the matter of how competition authorities should be structured, operate, and interact with sectoral regulators (often, being protectionist towards industrial polices and, as noted, SOEs).[78] He en passant analyses an important subject of that how tasks of competition authorities may be set and aligned with relevant goals of competition policies, which may vary significantly. The matter of whether goals of competition policy and, accordingly, tasks of competition authorities should embrace wider public policy goals (that implies a more lenient attitude towards SOEs entrusted with their performance) is, in turn, considered in thought-provoking works of Herbert Hovenkamp.[79]

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[71] Eva Barrett, 'A Case of: Who Will Tell the Emperor He Has no Clothes? Market Liberalization, Regulatory Capture and the Need for Further Improved Electricity Market Unbundling through a Fourth Energy Package' [2016] Journal of World Energy Law and Business 1

[72] Nevena Byanova, 'Effects of the EU Electricity Markets Opening on Competition and Prices' (2021) 30(1) Economic Studies 35

[73] Philip Lowe and others, 'Effective Unbundling of Energy Transmission Networks: Lessons from the Energy Sector Inquiry' (Directorate-General for Competition, 10 January 2007). DG Competition Competition Policy Newsletter 1 <https://ec.europa.eu/competition/publications/cpn/2007_1_23.pdf>

[74] Christian Schülke, *The EU's Major Electricity and Gas Utilities since Market Liberalisation* (French Institute of International Relations 2010)

[75] Sean Ennis, 'Independent Sector Regulators and Their Relationship with Competition Authorities' (Organisation for Economic Co-operation and Development, 2 December 2019). OECD Background Note for the 68th Meeting of the OECD Working Party No. 2 on Competition and Regulation DAF/COMP/WP2(2019)3

[76] Johannes Bauer, 'Regulation and State Ownership: Conflicts and Complementarities in EU Telecommunications' (2005) 76(2) Annals of Public and Cooperative Economics 151

[77] Donato de Rosa and Nick Malyshev, 'Regulatory Institutions: A Blueprint for the Russian Federation' (Organisation for Economic Co-operation and Development, 2008). OECD Working Paper on Public Governance 10 <https://www.oecd.org/regreform/regulatory-policy/42142925.pdf>

[78] Frederic Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends' in Frederic Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer 2016)

[79] Herbert Hovenkamp, 'Is Antitrust's Consumer Welfare Principle Imperiled?' (2019) 45 Journal of Corporation Law

As in case of the FSU, though the majority of out-of-FSU studies promote an active role of competition policies and authorities in shaping economic relations, there are rare studies that defend the preference of statism over active competition (in full or in part). Though being not quite persuasive and seeming to be driven to a varying extent by specific political perceptions, such studies are still a source of interesting ideas, including among others, on situations where the nurturing of the state sector may be justifiable.

1.4 Structure and Key Contributions of the Research

This thesis makes an original and significant contribution to the existing literature on the FSU region's transitional processes and development of competition policy by identifying and exposing those problematic aspects of statism through the state sector that hinder enhancement of competition and suggesting relevant mitigation solutions. It does this over four substantive chapters.

Chapter 2 analyses the historical development of the FSU region since the Soviet times, to investigate how it has informed the current reliance on the state sector and underdevelopment of competitive markets within the region. It seems important to uncover why the impetus to liberalise, to privatise, and to enhance competition emerged after the collapse of the Soviet Union, faded away so quickly after the first steps in this direction were made. It is also of interest which Soviet governance techniques tend to subsist or re-emerge today, owing to problems with the transition.

In this regard, generally, it is shown in Chapter 2 that the historical experience of the FSU states and, mainly, painful transition of the late 80s - the 90s with its impactful political, economic, and social shocks has been significantly affecting the trajectory of development and the economic governmentally within the region. Some proved to be inefficient managerial approaches applied in the Soviet Union, as described in the Chapter, including, in particular, the resolution of economic and social problems through unsystematic mobilisation of nurtured SOEs and directive management of the development processes through them, have been gradually readopted in the modern FSU states, whereas liberalisation and strengthening of private markets have again become feared and repelled to the detriment of competitive processes.

Chapter 3 analyses the reasons for the persistent reliance on the state sector today and current principles of its organisation and operation in the FSU, including how the state supports SOEs. The Chapter explores how these reasons and principles affect and hinder the development of robust competitive markets and how competition law and competition authorities of the

region address relevant problems. It is shown in the Chapter that numerous reasons are currently forwarded in the FSU in support of maintaining and enhancing the state sector (financial, social, strategic, etc.), but many of them are not quite justifiable and the state sector is to a large extent organised and operates in a way that harms competition, thus, blocking further transitional development. Some relevant areas of concern exposed in the Chapter include approaches to owning and managing SOEs, excessive state aid granted to SOEs, and specific institutional relations between SOEs and state authorities.

Chapter 4 studies relevant experience with statism and the state sector of other jurisdictions as well as relevant theoretical studies to identify what measures may be taken for mitigating the negative impact of statism on the development of competition and, in particular, those effects exposed in Chapter 3. Relying on international experience and theoretical findings, the Chapter reveals that there are a number of effective measures that are advised to be used to address the above concerns and to balance the reliance on the state sector with the need to improve competitive environment, including such sets of measures as improvement of corporate governance in SOEs, the development of a comprehensive competitive neutrality framework (as will be defined below), and enhancement of state property ownership agencies by making them less dependent on sectoral regulators as well as transformation of regulators themselves. It is particularly highlighted in Chapter 4 that improving the operation and capacity of competition authorities, tools they use, and the mode of their interaction with state regulators and SOEs is very important for facilitating the implementation of the above measures and restraining statism in general.

Chapter 5 concludes the research by suggesting which adjustment measures identified in Chapter 4 may be applied in the FSU in the context of its historical experience, as explored in Chapter 2, and motives and approaches to rely on the state sector, as explored in Chapter 3. It also analyses how these measures may actually be implemented and how the associated reluctance of the FSU governments (and, to an extent, the public at large) to engage in decisive reforming may be overcome. Generally, Chapter 5 recommends that a combination of different measures of varying significance should be used in the FSU for negating anticompetitive effects of the state sector on competition. These include: ensuring a greater purposefulness of legal acts on the state sector and competition; screening of economic legislation and acts on the creation of SOEs; functional enhancement of competition institutions; improvement of transparency of the operations of the state sector; the adoption of the policy of competitive neutrality; and wider use of alternative arrangements (e.g. public private partnerships and concessions). It is also suggested that to ensure that these measures are not too painful and are actually implemented, gradualism and planning are needed with, preferably, a sector-by-

sector focus. More fundamentally, a strong internal community of advocates of competition should be created (or be supported in its natural growth) through enhanced education and training. International assistance may be helpful, but should not be intrusive, playing rather a soft, supportive role. Intraregional support, to some extent, seems more preferable.

As follows from the above, this thesis represents an original focused and comprehensive legal review of the presented issue of the conflict between the habitual reliance on the state sector and the aim to develop competitive markets within the FSU region. By bringing together and analysing all factors related to the problem, this research significantly furthers our knowledge and tries to fill some relevant gaps in existing studies on transition problems and competition policies of the region. It also identifies a large number of potential directions for further research that may help to elaborate more effective and efficient approaches to the region's transition as a whole.

CHAPTER 2: THE HISTORY OF STATISM AND THE COMPETITION POLICY FRAMEWORK IN THE FSU STATES

Before proceeding to the actual analysis of the current state of things in the FSU i.e. the practice of reliance on the state sector and its perceived negative impact on the region's competitive environment, it is useful to take a closer look at the regions' recent historical experience (from the late Soviet Union till today), including, in particular, the evolution of the region's economic policy. It seems that region's institutional, cultural, and other barriers that conflict with competition polices and prevent the development of competitive markets, as discussed in this research, emanate from the Soviet and post-Soviet period in the history of the region; analysis of these periods will, therefore, help to better understand the origin and nature of such barriers and to identify better ways to address them.

The Chapter is structured in chronological order. Section 2.1 overviews the socialist economic model of the late Soviet Union (the 70s – 80s), discussing those specific attributes that distinguished it from free market economies and the reasons for its eventual collapse. The aim is to highlight dangers of the total reliance on the state sector and neglect of competition and to understand what peculiarities of the Soviet model have become barriers to the FSU states' transition to competitive markets.

Section 2.2 analyses the transition paths that were followed by Russia, Ukraine, and Uzbekistan after the collapse of the Soviet Union. The transformation of economic control and the state sector as well as the development of competition law and competition authorities during the privatisation and subsequent 're-nationalisation' periods in each country are analysed. It is examined what country-specific considerations stemming from these jurisdictions' specific experience informed their return to pro-statism practices to the detriment of competition.

Section 2.3 brings together the main findings for the three studied jurisdictions to make some general conclusion as to what the historical processes within the region have led to. The FSU region's transition is briefly compared with the relevant experience of the EU Eastern Bloc to highlight those peculiarities of the FSU that have caused the return to statism. The matter of that of how such a return is actually manifested in the FSU is explored in detail further in Chapter 3, analysing the current pattern of the functioning of the region's state sector and its impact on the competitive environment.

2.1 Administrative Economy of the Soviet Union

2.1.1 Main features of the Soviet economy

The Soviet economy (along with the socialist economies of Eastern Europe and other regions) was characterised by the two main features that distinguished it from the liberal free market system. The first was complete absence of private property with the state being the ultimate and sole owner of all means of production, including land, real estate, and capital. No private owners were allowed and no property could be privatised. Numerous state establishments and enterprises managed state property, being obliged to use it for purposes determined by the state based on limited property rights (the rights of 'operational control' or 'economic management', which are still present in FSU states' legislation regulating SOEs' operations, as discussed in Section 3.3). [80]

The second important feature of the Soviet economy was its centrally planned or, as rightfully argued, administrative system [81] of economic governance. All the main economic decisions within the system were taken by government, mainly at the central, but also at local levels, with a comprehensive production plan for the whole economy being elaborated regularly (generally, once in five years). To produce a plan, supply and demand for each particular good and service were calculated based on a variety of economic and statistical indicators. In accordance with the plan, some amount of goods and money were put into circulation with fixed prices being set. The performance of plans was monitored by different state agencies, including, central and regional Communist Party and executive bodies, sectoral regulators, and specialised planning and financial authorities (the State Planning Committee (Gosplan), the State Committee for Distribution of Material Products (Gossnab), and the State Committee for Prices (Goskomtsen)). [82]

Both of these features stemmed from the Marxist-Leninist political vision of how a fairer society should be organised. It was believed that only the state, expressing the will of the working people, the proletariat, might be an honest and fair owner of all means of production, thereby ensuring that common wealth is distributed equally amongst the population. Such a politico-economical doctrine was contrasted to market capitalism, where, as believed,

[80] V. Litovkin, E. Sukhanov and V. Chubarov, *Property Rights: Current Problems* (Statut 2008) 128-138, 276-281; Joskow and others (n 14), 302; International Monetary Fund and others (n 19) Volume 2: 18–20

[81] John H Wilhelm, 'The Soviet Union has an Administered, not a Planned, Economy' (2007) 37(1) Soviet Studies 118

[82] Joskow and others (n 14), 306–309; International Monetary Fund and others (n 19) Volume 1: 8-11

individuals – private owners of means of production exploited the proletariat for the purpose of profit maximisation. [83]

With the above two features being the fundamental principles of the Soviet economy, it also acquired other characteristics (particularly pronounced in the late Soviet Union), as are noteworthy for the purposes of this research. First, given the high centralization of the economic governance, Soviet enterprises had a very limited role in decision-making, representing largely production units and depending significantly on pricing, production, and supply decisions of state planners and line ministries (more than 40 by the end of the existence of the USSR). Owing to that the Communist Party was the country's supreme authority and to a large extent ensured coordination between various state actors and enterprises, such decisions were often very politicised and, thus, inefficient from the economic perspective with abovementioned plans being usually flawed. Many enterprises worked at loss with the initiative to improve and innovate being an issue. This, among others, resulted in chronic underproduction of consumer goods and constantly unsatisfied consumer demand. [84]

Secondly, driven by the need to simplify otherwise complex managerial processes in the context of the centralised control, Soviet administrators put much faith in economies of scale. Few enterprises employed less than 1,000 employees with enterprises of more than 10,000 employees being relatively widespread. Many of such enterprises were huge vertically integrated industrial complexes located in a single location near a corresponding source of resources and sometimes forming so-called mono-cities i.e. cities, the life of which revolved around and completely depended on the functioning of the respective enterprise. [85]

Lastly, the system of administrative planning completely rejected the need for competition in its current sense. In ideological terms, the nature of competition as a process aimed at the extraction of profits, domination, and manipulation of consumers was antagonised. In economic terms, in the eyes of Soviet planners, competition had little sense as wasteful duplication of production capacities and unreasonable increase in managerial costs. Narrow

[83] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (2nd edn, Clarendon Press 1987) 309–311; International Monetary Fund and others (n 19) Volume 1: 8-11

[84] Yevgeny Kuznetsov, 'Enterprise Behaviour in the Former Soviet Union and Contemporary Russia' in Joan Nelson, Charles Tilly and Lee Walker (eds), *Transforming Post-Communist Political Economies* (National Academy Press 1997); Hanson (n 13) 240–254; Joskow and others (n 14), 306–311; International Monetary Fund and others (n 19) Volume 1: 8-11; World Bank, 'Russian Economic Reform' (n 19) 3-5, 81-85

[85] Hanson (n 13) 240–254; Joskow and others (n 14), 311–320; International Monetary Fund and others (n 19) Volume 2: 28, 36–37, 140; Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy' (n 17)

specialisation was, therefore, pursued with the majority of products being usually produced by three or fewer enterprises. Similar products of different enterprises were treated as a combined output of the state under a relevant plan and they were generally allocated to different destinations, being thus not in competition. It is worth noting that no competition from foreign goods was also in place, as foreign trade was an exclusive prerogative of the Ministry of Trade and a very limited number of foreign products were usually imported. [86]

All the above specifics of the Soviet economy were essential pieces of the country's economic regime, but gradually became a significant impediment to its development and contributed to its collapse, as explored below. The forthcoming analysis is useful for, *inter alia*, understanding that how questionable from the total welfare perspective the reliance on statism in its ultimate form and accompanying disregard of private initiative and competition may be.

2.1.2 Intensifying problems of the Soviet economy and its collapse

Functioning poorly, but stably, the administrative economy of the Soviet Union began to fall sharply in the mid-1980s. From a narrow economic perspective, reasons for that seem clear - a sharp drop of oil prices in the 1980s seriously undermined the trade balance of the USSR. Like some of the modern FSU states, the country heavily depended on oil profits, which allowed it to import consumer goods and provision in the context of intensifying deficit (that is, in turn, apparently explicable by a combination of many negative factors, including the achievement of limits of the central planning and growing military expenses). [87]

Though such an economic perspective looks quite plausible and provides important lessons as to the efficiency of the state as an owner, it does not, however, fully explain the Soviet economy's abrupt fall. As Hanson notes, Soviet Union's 'per capita GDP was almost stagnant in the 1980s, but it was not failing. It was failing only in comparative sense… [but] the international economy is not, after all, an athletic competition'. [88] Although some authors claim that the threat of hunger was imminent and the Soviet economy was almost doomed to crash [89], this appears questionable. It is likely that the reallocation of resources from, for example, the military sector could help. [90]

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[86] Hanson (n 13) 240–254; Joskow and others (n 14), 302-306, 311-313, 351-354; Knyazeva, *Antimonopoly Policy in Russia* (n 17) 165–173; Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy' (n 17); International Monetary Fund and others (n 19) Volume 2: 16-17, 28-31

[87] Hanson (n 13) 240–254; Gaidar, *Collapse of an Empire* (n 16) 260–278

[88] Hanson (n 13) 240–254

[89] Gaidar, *Collapse of an Empire* (n 16) 268–278

[90] This was suggested by then Soviet Leader Mikhail Gorbachev in his interview to journalist Vladimir Pozner in 2008. See Vladimir Pozner, Interview with Mikhail Gorbachev (Moscow, 1 December 2008)

Generally, it seems that a major factor contributing to the downfall was a fundamental issue that enthusiasm and fear, constituting the main drivers of the administrative system (partially substituting the drive brought in by the necessity and willingness to compete), were lost during Brejnev's stagnant reign in the 1970s. Monotonous life in the atmosphere of stagnation and an obvious lagging behind Western economies instilled doubts in the minds of the population and made the Soviet government to turn to drastic changes. A series of unsuccessful regulatory choices corroded pillars beneath the Soviet system and it rapidly collapsed. [91]

The fundamental reforms put an end to the Soviet administrative economy were initiated by Mikhail Gorbachev, who had become the country's leader in 1985. As a part of the initiated economic restructuring (famous *perestroika*), four important regulations were adopted in 1986-1988 – the Law on State Enterprises [92], the Law on Cooperatives [93], the Law on Individual Labour Activities [94], and the Resolution on Joint Ventures [95]. Pursuant to the first Law, greater independence was given to state enterprises (from now on, for the avoidance of doubt, 'SOEs'), whereas the other legal acts created the basis for the emergence of private and semi-private forms of doing business. Hence, the Law on Individual Labour Activities legalised sole proprietorships, while the Resolution on Joint Ventures allowed foreign companies to enter Soviet markets by establishing joint ventures with Soviet SOEs. The Law on Cooperatives became particularly novel as for the first time since the 1920s, the establishment of private companies was permitted, albeit in a surrogate form of cooperatives (by 1990, about 200,000 cooperatives were established, including approximately 150 cooperative banks). [96]

Along with allowing some private entrepreneurship, starting from 1987, the Soviet government gradually liberalised foreign trade and took some measures to decentralise the economic governance. Line ministries and the planning authorities were prevented from excessive intervening into state enterprises' activities with the system of central planning having been

[91] Nikolai Baibakov, *Forty Years in the Government* (Respublika 1993) 123–124; Hanson (n 13) 240–254

[92] Law of the USSR on State Enterprises (Associations) 30 June 1987 (Supreme Soviet of the USSR)

[93] Law of the USSR on Cooperation No. 8998-XI 26 May 1988 (Supreme Soviet of the USSR)

[94] Law of the USSR on Individual Labour Activities No. 6050-X1 19 November 1986 (Supreme Soviet of the USSR)

[95] Resolution on the Establishment and Operation of Joint Ventures with the Participation of Soviet Organisations and Firms from Capitalist and Developing Countries 13 January 1987 (Council of Ministers of the USSR)

[96] A. Kiryukhin, 'USSR's Legislation on Cooperatives: Transformation of Ownership Relations' (2015) 1(33) Journal of Higher Educational Establishments of the Volga Region 85; Joskow and others (n 14), 325–326; Medvedev (n 18) 79–84; International Monetary Fund and others (n 19) Volume 2, 261-265

gradually replaced with the system of state orders. Many ministries were liquidated or transformed into industrial concerns or production and trade associations. [97]

None of the above reforms, however, improved the country's economy, while some of them, to the contrary, harmed it. For example, owing to the inexperience of the Soviet people in entrepreneurship and the remaining rigidity of the business environment, many cooperatives eventually engaged in the resale of goods purchased at state-fixed prices and, thus, exacerbated the problem of consumer goods deficit. [98] Moreover, cooperatives created within SOEs were used for syphoning assets out of SOEs, which gave rise to a phenomenon known as 'spontaneous privatisation'. After the adoption of the Law on Lease [99], this often happened in a way that the performance or non-performance of lease contracts between SOEs and cooperatives led to the transfer of SOEs' core assets to cooperatives. For example, in the Russian SSR, about 2,000 enterprises were spontaneously privatised by 1992. [100]

A more devastating blow was struck by the reform of economic management. As Soviet SOEs were not ready for the independence, it caused disorientation. Being unable to set up links with their customers, SOEs struggled to get state orders for their products. In this context, some liquated line ministries resurrected, but now in the form of non-state associations. [101]

Interestingly, in 1990, the Soviet government passed the Resolution on Measures to De-Monopolise the National Economy [102], proclaiming the adherence to new for the country principles of free competition. The Antimonopoly Committee of the USSR was set to be established for, among others, promoting competition, restructuring 'highly monopolised' SOEs, and launching de-statisation [103]. Calling for radical changes, the Resolution, however, in many ways contradicted to itself (for example, providing that line ministries would manage de-statisation), thus reflecting some government's willingness to create a 'regulated market

[97] Joskow and others (n 14), 325–330; Gaidar, *Collapse of an Empire* (n 16) 363–376; Medvedev (n 18) 79–84

[98] Sachs and others (n 15); Gaidar, *Collapse of an Empire* (n 16) 363–376; Medvedev (n 18) 79–84

[99] Law of the USSR on Lease No. 810-1 23 November 1989 (Supreme Soviet of the USSR)

[100] Simon Johnson, 'Spontaneous Privatisation in the Soviet Union: How, Why and for Whom?' (World Institute for Development Economics Research, 1991). WIDER Working Paper 91 <https://EconPapers.repec.org/RePEc:fth:wodeec:91>; Joskow and others (n 14), 326; International Monetary Fund and others (n 19) Volume 2: 20-22

[101] Vasily Laptev, *Entrepreneurship Associations: Holding Companies, Financial and Industrial Groups, Simple Partnerships* (Wolters Kluwer 2008) 5–17; Joskow and others (n 14), 326–330; Medvedev (n 18) 79–84

[102] Resolution on the Measures to De-Monopolise the National Economy 16 August 1990 (Council of Ministers of the USSR)

[103] A term widely used in the FSU region's legal acts and research literature that means taking a wide range of transition measures aimed at decreasing the role of the state in the economy.

economy'. Although the Resolution was followed in the Russian and then, the all-Union Laws on Competition, the administrative chaos of those times devalued importance of this competition legislation. [104]

Gorbachev's offensive on the Communist Party seems to have become the last shot at USSR's economic and political system. In 1990, transformation of the Party was complete with Article 6 of the Soviet Constitution, proclaiming its fundamental role in political decision-making, being repealed. With that move, horizontal and vertical links connecting country's political and economic institutions into a single whole were in effect torn apart. Eventually, in December 1991, after the economic system had collapsed, the deficit of consumer goods had reached an unprecedent scale, and ethnic conflicts had started to erupt all over the country, the Soviet Union was dissolved. [105]

In sum, it is difficult to conclude whether the reforms could have been implemented successfully. It seems that once questioned, the system had to be reformed further. Proper consensus was, however, not found and the Soviet government did not dare to proceed with drastic economic reforms that were seemingly needed, including the liberalisation of the price control and the adoption of full-fledged laws on private property. Instead, other reforms were chosen - primarily, of a political nature - that, along with some general incompetence, destroyed the Soviet model. [106]

A more important question for the purposes of this research, however, lies in the effectiveness of statism. Although it is clear that the administrative system with its directive control, suppression of private initiative, denial of the need for competition, and disregard of consumers is unable to deliver acceptable economic results, it remains questionable whether the state ownership is undesirable. It seems that it is this question that continues to torment post-Soviet leaders, engendering some craving to retain relevant socialist approaches within the modern market system.

2.2 Era of Privatisation and Reaction of the 2000s

After the collapse of the Soviet Union, 15 newly emerged states began to look for their own paths for transforming their economy, being now completely independent from each other. Although an attempt was made to establish a loose confederation in the form of the

[104] Joskow and others (n 14), 330–331; Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy' (n 17)

[105] Gaidar, *Collapse of an Empire* (n 16) 411-418, 564-576; Medvedev (n 18) 173-184, 353-357

[106] Gaidar, *Collapse of an Empire* (n 16) 411-418, 570–576; Medvedev (n 18) 329–331

Commonwealth of Independent States (the 'CIS')[107], it has not been able to effectively supersede the Union system and, to a large extent, remains to be a shadow of the past rather than a full-fledged regional structure able to promote cooperation and convergence.

With the above said, it is fair to note that many legislative solutions tested by the independent states were fairly similar as similar problems were generally encountered and the region's governments closely watched each other. As discussed below, it may also be concluded that rather similar results of the transition have eventually been achieved within the CIS by today.

Nevertheless, since some differences in the transition were still in place, the relevant processes going on in the three countries studied in this research - Russia, Ukraine and Uzbekistan - will now be analysed separately. The relevant analysis begins with and mainly focuses on Russia, having been the main contributor to the Soviet economy[108] and the country where the transitional processes reached an incredible scale in terms of both the number of people and enterprises affected and those unintended and devastating consequences that were caused. The relevant analysis for Ukraine and Uzbekistan is built upon and refers to the observations for Russia with only key specifics being highlighted.

2.2.1 Russia

As noted above, though similar results of the transition were ultimately achieved across the FSU, the context of the transition was different in each country. For Russia, the relevant background was pronounced political turmoil and a conflict between the conservative apparatus of the FSU (including, among others, members of the Russian Parliament[109] and managers of SOEs) and new liberal Russian government. Praised as a time of new opportunities by some and considered as a reign of chaos by others, Russia's transition of the 90s is often called an 'era of privatisation'.

2.2.1.1 Initial steps of the transition

Russia's national state authorities had begun to implement reforms even before the Union finally collapsed. In 1990, rebellious reformist Boris Yeltsin was chosen as the Chairman of Russia's Supreme Soviet and the sovereignty of Russia was soon proclaimed. Russian law became superior to the all-Union legislation and cautious market transition was pushed

[107] The formation is now described as a free association of sovereign states and unites nine member states and two associate members. The Baltic states (Estonia, Latvia and Lithuania) chose not to participate, while Georgia withdrew its membership in 2009.

[108] International Monetary Fund and others (n 19) 36–37

[109] Initially, the Supreme Soviet, and after 1993, the two-chamber Federal Assembly, consisting of the State Duma and the Federal Council.

forward. In late 1990 – early 1991, the first set of laws was adopted, including the Law on Competition [110], the Law on Enterprises and Entrepreneurship [111] and the Law on Property [112]. The latter fully legalised private property with no surrogates being offered instead. [113]

After the so-called August Coup of 1991, a short-lasting event when the last attempt had been made by Communist Party leaders to restore their control, more radical reforms were laid on the table at the initiative of Yeltsin and a team of liberal economists. Having been named a 'shock therapy', they envisaged the removal of price controls, greater liberalisation of foreign and internal trade, and mass privatisation. The price control in particular was eventually abolished in January 1992. Prior to that, the government prepared a list of monopolies, prices for some goods and services of which were to remain regulated. Prices for other goods and services were decontrolled and exploded on an unprecedented scale. According to some conservative estimates, by the end of 1992, prices were higher by 25 times on average. [114]

Though the purpose of filling consumer markets was, thus, achieved quickly, the measure led to impoverishment of the population and large-scale production decline (by some estimates, by more than 14% of GDP by the end of 1992). Most enterprises, being completely unaccustomed to operate in a free market, became unable to provide themselves with necessary supplies and in fact bankrupt. Their burden became even more unbearable with an overhaul of the tax system and an emerged necessity to calculate and pay taxes (in the administrative system, taxation played largely a nominal role and, essentially, enterprises just transferred their profits to the state budget). Eventually, owing to these reforms and other related factors (the flooding of markets by cheap Asian goods, lax budget constraints for SOEs, etc.), thousands of seemingly stable enterprises and establishments were swept away and many jobs were lost. [115]

[110] Law of the Russian SSR on Competition and the Limitation of Monopolistic Activity in Commodity Markets No. 948-1 22 March 1991 (Supreme Soviet of the Russian Soviet Socialist Republic)

[111] Law of the Russian SSR on Enterprises and Entrepreneurship No. 445-1 25 December 1990 (Supreme Soviet of the Russian Soviet Socialist Republic)

[112] Law of the Russian SSR on Property in the Russian SSR No. 443-1 24 December 1990 (Supreme Soviet of the Russian Soviet Socialist Republic)

[113] Medvedev (n 18) 184–193, 240-241

[114] Joskow and others (n 14), 338–340; Medvedev and Shriver (n 18) 14–22

[115] Jim Leitzel, *Russian Economic Reform* (Routledge 1995) 46–63; Medvedev and Shriver (n 18) 19–25. See also the documentary film Alexey Pivovarov, *The 90s: The Price Paid* (NTV 2016)

2.2.1.2 Privatisation of the early 90s

Almost simultaneously with the removal of the price control, privatisation began.[116] It envisaged the disposal of shares of SOEs or their real estate complexes with equipment. Generally, three privatisation approaches were elaborated for different kinds of SOEs with the specially established State Committee for Managing State Property (the 'SPC') and regional state property management committees being ordered to administer relevant procedures. Prior to launching privatisation, state property was divided on federal property, property of subjects of the federation, and municipal property, though this systematisation was not completed and the status of many objects remained unclear throughout privatisation.[117]

Generally, the first privatisation approach presumed the transfer of relatively small SOEs (roughly, up to 200 employees), including stores, warehouses, and enterprises in catering, to local governments and their mandatory privatisation - about 70% of such enterprises were privatised by 1994.[118]

The second approach was designed for SOEs of economic, political, or state security importance, including large enterprises (whose revenue exceed some set thresholds or that employed more than 10,000 workers), enterprises in the oil and gas or power industries, military enterprises, public utilities, and operators of some important infrastructure. Privatisation of these SOEs required special assessment and a resolution of either the federal or local governments or the SPC, acting based on recommendations of line ministries. Before privatisation, concerned SOEs had to be restructured into joint-stock companies. Many relevant SOEs were eventually privatised based on decisions of the federal and local governments through the procedures applied for the third approach below.[119]

The third and most widespread approach – mass or voucher privatisation – meant privatisation of all other medium and large SOEs at the initiative of the SPC, local state property management committees, state authorities, SOEs themselves, or other interested groups. As in case with strategic enterprises, prior to privatisation, each relevant SOE had to be reorganised. Though, in principle, particular arms of enterprises could be privatised separately,

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[116] See, among others, the Law of the Russian SSR on Privatisation of State-Owned and Municipal Enterprises No. 1531-1 3 July 1991 (Supreme Soviet of the Russian Soviet Socialist Republic); the State Program of Privatisation of State-Owned and Municipal Enterprises in the Russian Federation for 1992 No. 2980-1 11 June 1992 (Supreme Soviet of the Russian Federation)

[117] Maxim Boycko, Andrei Shleifer and Peter Wang, 'Privatising Russia' (1993) 1993(2) Brookings Papers on Economic Activity 139; Joskow and others (n 14), 332

[118] Joskow and others (n 14), 332–333; Boycko, Shleifer and Wang (n 117)

[119] Joskow and others (n 14), 333; Boycko, Shleifer and Wang (n 117)

SOEs were rarely restructured owing to the overall presumption that Soviet enterprises were appropriately formed entities. Privatisation itself was implemented in two stages. At the first stage, SOE's managers and workers could choose one of three schemes of participating in it, which would generally allow them to purchase a specific number of shares at specific price. [120] At the second stage, the remaining shares were traded amongst the general public for special vouchers and cash, based on a plan elaborated by a relevant SOE and privatisation institution. [121]

Vouchers and voucher auctions became the main feature of the mass privatisation. In 1992-1993, the SCP calculated the total value of state-owned assets and provided each citizen with one privatisation check, informally called a 'voucher', with a nominal value of 10,000 roubles. They were accepted as means of payment at privatisation trades and were freely tradeable. [122]

Although technically, the voucher privatisation could be viewed as a success – almost 60% of SOEs were privatised by 2000 – not many of its initial goals and, primarily, the creation of a class of effective owners, were actually achieved. It seems that no one besides for the liberal government demanded privatisation and understood its true meaning. In the pre-privatisation times, with everything being owned by the state, it is control over financial flows that mattered rather than ownership rights. Not comprehending the value of vouchers and experiencing palpable lack of income, the Russians were forced to sell them. However, as vouchers quickly lost their face value in the growing inflation fire, they were soon given for free, sold for a symbolic price, or remained unclaimed. Eventually, the proposed privatisation schemes were mostly abused by state officials and SOEs managers (widely called 'red directors' for their connections with state officials and adherence to the old regime), unwilling to change their management approaches, or new businessmen of a dubious kind, often coming from criminal structures and being more ready to sell out enterprise's valuable assets rather than to act as responsible owners. [123]

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[120] In the vast majority of SOEs, a scheme was chosen that gave workers and managers a preferential right to purchase 51% of voting shares of a relevant SOE for a basic privatisation price. Boycko, Shleifer and Wang (n 117)

[121] Joskow and others (n 14), 333–335; State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 11–15; Boycko, Shleifer and Wang (n 117)

[122] Joskow and others (n 14), 334–335, 340-346; Medvedev and Shriver (n 18) 89–90; State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 11–15; Boycko, Shleifer and Wang (n 117)

[123] Medvedev and Shriver (n 18) 89–94, 145-153; Goldman, *The Piratisation of Russia* (n 20) 81–91; State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 15-21, 49-68, 81-87; Pivovarov (n 115)

It is noteworthy that the perversion of the mass privatisation was also caused by the underdevelopment of relevant legal and institutional instruments. Hence, detailed procedural regulations on conducting privatisation trades were adopted only by 1994 with many SOEs being already privatised. There was no meaningful legislation on the evaluation of assets, the reclamation of illegally privatised property, and control over that how investment and production obligations are performed by new owners. From the instructional perspective, there was no effective communication between the federal centre and regions, between the SPC and other state institutions, and within the SPC itself. [124]

Newly privatised entities found themselves in no less messy regulatory environment and were to an extent doomed to inefficiency. Mechanisms for exercising ownership rights were underdeveloped, the functioning of the banking and insurance systems was weak, the securities market was dysfunctional, etc. [125] It is also of significance that no meaningful bankruptcy laws were developed. Soviet legal theorists abandoned the concept as needless in the 60s and when the Law on Insolvency of Enterprises was actually passed in Russia in 1992 [126], it was vague, incomplete, and tended to favour potential bankrupts. Only an insignificant number of bankruptcy procedures had, thus, been completed until a new Law was adopted in 1998. This seems to have restricted a natural circulation of property and capital, harmed the efficiency of privatisation, and hindered the development of competitive markets. [127]

2.2.1.3 Privatisation of the late 90s and slowdown of reforms

It was declared in the mid-90s that with the mass privatisation being almost complete, a new goal of privatisation would be targeted sales aimed to replenish the state budget. Nevertheless, SOEs continued to be sold haphazardly, at a low cost, and, as suggested, with much corruption being involved. The apogee of that was the loans-for-shares privatisation of 1995-1996, which allowed some of the country's richest businessmen to take control of 12 large SOEs, primarily in the oil and gas industry (including well-known Yukos and Lukoil), for a relatively small price

[124] Medvedev and Shriver (n 18) 148–153; Goldman, *The Piratisation of Russia* (n 20) 81–91; Muravyev and Hare (n 22); State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 15–21

[125] Medvedev and Shriver (n 18) 143–145; State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 19–21

[126] Law of the Russian Federation on Insolvency (Bankruptcy) of Enterprises No. 3929-1 19 November 1992 (Federal Assembly of the Russian Federation)

[127] Ekaterina Vinogradova and Ekaterina Bubnik, 'The Institution of Bankruptcy in Russia: Stages of the Formation and Development' (Timofeev, Farenvald, and Partners 2017) <https://tbplaw.com/data/423-007%20Institut%20bankrotstva%20v%20Rossii.%20Etapy%20stanovleniya%20i%20razvitiya.pdf> accessed 6 June 2020; Grigoriy Khanin, *Economic History of Russia in Modern Times* (Novosibirsk State Technical University 2014) 144–155

of USD 1 billion and to turn into immensely influential oligarchs. As it is now known, this privatisation represented an act of gratitude from President Yeltsin to businessmen who had given him political support and they actually purchased the enterprises for the money received from the state. [128]

Though details of the loans-for-shares privatisation were unknown, it clearly violated some applicable laws. This caused much public discontent and since then, the very idea of privatisation became discredited. As a result of that and with the majority of SOEs being already privatised, starting from 1997, the pace of privatisation slowed significantly and only case-by-case decisions were occasionally made. With greater administrative and political stabilisation, relevant processes also became more manageable and less politically motivated. [129]

After the implementation of the main liberalisation reforms, in 1997, the Russian economy began to recover. Though in 1998 it was in crisis again, owing to a combination of different factors, including the fall of world prices for fuels and metals and the Asian financial crisis of 1997, this rendered a healthy impact. The depreciation of the rouble made the Russian export more profitable; government's distortive interventions became rarer; and more stringent budget policies started to be applied across the state sector. Since the end of 1999, the country's economy began to pick up pace. Some further growth was, however, connected with reforms of new President Vladimir Putin. [130]

Speaking of the actual results of the transition achieved by the 2000s, though some basics were created for the development of a market economy, major goals of the transformation were not reached. Hence, no effective private owners emerged and the competitive environment generally remained static with concentration levels remaining high across the majority of industries. [131] Most importantly, however, owing to the experienced hardships, liberal market ideas became distrusted by both the population and many top officials. Since 2000, nostalgic

[128] Medvedev and Shriver (n 18) 146–153; Goldman, *The Piratisation of Russia* (n 20) 2–9; Muravyev and Hare (n 22); State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 21, 49–68

[129] Sergey Guriev, 'How Oligarchs and Reformers Have not Allowed to Make Private Property Legitimate in Russia' (Forbes 29 November 2021) <https://www.forbes.ru/society/447691-kak-oligarhi-i-reformatory-pomesali-sdelat-castnuu-sobstvennost-v-rossii-legitimnoj> accessed 12 December 2021; Medvedev and Shriver (n 18) 146–153; Goldman, *The Piratisation of Russia* (n 20) 2–9; Muravyev and Hare (n 23)

[130] Sutela, 'The Financial Crisis in Russia' (n 21)

[131] Reza Rajabiun, 'Competition Law and the Economy in the Russian Federation, 1990-2006' (2009) 9(2) Global Jurist 10; Gaidar, *Russia* (n 16) 210-211, 232-233; Medvedev and Shriver (n 18) 169-170,198–200; Goldman, *The Piratisation of Russia* (n 20) 70-71, 86-91; State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 86-89, 143-149

sentiments have begun to spread with an incredible speed with Leonid Brezhnev being regularly named as the best leader in the country's history. [132]

2.2.1.4 Return to statism in the 2000s and 2010s

After President Putin came to power in 2000, the Russian economy began to improve rapidly. The growth, continuing till 2008, was prompted by delayed effects of the liberalisation of the 90s, high oil prices, inflow of external funds, and further reforms implemented by the government, including large-scale tax, banking, judicial, labour, and land law changes. During this period, Russia's GDP grew on average 7% per year and, in 2008, the World Bank declared that the country had achieved 'unprecedented macroeconomic stability' [133]. [134]

In 2001, a new Law on Privatisation [135] and several accompanying by-laws were adopted. Generally, a large number of gaps were filled and relevant procedures became more streamlined and transparent. [136] At the same time, however, the government started its counteroffensive against private property with the intention to do away with the existing 'wild' capitalism and the omnipotence of oligarchs. It is notable that even before the intervention began, the state had still owned a relatively large chunk of property with about 100 very large enterprises being under its control, including the oil company Rosneft, the oil pipeline monopoly Transneft, the natural gas monopoly Gazprom, the savings bank Sberbank, the aircraft maker Sukhoi, and the Russian Railways Corporation. [137]

In the middle of 2000, 21 most influential oligarchs, mainly those in control of energy companies, were summoned to the Kremlin to meet with the new President. A clear message was delivered that the new government would not tolerate tax evasion, redistribution of property by illegal means, and interference in high politics. There was little solidarity between the feuding tycoons - many of them favoured a more stable regulatory regime and quickly surrendered. Those who had tried to resist were effectively suppressed. In 2000-2001,

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[132] Vladimir Dergachev, 'Russians' Admiration of Stalin Reached a Historic High in 16 Years' (RBC 15 February 2017) <https://www.rbc.ru/politics/15/02/2017/58a33b919a79472a55281e2a> accessed 23 December 2017; David Remnick and Lev Oborin, *Lenin's Tomb: The Last Days of the Soviet Empire* (AST 2017) 5-8; 570-578

[133] Konstantin Rozhnov, 'Russia Attracts Investors Despite its Image' (BBC 30 November 2007) <http://news.bbc.co.uk/1/hi/business/7096426.stm> accessed 12 January 2018

[134] Kudrin and Gurvich (n 7); Yasin, Akindinova and Kuzminov (n 7); Yasin and others (n 7)

[135] Law of the Russian Federation on Privatisation of State and Municipal Property No. 178-FZ 21 December 2001 (Federal Assembly of the Russian Federation)

[136] State Research Institute for System Analysis under the Accounts Chamber of the Russian Federation (n 24) 26–32

[137] Richard Sakwa, 'Putin and the Oligarchs' (2008) 13(2) New Political Economy 185; Yasin and others (n 7); Goldman, *Petrostate* (n 20) 101–113

seemingly most powerful Berezovsky and Gusinsky lost their media assets and had to leave the country with their other assets being taken away later. In 2003, Mikhail Khodorkovsky was arrested and his oil and gas giant Yukos having was re-nationalised trough the enforcement of tax claims. In 2005, the government re-established its full control over Gazprom by re-purchasing 10,7% of its shares. In the same year, 75% of shares of Sibneft (at that time, the country's sixth largest oil producer) were purchased by Gazprom from Roman Abramovich. Foreign Shell and BP were also targeted for working under project sharing or joint venture agreements that were seen as colonial treaties by the new government. Eventually, Gazprom got access to those projects as a full partner. [138]

The above struggle of the government with oligarchs, going on in higher strata of business with mainly large enterprises being affected, was soon to an extent reflected at lower levels, as a corresponding signal to restore control over economic relations passed through administrative chains. State authorities and SOEs thus became more aggressive in retaking the property they once lost. While in some cases, state actors acted openly and used high proceeds from the sale of natural resources for acquiring private assets, in other cases, they were as unscrupulous as oligarchs and resorted to a variety of techniques to get such assets. [139]

In 2006, a trend emerged to establish 'state corporations', which represented a new form of an SOE combining features of a public development institution and a state enterprise. Eight such corporations were created, including Vnesheconombank (i.e. the Russian Development Bank), Rusnano (the Russian Corporation of Nanotechnologies), and Rostec (the State Corporation for Developing Advanced Technology Industrial Products). Although different functions were assigned to these corporations, the initial goal of creating them was to have a flexible structure that would escape strict financial discipline of budgetary institutions, but would be able to support or consolidate those assets that remained or returned under state control in some priority sectors of the economy. It seems, however, that mixed results have been achieved. Although the state corporations proved their flexibility during subsequent crises by, among others, offering prompt financial assistance to companies they controlled, and implemented few successful projects, their structure, governance, and means to achieve relevant goals have been of questionable efficiency. Hence, some state corporations have

[138] Nadia Vanteeva, 'In the Absence of Private Property Rights: Political Control and State Corporatism during Putin's First Tenure' (2016) 2(1) Russian Journal of Economics 41; Laura Solanko and Pekka Sutela, 'Economic Policy' in Stephen Wegren (ed), *Putin's Russia: Past Imperfect, Future Uncertain* (6th edn. Rowman and Littlefield 2016); Goldman, *Petrostate* (n 20) 102–135; Sakwa (n 137)

[139] Goldman, *Petrostate* (n 20) 102–135

absorbed an incredible number of SOEs [140], many of which are likely to be under-performing and have opaque and intricated relations between each other. There are indications that uncontrolled cross-subsidisation has been in place that causes series concerns from the competition policy perspective.

Speaking of the state corporations, it is worth making a brief note of country's line ministries and industrial concerns, which to an extent served as a prototype for the state corporations and were also affected by the reforms of the 2000s. As was mentioned in sub-Section 2.1.2, many Soviet line ministries transformed into concerns or production and trade associations either by virtue of a special government decree or as a result of natural consolidation processes taking place within post-Soviet markets. Those ministries that survived multiple transformations were 'optimised' under Putin. Some ministries existing since then are the Ministry of Energy, the Ministry of Telecom and Mass Communications, and the Ministry of Transport. Although their functions are not as all-encompassing as those of Soviet line ministries, they still determine government policy in respective sectors and have broad powers to oversee and control relevant SOEs, state corporations, and, to a slightly lesser extent, private companies. As for concerns and associations, both existed in the Soviet times and appeared later, they generally transformed into holding companies (generally, large joint-stock companies owning many other companies). Those of them that have remained or returned under state control and did not go bankrupt or restructured, often represent an impressive force capable of dictating policies in relevant sectors (Gazprom, Rosneft, etc.), being in some way similar to the state corporations. [141]

Going back to the timeline, the Great Recession of 2007-2008 had a palpable impact on the Russian economy and reinforced the trend to return to statism, but now through the so-called 'soft nationalisation'. Hence, government's rescue programmes were mainly offered to SOEs and state-owned banks that to an extent undermined the competitiveness of private companies and private banks, being already pressured by consequences of the crisis.

[140] Hence, for example, Rostec has extended its control to approximately 800 SOEs in a wide range of industries, both related (e.g. technologies, the defence industry, and machine building) and unrelated (e.g. pharmaceutics and printing) to objectives of its operation. See, among others, Rostec, 'Development Strategy' (2021) <https://rostec.ru/about/strategy/> accessed 5 September 2021

[141] Government of the Russian Federation, 'Ministries and Agencies' (2018) <http://government.ru/en/ministries/#federal_ministries> accessed 16 February 2018; Ministry of Economic Development of the Russian Federation, 'Effective Management of State Property' (2018) <http://economy.gov.ru/minec/activity/sections/use/> accessed 17 February 2018; Joskow and others (n 14), 327-330, 346-348, 365-366; Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy' (n 17); Laptev (n 101)

Eventually, many bankrupted private players became a part of supported SOEs either through debt collection procedures or voluntarily, willing to get under state protection. [142]

Given somewhat uncontrolled growth of the trend, starting from 2010, the government has begun to reluctantly admit the excessiveness of the state expansionism. Hence, in his article of 2012 [143], Putin stated that the state should reduce its presence in both financial and non-financial sectors, noting that, ideally, only the defence and energy industries should remain under state control. Though that had been declared, no much real effort in the relevant direction was, however, made afterwards. Partially, nevertheless, the suspension of relevant reforms may be attributed to a new economic crisis of 2013, caused by a drop in energy prices, the conflict erupted in Ukraine, and related financial sanctions imposed by the EU and the US. [144]

It is fair to note that some occasional privatisation deals have still been implemented during Putin's era, albeit, mainly, at the regional and municipal levels. To give examples of some major deals, after the state corporation Rostec had failed to ensure the efficiency of the automobile giant AvtoVAZ, the company was privatised in 2014 with more than 70% of its shares being now owned by the Renault-Nissan. [145] In 2004-2008, an attempt had been made to reform the power industry by dismantling the vertically integrated holding company RAO UES, as a result of which 23 new power companies emerged, only two of which belonged to the state. Nevertheless, as the ultimate results were ambiguous, as discussed in the next Chapter, the government partially reinstated its control (through state-owned RusGidro and Inter RAO UES). [146]

In summarising the above and taking note of some of the latest developments (e.g. Central Bank's cleansings and consequential nationalisations in the banking sector), it may be noted that the state has become a major player in Russia's markets once again. According to the FAS,

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[142] Andrei Vernikov, 'The Impact of State-Controlled Banks on the Russian Banking Sector' (2012) 53(2) Eurasian Geography and Economics 250; Yasin, Akindinova and Kuzminov (n 7); Yasin and others (n 7); Sprenger (n 41)

[143] Putin (n 8)

[144] Yasin, Akindinova and Kuzminov (n 7); Yasin and others (n 7)

[145] Raj Chari, *Life after Privatisation* (Oxford University Press 2015) 118, 123

[146] Centre for Strategic Researches 'Severo-Zapad' and Ministry of Energy of the Russian Federation, 'Results of the Reforms in the Electric Power Industry in the Russian Federation' (17 December 2014) <https://csr-nw.ru/publications/detail.php?ID=1329>; Anastasiya Baykalova, 'The Reform of UES Continues. Have 12 Years Been Wasted?' *Moskovskiy Komsomolets* (6 November 2013) <http://www.mk.ru/economics/article/2013/11/06/941761-reforma-ees-prodolzhaetsya-12-let-proshli-vpustuyu.html> accessed 2 March 2018; Natalya Badovskaya, 'Reforming Electric-Power Industry in Russia' (2009) 2(9) World and National Economy

from 2005 to 2015, the state's share in GDP increased from 35% to 70%, whereas the number of SOEs almost tripled. More conservative estimates evaluate the current state's share at 28%-41%. It is revealing, however, that amongst 600 Russian largest companies, the revenue of SOE amounts to approximately 50%. The state seems to be absolutely dominant in the financial, oil and gas, transportation, and power industries, not to mention mass media, education, healthcare, and utilities. This obviously does not take into account those opaque relations between the government and state-controlled businessmen, who have replaced or come from former oligarchs. [147]

2.2.1.5 Formation of Russia's competition legislation and competition authorities

As much was said about Russia's eventual return to the policy of statism, the history of its competition legislation and competition agency (the FAS) should also be briefly covered. Though Russia's first Law on Competition was adopted in 1991 [148] and the relevant regulator was created at the same time, the country did not have functioning competition policy in the 90s. There was little understanding of the importance of competition and those principles and methodologies that form competition regulation. During the hasty mass privatisation, since SOEs were generally not restructured and case-by-case analysis was not employed, the role of the competition regulator was rather nominal and, as appears, a rubber-stamp way of work was chosen for dealing with privatisation cases. Particular functions, including the monitoring of prices and the clearance of merger and acquisition transactions, were performed more enthusiastically. However, it seems that the regulator was too overwhelmed with routine work to operate effectively – hence, besides for the functions noted above, it was supposed to monitor compliance with the legislation on advertisement, investments, the securities market, the protection of consumers, and trade. Moreover, the competition regulator was plagued by underfunding, corruption, lack of commitment to the reforms, and fear of both state officials and new private owners. Numerous attempts were made to improve the work of the competition authority. In 1998, the Ministry of the Antimonopoly Policy was established to

[147] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2017' (24 September 2018) <https://fas.gov.ru/documents/658027>; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2016' (31 October 2017) <https://fas.gov.ru/documents/596439>; Ekaterina Mermerinskaya, 'The State and State-Owned Companies Control 70% of the Russian Economy: FAS Sees the State as the Main Enemy of Competition' *Vedomosti* (29 September 2016) <https://www.vedomosti.ru/economics/articles/2016/09/29/658959-goskompanii-kontroliruyut-ekonomiki> accessed 2 May 2018; Krivoshapko and Westman (n 6); Radigin and Abramov (n 6); Radchenko and Parshina and others (n 42)

[148] Law of the Russian SSR on Competition and the Limitation of Monopolistic Activity in Commodity Markets No. 948-1 (n 110)

elevate the status of the competition agency, remaining to be alien within the state apparatus. In 2004, the efficiency of the ministerial structure as well as the degree of the Ministry's independence from the Government [149] and other state authorities were questioned and the Ministry disintegrated into several state institutions, including the FAS. Despite this transformation and the fact that the agency has made a truly impressive progress since then, its structure and scope of authorities as well as the overall integration into the system of state governance still remain an issue, as discussed further in this thesis. [150]

It is worth mentioning that though the administrative model of dealing with competition law cases has historically been applied in Russia as well as the other FSU states, courts have also been involved in adjudicating relevant cases where there have been appeals. A lack of proper economic expertise has however always been a major issue for them and the progress of development here has seemingly been more modest that in case of the competition authorities. [151]

The trajectory of evolution of the Law on Competition and related legislation (e.g. the Law on Natural Monopolies [152]) has generally been similar to that of the competition authorities. For establishing the regime, laws of the European Community in general and its civil law members, Germany and France, in particular were chosen as a model. The first Law on Competition of 1991 [153], being quite incomprehensive and vague (due to the fact that some political compromise was tried to be reached), was almost completely replaced by a new Law on Competition in 2006 [154], which has, in turn, been subject to subsequent changes. As in the case

[149] Where the capitalised term 'Government' is used here and further below, a specific state body - generally, a meeting of ministers of the central government led by the Prime Minister (in Ukraine and Uzbekistan, the name 'Cabinet of Ministers' is rather in use) that is meant rather 'government' in some broad sense.

[150] Federal Antimonopoly Service, 'The History of Creation of the Antimonopoly Agency in Russia' (2018) <http://moscow.fas.gov.ru/page/6165> accessed 12 February 2018; Igor Artemev, Sergei Puzirevsky and Alexey Sushkevich, *Competition Law of Russia* (Higher School of Economics 2014) 33–38; Svetlana Avdasheva and Polina Kryuchkova, 'Law and Economics of Antitrust Enforcement in Russia' (Higher School of Economics, January 2013). Basic Research Program Working Paper 05/PA/2012 <https://www.researchgate.net/publication/272306845_Law_and_Economics_of_Antitrust_Enforcement_in_Russia>; Reynolds (n 2); Joskow and others (n 14), 335-338, 359-362; Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy' (n 17); Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (n 28); Rajabiun (n 131)

[151] Reynolds (n 2); Joskow and others (n 14), 335, 359-362

[152] Law of the Russian Federation on Natural Monopolies No. 147-FZ 17 August 1995 (Federal Assembly of the Russian Federation)

[153] Law of the Russian SSR on Competition and the Limitation of Monopolistic Activity in Commodity Markets No. 948-1 (n 110)

[154] Law of the Russian Federation on the Protection of Competition No. 135-FZ 26 July 2006 (Federal Assembly of the Russian Federation)

of other countries in transition, the initial focus of the Law was on provisions dealing with abuses of dominance, while some complex prohibitions on concerted practices were introduced at a later stage. A number of features distinguished the Russian competition legislation throughout its initial history (and, to extent, today). Hence, from the very beginning, the competition regulator got broad discretionary powers to find violations of competition law. Considering past ties between regulators' officials and management of many enterprises within the nomenklatura system and mass corruption, this has engendered some reluctance from the side of the regulator to penalise anticompetitive behaviour in many cases. Often, however, such reluctance was dictated not so much by some malicious interests, but by various social considerations, being advocated by enterprises' management and employees and public officials. This correlated with another feature of the applied competition rules, which was the readiness to consider a wide range of social and non-social efficiencies as a valid reason for the distortion of competition. Some other relevant features were a great focus on controlling excessive pricing and some close attention to economic activities of state authorities (in their broadest sense, from public decisions affecting competition to public procurement). [155]

It seems necessary to also make a brief note of the development of the country's consumer protection legislation. Generally, consumers, who would reasonably be expected to instigate competition in market economies, were unable do so in the USSR. No consumer laws were developed outside basic provisions in the Civil Code and no consumer protection institutions were created. In the absence of those and having few sources of supply, consumers played a limited role within the planning system and it is the monitoring of state planners and intra-state quality control bodies that was used to emulate consumer control to an extent. [156]

Though a relevant legislative framework with specific rules and own institutions has been gradually created in independent Russia, the engagement of consumers in the formation of competition policies has remained to be problematic. One part of this issue is considerable lack of consumer culture, which would have informed the desire to push forward consumer claims and be more active in promoting competition for deriving self-benefits (this also informs the underdevelopment of consumer associations). Another part of the problem is some specific legal and practical difficulties in the use of consumer rights and rights of private enforcement

[155] Joskow and others (n 14), 330-332, 335-338, 359-362; Knyazeva, *Antimonopoly Policy in Russia* (n 17) 176–212; Knyazeva, 'The Genesis of Monopolism and Competition in the Russian Economy' (n 17); Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (n 28); Rajabiun (n 131)

[156] James Nehf, 'Empowering the Russian Consumer in a Market Economy' (1993) 14(4) Michigan Journal of International Law; International Monetary Fund and others (n 19) Volume 3: 31-46

of competition law (introduced in 2011), the discussion of which is, however, beyond the scope of this research. [157]

2.2.2 Ukraine

As in Russia, results of the economic transition have been mixed in Ukraine. Quite similarly to Russia, a political confrontation at the top partially contributed to that, albeit the overall political context in Ukraine differed slightly from that in Russia. One of the main challenges faced by the Ukrainian government was great difficulties in the construction of national statehood caused by the lack of relevant administrative experience and relative heterogeneity of the population.

2.2.2.1 Transition of the 90s

Traditionally, Ukraine was an agrarian country – a breadbasket of the Russian Empire. During the Soviet period, it was able to noticeably modernise its chemical, mining and metallurgy industries, but that came at a high cost. The agrarian-based economy was devasted by massive collectivisation purges and forced drive to industrialisation. Ukraine also became dependent on oil, gas, and minerals from Russia. By importing resources and developing the aforementioned basic industries, the country, however, mastered the production of some high value-added export commodities in aircraft components, helicopters, electrical machinery, and pharmaceutics. [158]

Though some activists within Ukraine had longed for the separation from Russia long before the opportunity to grab it materialised, it appears that the idea of independence was somewhat spontaneous in 1990 and gained its strength only after Russia's rebellious apparatus had radicalised. Following the August Coup of 1991, the nationalistic ideas gained momentum and the independence was declared.

After gaining the independence, the country started to implement cautious reforms. Throughout 1992-1993, the price control was generally abolished and retail trade and currency exchange rules were relaxed. With that done, in contrast to Russia, the government did not proceed to further economic changes - apparently, being confused and preoccupied with the

[157] A. Khramtsov, 'Current Problems in the Sphere of Consumer Protection' (2018) 7(2) Siberian Journal of Economics and Management 129; Viktor Gurevich, 'The Legislation of the Russian Federation on Consumer Protection: Problems of Application' (Russian State University of Justice, 21 April 2017). Conference Paper; Yulia Verzun, 'Problems of Protecting Competition in Russia' (2016) 1(16) Mariy Law Review

[158] Sutela, 'The Underachiever' (n 27)

necessity to build new statehood. A slower approach to the transition did not, however, prove its reasonableness and Ukraine was hit by a crisis, which was even deeper than that in Russia. Generous budget subsidies and uncontrolled monetary emissions sparked hyperinflation. According to some studies, consumer inflation averaged 33.5% per month in 1992 and 47.1% in 1993. [159]

In 1991-1992, privatisation regulations, including the Concept for De-Statisation and Privatisation of State Enterprises, Land, and Housing [160] and three Laws on privatisation [161], were adopted. Under these documents, all state property was divided into six main categories: small enterprises; medium enterprises with a smaller level of assets per employee; medium enterprises with a higher level of assets per employee; large enterprises, enterprises in the military industry, and enterprises intended to be sold to foreign entities; unfinished construction objects; and state-owned shares in mixed ownership enterprises. Along with identifying different classes of state property, the Ukrainian government elaborated several privatisation methods: an auction, a tender, a non-commercial tender (in which bidders compete by offering investments or the adherence to certain conditions), lease with buyout, buyout, etc. Either cash or privatisation certificates were accepted, depending on a chosen privatisation method. [162]

Similarly to Russia, the Ukrainian privatisation of the 90s can roughly be divided into several stages. Though a detailed description of each stage seems superfluous, as, generally, all relevant events and effects did not differ much from those in Russia, some general outline may still be useful for understanding the Ukrainian context. The first stage of the Ukrainian privatisation, lasting from 1992 to 1994, proceeded similarly to other reforms of the Ukrainian government of that period. There did not seem to be much interest in accelerating the privatisation and restructuring the economy: procedural rules for initiating privatisation of SOEs were messy and intricate, while the Ministry for De-Statisation and De-Monopolisation, responsible for spurring and administering privatisation, was conservative, slow, and lacked

[159] John Tedstrom, 'Ukraine: A Crash Course in Economic Transition' (1995) 37(4) Comparative Economic Studies 49; Dabrowski (n 25); Sutela, 'The Underachiever' (n 27)

[160] Resolution on the Concept for De-Statisation and Privatisation of State Enterprises, Land, and Housing No. 1767-XII 31 October 1991 (Verkhovna Rada of Ukraine)

[161] Law of Ukraine on Privatisation of Property of State Enterprises No. 2171-XII 6 March 1992 (Verkhovna Rada of Ukraine); Law of Ukraine on Privatisation Certificates No. 2173-XII 6 March 1992 (Verkhovna Rada of Ukraine); Law of Ukraine on Privatisation of Small State Enterprises (Small Privatisation) No. 2544-XII 7 July 1992 (Verkhovna Rada of Ukraine)

[162] Sutela, 'The Underachiever' (n 27); Tedstrom (n 159)

necessary political authority. A relatively small number of enterprises were, consequently, privatised during this first stage. [163]

In 1994, with the election of new President Leonid Kuchma, the transformation of the economy became a top priority. After a list of property not subject to privatisation had been approved, mass privatisation was pushed through with non-tradeable privatisation certificates being distributed among 46 million Ukrainians and with regional privatisation auction centres being established. Simultaneously with the distribution of the certificates, special rules for the creation of intermediaries, investment trusts and investment companies, were set allowing such organisations to accumulate privatisation certificates and to use them for acquiring shares of SOEs (up to certain limits). Shortly after the distribution of privatisation certificates, transferable compensation certificates were also issued for the privatisation purposes; they were intended to cover losses of those whose deposits with the State Savings Bank had depreciated after the lifting of the price control in 1992. [164]

Following the end of the mass privatisation (roughly, by the end of 1997), the Ukrainian government launched the third stage of the privatisation, which has been continuing up to the present day. Similarly to Russia, it has been mainly aimed at replenishing the state treasury. Generally, about 21,000 SOEs were privatised by 1999 with about 68% of all Ukrainian SOEs having ended up in private hands. According to some studies, this number has remained largely unchanged since then. [165]

As was noted above, the results of Ukrainian's reforms of the 90s, including the privatisation, were not too different from those in Russia. Having received a relatively rich inheritance from the collapsed Union, enjoying closeness to the EU, and being in part subsidised by Russia, Ukraine had the potential to make a rapid transformation. It turns out, however, that the collapse of production links with the rest of the Union, outflow of country's professionals, and lasting indecisiveness of top officials rendered a significant negative impact. As the

[163] Bate Toms and Dmytro Korbut, 'Privatisation in Ukraine' in Marat Terterov (ed), *Doing Business with Ukraine* (3rd edn. GMB; American Chamber of Commerce in Ukraine 2005); Katrin Elborgh-Woytek and Mark Lewis, 'Privatisation in Ukraine: Challenges of Assessment and Coverage in Fund Conditionality' (International Monetary Fund, 1 May 2002). IMF Policy Discussion Paper 02/7 <https://www.elibrary.imf.org/view/journals/003/2002/007/003.2002.issue-007-en.xml>; Snelbecker (n 26); Tedstrom (n 159)

[164] Vita Strukova, 'Privatisation in Ukraine in the Context of Public-Private Partnership Processes' (2016) 2(2) Baltic Journal of Economic Studies 143; David Smallbone and others, 'Government and Entrepreneurship in Transition Economies: The Case of Small Firms in Business Services in Ukraine' (2010) 30(5) The Service Industries Journal 655; Snelbecker (n 26); Kuzio, 'Regime Type and Politics in Ukraine under Kuchma' (n 29)

[165] Elborgh-Woytek and Lewis (n 163)

development of the reforms was too slow, momentum was lost and the Ukrainians, disappointed in the reforms and appalled by the Russian experience, were not in rush to participate in the privatisation and to support further changes. This apathy, the economic instability, and the absence of stable state institutions eventually led to the subversion of the reforms and instead of competitive markets and an institution of effective private owners, a favourable ground was created for the thriving of numerous oligarchs. [166]

It is noteworthy that the apparent sluggishness and indecisiveness of the Ukrainian government was to a notable extent caused by that specific political environment that formed in the country in the 90s. In contrast to the other FSU states, the Ukrainian Parliament, the Verkhovna Rada, managed to become the country's most influential political institution with no father figure or an influential group having emerged, albeit Ukrainian Presidents made many attempts to cement their power. As appears, however, that had an ambiguous effect on the Ukrainian statehood. The Rada was utterly split from the first days of Ukraine's independence and dozens of unstable political parties with competing visions of the majority of matters emerged. The absence of unity made members of the Rada easy targets for political lobbyists with criminals and nouveau riches getting executive positions and parliamentary mandates. That entailed a much tighter connection between capital and political power within the highest echelons of the Ukrainian government. Rampant corruption started to plague the country and the influence of private interests on economic decision-making became pronounced. Numerous political scandals of the period indicate that the county's Presidents and Prime Ministers themselves were keen to strengthen their tights with wealthiest Ukrainians for consolidating power by financial means. [167]

2.2.2.2 Post-Kuchma Ukraine of the 2000s and the 2010s: political challenges and troubled reforming

As in case of Russia, the 2000s became a prosperous period for Ukraine with the annual growth of GDP of approximately 7%. This, however, did not make the country more stable and the presidential elections of 2004 brought a noticeable confrontation known as the Orange Revolution. Allegations were made than the election results were rigged in favour of Kuchma's protégé Viktor Yanukovych and thousands of protesters demanded a revote. After the revote,

[166] Sutela, 'The Underachiever' (n 27)

[167] Anders Åslund, 'Comparative Oligarchy: Russia, Ukraine and the United States' (Center for Social and Economic Research, 8 April 2005). CASE Network Studies and Analyses 0296 <http://www.case.com.pl/upload/publikacja_plik/4931074_SA%20296last.pdf>; Kuzio, 'Impediments to the Emergence of Political Parties in Ukraine' (n 29); Kuzio, 'Regime Type and Politics in Ukraine under Kuchma' (n 29)

another candidate, Viktor Yuschenko, was brought into power. Some role in such an overturn was played by accusations of Yanukovich in privatisation machinations. [168]

The public dissatisfaction with the privatisation in general was readily addressed by the new government, which made a promise to revisit the most questionable privatisation deals. In contrast to Russia, where steps were made to reinstate the full state control over particular property, Ukrainian officials spoke more of reprivatisation, implying that additional payments would be made by owners of privatised property sold suspiciously cheaply or that allegedly illegal privatisation deals would be cancelled with new privatisation auctions being conducted. In 2005, the first move was made, when results of an auction for privatisation of Ukraine's largest steel combine Kryvorizhstal were invalidated and a new auction was successfully held. Being seen by the general public as a positive move, this, however, remained to be an exception rather than a practice and only few reprivatisation steps were further made. Some analysts saw those rare occasions as largely being public flogging, aimed at gratification of the Ukrainian public, and a result of personal feuds between vying groups of Ukrainian oligarchs. [169]

In 2008, after the Great Recession had reached Ukraine, the country entered the period of economic turbulence. The Ukrainian government had to take numerous anti-crisis measures to save the country's largest financial institutions and industrial enterprises with the state ownership in particular sectors having increased substantially (e.g. three major private banks came under state control). After a short period of recovery in 2010-2011, the Ukrainian economy was in recession again. In 2014, following political riots that led to the overthrow of President Yanukovych, who had won the presidential elections of 2010, the loss of Crimea, the conflict in Donbass, and the rupture of trade relations with Russia, Ukraine plunged into a deeper crisis. The size of its economy shrunk by almost 7% in 2014 and by almost 11% in 2015. The government had to resort to a combination of market and non-market measures to stabilise the economy, though actual implementation of managerial decisions proved to be significantly impeded by the unceasing political unrest. Several draft laws on nationalisation were put forward by members of the Rada, which, however, tended to be of a revengeful nature, focusing on nationalising the property owned by Russia-based companies and that of expelled Ukrainian officials. None of these drafts have, however, come into law. Nevertheless,

[168] Fredirk Erixon, 'Ukraine after the Crisis: Recovery and Reform, not Revolution or Russification' (European Centre for International Political Economy, April 2010). ECIPE Policy Brief 1653-8994 <https://ecipe.org/wp-content/uploads/2014/12/ukraine-after-the-crisis-recovery-and-reform-not-revolution-or-russification.pdf>; Sutela, 'The Underachiever' (n 27); Kuzio, 'Impediments to the Emergence of Political Parties in Ukraine' (n 29)

[169] Sutela, 'The Underachiever' (n 27); Erixon (n 168)

several nationalisation (or semi-nationalisation) moves were yet made by the Ukrainian government with the 61% stock of the Zaporozhye Aluminium Industrial Complex being reclaimed from Russia's Oleg Deripaska in June 2015 and the country's largest bank PrivatBank being nationalised in December 2016 (as previously owned by Ukrainian oligarch Ihor Kolomoyskyi). [170]

Eventually, as of today, more than 4,000 enterprises are under state control in Ukraine (the number seem to vary across different sources, as no clear register has yet been drawn up by the government). They employ about 1 million Ukrainians and produce about 15%-25% of national GDP. The state is indisputably dominant in agriculture, fishery and forestry, banking, the power industry, transportation and utilities; it further maintains strong presence in the oil and gas, IT and some manufacturing (e.g. aircraft and petrochemical) industries. [171]

The state continues to closely monitor operations of SOEs with the monitoring functions being scattered across a number of institutions. The State Property Fund, line ministries, and regional authorities (depending on the type of an SOE) perform the functions of the owner, whereas the Ministry of Economy and the Ministry of Finance are responsible for directing and monitoring their overall functioning and profit distribution respectively (with the Ministry of Finance also acting as an owner of some SOEs, including state-owned banks). The role of line ministers in particular is generally pronounced, albeit, as in Russia, their number and functions have been optimised with the scope of their control being gradually narrowed. Some SOEs (mainly large state holding companies and state joint-stock companies being successors of restructured ministers, including Naftogaz, the Ukrainian Railways, etc.) enjoy a greater degree of independence from their respective regulators, being themselves capable of informing semi-regulatory market alterations. It is noteworthy, however, that unlike the Russian government, the Ukrainian one is determined to continue privatisation (partially, owing to the pressure of country's foreign donors). Thus, in 2018, about 200 small SOEs were intended to be privatised, though the continuing macroeconomic instability and the low quality of the assets undermined this plan. [172]

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[170] Sutela, 'The Underachiever' (n 27); Tedstrom (n 159)

[171] Alexander Berchiy, 'Overview of the State Sector of the Ukrainian Economy' (Ernst and Young, January 2017) <https://hub.kyivstar.ua/wp-content/uploads/2017/03/KSBD-trends_01_2017_print.pdf>; David Brown and others, 'Is Privatisation Working in Ukraine? New Estimates from Comprehensive Manufacturing Firm Data, 1989-2013' (Institute of Labour Economics, August 2015). ILE Discussion Paper 9261 <https://ftp.iza.org/dp9261.pdf>

[172] Tatiana Kyselova, 'The Role of State in Ukrainian Business: Violent Bespredel and Profitable Partner' (2015) 0(1) Kyiv-Mohyla Law and Politics Journal 83; Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45)

2.2.2.3 Formation of Ukraine's competition legislation and competition authorities

Speaking of the history of the Ukrainian competition legislation, it may be noted that, similarly to Russia, the Ukrainian government started to show some genuine interest in it only in the 2000s. The country's first competition law, the Law 'On Limiting Monopolism and Preventing Unfair Competition in Entrepreneurial Activity', was adopted in 1992 [173] and mainly focused on abuses of dominance, government discrimination of businesses, and unfair competition. Though provisions on concerted actions and mergers were included in the Law, they were not particularly well developed. The Law did not provide for the creation of a competition regulator, but in 1993, a special Law [174] established the Antimonopoly Committee of Ukraine. In 1996, the unfair competition provisions of the Law of 1992 were expanded and transferred into a separate Law on the Protection against Unfair Competition [175]. By 2001, the inadequacies of the 1992 Law had become glaring enough to warrant its partial repeal and the adoption of the current Law on the Protection of Economic Competition [176]. Since then, numerous changes have been introduced to the later Law. Generally, great efforts have been made to harmonise the Ukrainian competition legislation with that of the EU, especially, after the signing of the EU-Ukraine Association Agreement in 2014 [177], and a large set of rules is now in place with some bigger gaps being filled. It is noteworthy that based on the requirements of the Association Agreement [178], the Law on State Aid to Business Entities was adopted in July 2014 [179] and entered into force in August 2017 with the relevant guidelines being further issued by the Antimonopoly Committee in November 2017. [180]

Although the Ukrainian competition regulatory framework has been substantially strengthened over the years, institutional powers and the advocacy capacity of Ukraine's

37-56, 79–88, 122-124; World Bank, 'The System of Financial Oversight and Management in State-Owned Enterprises in Ukraine' (n 46) 21–31; Pop and others (n 48) 1-3, 11-21; Berchiy (n 171)

[173] Law of Ukraine on Limiting Monopolism and Preventing Unfair Competition in Entrepreneurial Activity No. 2133-XII 18 February 1992 (Verkhovna Rada of Ukraine)

[174] Law of Ukraine on the Antimonopoly Committee No. 3659-XII 26 November 1993 (Verkhovna Rada of Ukraine)

[175] Law of Ukraine on the Protection against Unfair Competition No. 237/96-VR 7 June 1996 (Verkhovna Rada of Ukraine)

[176] Law of Ukraine on the Protection of Economic Competition No. 2210-III 11 January 2001 (Verkhovna Rada of Ukraine)

[177] Association Agreement between the European Union and its Member States and Ukraine 29 May 2014 OJ L 161

[178] ibid, Articles 262-267

[179] Law of Ukraine on State Aid to Business Entities No. 1555-VI 1 July 2014 (Verkhovna Rada of Ukraine)

[180] Organisation for Economic Co-operation and Development, 'OECD Reviews of Competition Law and Policy: Ukraine' (n 48) 9-10, 13-14; Organisation for Economic Co-operation and Development, 'Progress in Investment Reform in Ukraine' (n 30) 69–71; Tedstrom (n 159)

Antimonopoly Committee have remained relatively weak. Based on a relevant review of the OECD [181], the agency has been chronically underfunded and staffing is still a big issue. It lacks some powers and instruments for cooperation with other state agencies and courts that impairs effective enforcement. Moreover, the Committee is heavily overloaded with many additional responsibilities similar to those that have been conferred upon Russia's FAS (e.g. related to privatisation, advertisement, public procurement, etc.). As the OECD review summarises, the Committee currently resembles 'a start-up institution with a renewed commitment to achieve the aims of the 1990s competition reforms'. Considering the market environment of Ukraine, where political power and power of large capital are interwoven closely, the Committee's impotence represents a high threat to the country's transition. [182]

Taking a brief look at Ukraine's legislation on consumer protection, it is notable that the country was the first FSU state to adopt the relevant legislation [183] and, over the years, a more or less workable regime has been created. Nevertheless, aside from its other problems (low fines, the lack of systematic and profound market reviews and quality checks, etc.), one of its major flaws, from the competition policies perspective in particular, is, as in case of Russia, lack of due support for the development of consumer culture. Hence, among others, no independent organisations or consumer associations have been backed to ensure that alternative ways to protect consumer rights are available. The State Service for Consumer Protection remains the only option to convey consumer concerns and, often, it has been lacking independence, initiative, and persistence to act as a powerful advocate. [184]

2.2.3 Uzbekistan

Uzbekistan's transition path has been somewhat different from those of Russia and Ukraine - country's liberalisation reforms were largely halted at the end of the 90s and were only returned to some time after the death of country's long ruling President Islam Karimov in 2016. Owing to that, the scale of the statism - competition policies conflict is likely to be the greatest in the country.

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[181] Organisation for Economic Co-operation and Development, 'OECD Reviews of Competition Law and Policy: Ukraine' (n 48) 9-10, 23-31

[182] Yevgeniy Stotyka, 'The Role of the Antimonopoly Committee in the Development of Competition in Ukraine' (August 2004) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=613262>; Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (n 28);

[183] Law of Ukraine on the Protection of Consumer Rights No. 1023-XII 12 May 1991 (Verkhovna Rada of Ukraine)

[184] Oksana Holovko-Havrysheva, 'Legal Regulations of the Consumer Protection in Ukraine' (2020) 4 Przegląd Europejski 61; I. Tsaruk and Yu. Shpilevskaya, 'Protection of Consumer Rights: Foreign Experience and Lessons for Ukraine' (2014) 7 Vestnik of the Mariupol State University 65

2.2.3.1 Gradualist transition efforts of the 90s

Generally, the Uzbek transition has had a slower pace and has been less traumatic for the country's population than those of Russia and Ukraine. Having declared its independence in August 1991, Uzbekistan became fully sovereign at the end of 1991 with the country's pre-collapse government under the leadership of Islam Karimov having remained in power. In contrast to Russia and Ukraine, the Uzbek government faced relatively limited opposition. Though some threat was posed by Islamic fundamentalists, decisive measures and generous promises allowed to suppress the radicals. [185]

Economically, prior to the independence, relatively high populated Uzbekistan (about 20.5 million people as of 1990) was primarily an agricultural state with cotton contributing to about 60% of the agricultural output. The production of cotton resulted in forward linkages in the economy in terms of ginning and textiles production. Other industries that were fairly well-developed were electricity generation, non-ferrous metallurgy, and mining of precious metals, particularly gold (currently, the country ranks among the world's top 10 producers). Some major industrial complexes within the country also included several oil refineries, an aircraft assembling plant, and factories producing agricultural machinery. [186]

Initially, throughout 1991-1993, similarly to Ukraine, the Uzbek government was not in rush to take decisive economic steps, closely watching the situation in Moscow. However, after it had become clear that the disintegration of the Soviet Union had been irreversible, Uzbekistan began to look for its own way of transition. Largescale social problems, plaguing the other FSU states prompted Karimov's government to refuse from the common recipe of radical reforms in favour a more gradualist approach and even the 'first generation' policy reforms, such as the abandonment of the price control and the liberalisation of trade and foreign exchange were slower to develop in Uzbekistan. An ideological basis for such a gradualist transition under close supervision of the state was later developed by Karimov in his many books, promoting 'Uzbekistan's own model of economic development'. [187]

The first economic reforms started by the government had some repercussions similar to those observed in Russia and Ukraine, but the gradualism allowed to avoid the most traumatic

[185] David Bartlett, 'Economic Recentralisation in Uzbekistan' (2001) 42(2) Post-Soviet Geography and Economics 105

[186] R. G Gidadhubli, 'Economic Transition in Uzbekistan' (1994) 29(6) Economic and Political Weekly 294; Broadman (n 31); Kaser (n 32); Asian Development Bank, 'Country Assistance Program Evaluation for Uzbekistan' (n 34) 1-2, 6

[187] Broadman (n 31); Bartlett (n 185); Gidadhubli (n 186); Asian Development Bank, 'Evaluation Study' (n 34) 6, 9-10; Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (n 34) 1, 8, 11

aftershocks. Having kept the price control for a number of goods, limited salaries growth, shielded markets from mass inflow of imported goods, and restricted free currency exchange, the Uzbek government managed to tame inflation and, thus, to prevent consequential negative effects, including mass bankruptcy of enterprises. [188]

Being generally satisfied with the gradualism, the government transposed it to privatisation. The initial legislation on privatisation, including the Law on Property of 1990 [189] and the Law on De-Statisation and Privatisation of 1991 [190], was based on corresponding Soviet drafts of the pre-collapse period and provided for a variety of privatisation methods, including mass voucher privatisation. However, after the initial stage of privatisation of small enterprises and housing stock had been completed in 1993, the government decided to retain its control over a long list of 'strategic' SOEs and refused to proceed to mass privatisation, having criticised it as yet another form of socialist equalisation and a means of pointless fragmentation of ownership rights. From 1994 onwards, the majority of medium-sized and large enterprises were privatised on a case-by-case basis with blocking stakes being retained by the state and some limited number of shares being distributed amongst enterprises' employees. Investors from far abroad were usually preferred with many privatisation deals being structured to fit a particular investor. Although private individuals from Uzbekistan and the FSU made many attempts to capture privatised property in the way it was done in other post-Soviet states, the Uzbek government kept its tight grip over the largest pieces of infrastructure and production facilities. This partially contributed to the fact that, in contrast to Ukraine where private wealth was able to spread its power to political strata, the Uzbek oligarchy took a hidden form and it has been political influence and public office that determined the ability to accumulate wealth. [191]

Despite that a seemingly more thought-through approach was opted for, the Uzbek privatisation of the 90s was not more successful than privatisation in Russia and Ukraine. According to some estimates, no more than 50% of SOEs were privatised by 2000 with the

[188] Kaser (n 32); March, 'From Leninism to Karimovism' (n 33); March, 'State Ideology and the Legitimation of Authoritarianism' (n 33); Asian Development Bank, 'Country Assistance Program Evaluation for Uzbekistan' (n 34) 2, 6

[189] Law of the Republic of Uzbekistan on Property No. 152-XII 31 October 1990 (Supreme Soviet of the Republic of Uzbekistan)

[190] Law of the Republic of Uzbekistan on De-Statisation and Privatisation No. 425-XII 19 November 1991 (Supreme Soviet of the Republic of Uzbekistan)

[191] Kaser (n 32); Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (n 34) 11–16

privatisation programmes of 1994[192] and 1998[193] having remained underperformed. As in Russia and Ukraine, those common Uzbek citizens that bought shares (being oftentimes compelled to do so by their employees – state agencies or SOEs) were not able to become effective owners. Foreign investors, who entered the market in the hope of gradual liberalisation, were soon disillusioned with the slow pace of the reforms and left the country, discouraging potential newcomers. Local business entities, including mutual investment funds (established at some point at the behest of the government), also struggled to benefit from their new investment. Since blocking stakes were in most cases retained by the state, few privatised enterprises could operate freely, without serving as an additional source of funding for state's social needs.[194]

Generally, it appears the idea of gradualism became a doubled edged sword for the country's economy, having brought some positives at the beginning of the transition, but having become a notable impediment at its later stages. Although social upheavals were avoided, the transition eventually fell into a stupor, being confined by its own ideological frameworks, developed by President Karimov. According to some researchers, a turning point was reached in October 1996, when the government realised that a poor cotton harvest might affect the country's foreign trade balance and introduced strong protectionist measures, including the suspension of currency convertibility, the imposition of high customs tariffs, and heavy subsidisation of SOEs. This seriously affected previous liberalisation efforts and spawned many negative effects. In attempts to tackle the problems, the government elaborated intricate response measures, including forcing banks to act as state units of financial control, centralising trade in so-called 'highly liquid' goods[195], and tightening control over cash supply, which, however, caused new regulatory distortions. The implementation of further liberal reforms began to be regularly postponed and, with President Karimov's decrepitude, was almost completely abandoned until his death in 2016.[196]

[192] State Programme for Developing the Processes of De-Statisation and Privatisation No. 171 29 March 1994 (Cabinet of Ministers of the Republic of Uzbekistan)

[193] Resolution on Enhancing Privatisation and Increasing Profits from Sale of State-Owned Property in 1999-2000 No. 525 17 December 1998 (Cabinet of Ministers of the Republic of Uzbekistan)

[194] Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (n 34) 11–16

[195] The definition embraces so-called 'strategic' goods (e.g. electricity, natural gas, coal, petrol, etc.) and some other categories of goods.

[196] Alexandr Akimov and Brian Dollery, 'Uzbekistan's Financial System: An Evaluation of Twelve Years of Transition' (2006) 48 Problems of Economic Transition; March, 'From Leninism to Karimovism' (n 33); March, 'State Ideology and the Legitimation of Authoritarianism' (n 33); Asian Development Bank, 'Country Assistance Program Evaluation for Uzbekistan' (n 34) 6–8; Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (n 34) ii–iv, 8; Bartlett (n 185)

2.2.3.2 Stagnation in the transition in the 2000s and the 2010s

As noted above, from the late 90s and until very recently, the Uzbek transition was actually halted. Though the real data on the performance of the Uzbek economy are unaccusable for objective assessment, the general consensus seems to be that it has been stagnant from the late 90s onwards with some moderate growth being in place in particular years. [197]

The state continues to represent the most significant player across all Uzbek markets. Owing to distortions in the official statistics (only SOEs directly owned by the state have been considered as a part of the country's 'state sector'), it is hard to provide exact numbers. Based on the official data, in 2017, the state sector (about 38.000 SOEs) accounted for 47% of the total industrial output in 2017. More objective estimates, made, for example, by the ADB, suggest that more than 55% of GDP are actually contributed by SOEs. The state is absolutely dominant in the banking and financial sector (more than 90% of bank assets are controlled by the state), power energy, oil and gas, mining, metallurgy, transportation, vehicles manufacturing, chemicals, cotton processing, provision of utility and social services, and some others industries. The state presence is substantial in virtually every other industry with some non-dominant SOEs enjoying semi-regulatory powers. [198]

Though some privatisation efforts have been made after 2000, they were largely unsuccessful. Albeit some seemingly lucrative assets were offered to potential foreign investors, including, for example, stakes in Uzbektelecom (the country's dominant telecom company) in 2001 and in the Uzbek Railways in 2004, potential investors were scared off by the desire of the government to retain some control over privatised entities and to tie liquid and non-liquid assets. In cases where privatisation efforts, nevertheless, succeeded, but did not bring any of initially anticipated results or involved a certain degree of dishonesty, the government was even more vengeful than its Russian and Ukrainian counterparts. Privatisation decisions and investment agreements were readily cancelled with relevant assets being returned to the state. Some examples here are the expulsion of Wimm-Bill-Dann, a Russian dairy company, in 2010 and Oxus Gold, a UK-Uzbek gold mining venture, in 2011, being both charged with tax evasion. [199]

[197] Asian Development Bank, 'Country Assistance Program Evaluation for Uzbekistan' (n 34) 7–8, 70-71; Asian Development Bank, 'Evaluation Study' (n 34) 1-2, 40-41

[198] Abdullaev (n 47); Akimov and Dollery (n 196)

[199] Asian Development Bank, 'Country Assistance Program Evaluation for Uzbekistan' (n 34) 7, 82; Asian Development Bank, 'Evaluation Study' (n 34) 3, 43; Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (n 34) 11-13, 29-33, 41-43; Abdullaev (n 47)

Making a note of the organisation of industrial governance in the Uzbek economy, little was done to dismantle previously existing mechanisms of administrative control. In the early 90s, most line ministries were re-organised into concerns and holding companies, who were then commercialised (turned into joint-stock companies), but retained most functions of the disbanded ministries, including the supervision of the implementation of industrial policies. Virtually every industry in modern Uzbekistan is consequently dominated by an incumbent SOE, enjoying some regulatory powers and a mandate to manage a portfolio of subservient SOEs. CEOs of some of such SOEs have high bureaucratic ranks with much political weight attached; thus, for example, the position of CEO in such SOEs as Uzavtosanoat (overseeing the car manufacturing) and Uzbekneftegas (the oil and gas industry) is formally indicated as being equivalent to the rank of a minister. [200]

As in the Soviet times, SOEs within each industry are closely integrated with one another, being ultimately controlled by one of incumbent SOEs above. Some state agencies can also interfere into the SOEs' functioning. Hence, the State Assets Management Agency performs functions of an owner or participates in corporate governance of a number of SOEs. The Ministry of Finance controls country's state-owned banks, excises direct control over financial flows of largest SOEs, and sets or approves prices for products of natural monopolies (usually, SOEs) and specific SOEs as well as the abovementioned 'highly liquid' goods. [201] The Ministry of Economy (along with line ministries that have been preserved e.g. the Ministry for Agriculture) controls the SOEs' overall performance and drafts plans, orders, and so-called 'material balances', providing for that how goods produced by SOEs shall be distributed (somewhat similarly to Soviet Gosplan). [202]

If to summarise, the economic environment of Uzbekistan in the 2020s to an extent demonstrates the essence of those problems of the whole FSU region that are put at the centre of this research. Uzbekistan has maintained statism to the degree reminiscent of the Soviet

[200] Asian Development Bank, 'Private Sector Assessment for Uzbekistan' (n 34) 25–28; Abdullaev (n 47); Bartlett (n 185)

[201] Among others, Clauses 3-5 of the Regulation on the Order of Forming, Declaration (Approval) and Setting of Regulated Prices (Tariffs) for Goods (Works, Services) and State Control over Their Application No. 239 28 October 2010 (Cabinet of Ministers of the Republic of Uzbekistan); Clauses 2 and 4 of the Resolution on the Measures for State Control over the Production and the Sale of Particular Categories of Goods No. 532 23 December 1998 (Cabinet of Ministers of the Republic of Uzbekistan)

[202] See, among others, the Regulation on the Order of Development and Submission for Approval of Material Balances No. 124 28 June 2006 (Cabinet of Ministers of the Republic of Uzbekistan); Clauses 2 and 7 of the Resolution on Further Implementation of Market Mechanisms for the Sale of Highly Liquid Products, Resources, and Materials No. 57 5 February 2004 (Cabinet of Ministers of the Republic of Uzbekistan)

times and it has become a conduit to its unceasing economic stagnation. It is fair to note that since the death of President Karimov in 2016, the new government of Shavkat Mirziyoyev has been making some effort to turn the tide. Rigorous foreign exchange rules have been abolished, new tax and investment legislation has been developed, and some important procedural rules, including those for the registration of companies and engagement in trade, have been liberalised. Plans have also been declared to gradually decrees the state presence in the economy, including by, among others, reforming state concerns (some of them have already been reorganised or liquidated [203]).

Though the above changes are most welcome, it is, nevertheless, still hard to say whether the new government will have sufficient political will and will be able to take the Uzbek Soviet-styled economy out of its current limbo. Many of taken decisions look declaratory, fitful, and feverish with no clear strategies being in place. It is of particular concern that with old barriers being removed, new ones are erected, among others, through the creation of new powerful SOEs (some recent examples include the creation of the National Energy Saving Company, being the only company that is authorised to supply and service energy saving solutions for SOEs and state agencies [204], and the National Company Uzagroexport, having received the exclusive right to export fruits and vegetables produced in Uzbekistan [205]).

2.2.3.3 Formation of Uzbekistan's competition legislation and competition authorities

Turning to the country's competition legislation, one may note that Uzbekistan's progress in this regard has been very modest. Although a set of relevant Laws, including the Laws on the Limitation of Monopolistic Activity [206] and on Natural Monopolies [207], was adopted during the

[203] For example, on 7 November 2017, the State Concern Uzpharmsanoat, controlling the Uzbek pharmaceutical industry, was liquidated. Its regulatory functions are now with the newly established Agency for the Development of the Pharmaceutical Industry. See the Preface, Clauses 1, 2, 5, and 10 of the Resolution on the Measures for Cardinal Improvement of the Management of the Pharmaceutical Industry No. UP-5229 7 November 2017 (President of the Republic of Uzbekistan)

[204]See the Resolution on Further Implementation of Modern Energy Efficiency and Energy Saving Technologies No. PP-3238 23 August 2017 (President of the Republic of Uzbekistan), particularly, Clause 3

[205] The company was established in 2016. Some of its rights, including the named one, were revoked in 2017, but it retained a number of exclusive benefits along with some regulatory powers. See the Resolution on the Establishment of the Specialised Foreign Trade Company for Exporting Fresh and Processed Fruits and Vegetables 'Uzagroexport' No. PP-2515 7 April 2016, as amended on 22 September 2016 and 26 May 2017 (President of the Republic of Uzbekistan), particularly, Clauses 1, 2, 7, and 8.

[206] Law of the Republic of Uzbekistan on the Limitation of Monopolistic Activity No. 623-XII 2 July 1992 (Oliy Majlis of the Republic of Uzbekistan)

[207] Law of the Republic of Uzbekistan on Natural Monopolies No. 398-I 24 April 1997 (Oliy Majlis of the Republic of Uzbekistan)

90s, being later revised and (or) extended, the regulatory environment has remained stagnant. The current Law on Competition [208] remains insufficiently complex to address a variety of market conditions and employs some obsolete instruments, including, for example, a state-maintained register of dominant entities. [209]

The same relates to the State Committee for De-Monopolisation, established as a special department of the Ministry of Finance in 1996, transformed into a full-fledged state agency under the Cabinet of Ministers in 2000, restructured in 2005 and in 2010, merged with the State Committee for Managing State-Owned Property in 2012, and revived again as the Antimonopoly Committee in 2019. As the competition agencies of Russia and Ukraine, it has always been overwhelmed with responsibilities, underfinanced, and understaffed. Employing specialists of former Goskomtsen, the Committee has been particularly pre-occupied with the price controls, scrupulously monitoring prices for 'highly liquid' goods. Other prioritised directions of its activity have been somewhat mechanical clearance of mergers and acquisitions transactions and combating unfair competition with the focus on adverse marketing, discreditation of competitors, and consumer protection. Being under control the Ministry of Finance and, then, the Cabinet of Ministers, the Committee has always been cautious to question anticompetitive behaviour of state agencies and SOEs, albeit it has not lacked relevant enforcement powers. [210]

Not much can be said about the country's consumer protection legislation. Though it was formed yet in the 1990s [211], it has generally been lagging behind that of Russia and Ukraine. It seems that due to the presence of massive and powerful state sector, the problem of lack of due representation of consumers by strong independent entities is especially acute in Uzbekistan. To an extent like in the Soviet times, Uzbek state-owned producers are almost completely impervious to signal from consumers with the Consumer Protection Agency under the Antimonopoly Committee being of little help in this regard. [212]

[208] Law of the Republic of Uzbekistan on Competition No. ZRU-319 6 January 2012 (Oliy Majlis of the Republic of Uzbekistan)

[209] Broadman (n 31)

[210] ibid

[211] Law of the Republic of Uzbekistan on Protecting Consumers' Rights No. 221-I 26 April 1996 (Oliy Majlis of the Republic of Uzbekistan)

[212] Sputnik, 'How to Protect Consumer Rights? One of the Most Acute Will be Resolved in Uzbekistan' (15 March 2021) <https://uz.sputniknews.ru/20210315/kak-zaschitit-prava-potrebitelya-v-uzbekistane-reshat-odnu-iz-samykh-ostrykh-problem-17767756.html> accessed 15 October 2021

2.3 Conclusion

This Chapter has provided an in-depth analysis of the history of transformations of the state sector and the development of competition policies in Russia, Ukraine, and Uzbekistan, since the times of the late Soviet Union. This appears important for understanding the factors (barriers) that have informed the current reliance on statism and underdevelopment of the competitive environment within the region. It also highlights that antagonism between Soviet-styled paternalistic techniques and goals of the competition polices that is likely to exist in the FSU.

As the analysis showed, each of the studied FSU states has to some degree returned to statism and the pro-active use of the state sector, despite the fact that the ultra-statism employed by the Soviet Union had proven to be an economic failure. Obsolete Soviet economic policy approaches have been reinvented, albeit being wrapped differently e.g. as a stabilisation policy in Russia or a 'unique economic path' in Uzbekistan. Generally, as appears, such return was informed by the unsuccessful course of reforms, causing much social resentment and seeming too radical in the context of the region's economic background and the Soviet mentality.

A reasonable question here is why the reforms of a similar nature conducted in Eastern and Central Europe were way more successful (at least, in such countries as former Czechoslovakia, Hungary, the former German Democratic Republic, and Poland). It seems that the right understanding here was captured by experts of the World Bank who produced a summative analytical report on the results of 10 years of the transition in Eastern Europe and the FSU in 2002 [213]. The report talks about the so-called low-level reform equilibrium or the partial reform paradox, implying that a strong commitment to the reforming has to exist within the society and government to complete the post-socialist transition. Winners from early reforms, such as liberalisation and privatisation, – insiders or oligarchs – are likely to oppose subsequent reforms when these reduce their benefits. Where the risk of oligarchs and insiders blocking anything more than partial reform is high, potential new entrants and state workers either reject reform or support only partial reform, as this imposes lower adjustment costs. Yet it is partial reforming – liberalisation without discipline and with selective encouragement, where the winners claim for the revitalisation of familiar vertical links, while the public opposes further changes – that raises barriers to entry and 'makes capture of the state by oligarchs and insiders a self-fulfilling prophecy'. In conditions of such ominous equilibrium, the government

[213] World Bank, *Transition, the First Ten Years* (n 30) 91–95

must, thus, be sufficiently strong and active to constrain the winners and credible enough to follow through with the long and difficult process of economic reform. [214]

As follows from the analysis in the Chapter, the governments that headed the FSU states immediately after the dissolution of the USSR came to power as a result of political struggles inside local apparatuses and within the whole Union. No political consensus existed that could shape the initial economic policy or give impetus to the transition process; the governments enjoyed limited credibility and in the context of collapsed institutions, the creation of stable statehood became of concern rather than the reforming the economy. In addition to that, the Soviet public was apathetic and exhibited utter indifference to the economic component of the reforms. There was little understating of ongoing economic transformations and, generally, though there was some demand for changes, the people were not negative about the pre-Gorbachev administrative system, expecting the same, but without the total shortages. As suggested by some studies, in contrast to Eastern and Central Europe, where all the pieces of the socialist order became repulsive for the population as parts of an alien regime imposed by the USSR, socialist dogmas and the relevant economic system did not conflict with the worldview of the majority of the Soviet people and were adjusted to the national character, having merged with it into a single whole. Although visible manifestations of the communist ideology were easily abandoned to express long suppressed discontent with party leaders, no real enthusiasm was there when it came to shaking the foundations. [215]

It appears that in the context of the above, the FSU states were fated to get into the trap of partial reforms. Although Eastern and Central European states chose various transition paths, similarly to the FSU (with shock therapy like approaches in, for example, Poland, the Czech Republic, and Slovakia and the gradualism in, for example, Hungary, Slovenia, and Romania), none of them seemed to have such a combination of political and social conditions. There were also other contributory factors. Hence, among others, the FSU states were more remote from Western Europe and foreign businesses were, thus, more cautious to invest into the region; not much foreign aid was provided; no private sector existed in the FSU prior to perestroika (in

[214] Stilpon Nestor, 'Corporate Reform in Russia and the Former Soviet Union: The First Ten Years' in Gertrude Tumpel-Gugerell, Lindsay Wolfe and Peter Mooslechner (eds), *Completing Transition: The Main Challenges* (Springer 2002); Svejnar (n 35)

[215] Károly A Soós, *Politics and Policies in Post-Communist Transition: Primary and Secondary Privatisation in Central Europe and the Former Soviet Union* (Central European University Press 2010) 141–147; Sutela, 'Privatisation in the Countries of Eastern and Central Europe and of the Former Soviet Union' (n 21); Dabrowski, Gomulka and Rostowski (n 25); World Bank, *Transition, the First Ten Years* (n 30) 103–116; Dabrowski, Rohozynsky and Sinitsina (n 36); Roháč (n 37); Shleifer and Treisman (n 38); Nestor (n 214)

contrast to Poland, for example), while the other liberalisation experiments began only in the late 80s (in contrast to the Czech Republic, Slovakia, Hungary, the Yugoslavian states, etc.); the scale of industrialisation and the reliance on the heavy industry (organised in the way discussed in sub-Section 2.1.1) were way more substantial in the USSR; and its military sector was much bigger. [216]

Going back to the subject of this research, one may make several important conclusions on how the region's unfortunate historical experience defines the current state of equilibrium between competition policies and statism within it and what appears to be necessary to proceed with the transition. First, it is unlikely that after the experienced upheavals of a varying nature, there is much enthusiasm in the FSU to continue radical reforms and complete the transition by further shock measures. It appears that the gradualism is the most viable approach now, as satisfying numerous actors within the FSU economic biosphere and, thus, less costly in political terms. [217]

Secondly, though there is a certain reluctance to engage in major reforms, there is some understanding that the transition is not over and will have to be continued. It is, however, of concern whether competition law will get sufficient attention. As the provided analysis reveals, competition has never been a priority and even a desirable outcome in both the Soviet Union and post-Soviet states. In contrast to, for example, the Czech Republic and Poland, whose historically caused hostility to socialist monolithism fuelled SOEs restructuring and relatively active pursuance of ordoliberal objectives, competition policy has remained inert in the former USSR. It is been expected that competition will emerge naturally, as soon as other reforms are completed (in some way based on the Coase theorem). However, in the context of soft budget constraints for SOEs, the selectiveness and favouritism in providing state subsidies, the reluctance to change managerial behaviour, and numerous entrance barriers across different industries, it can hardly be expected that markets will become competitive. In this regard, a

[216] Hannes Mueller, 'Why Russia Failed to Follow Poland: Lessons for Economists' (London School of Economics, 17 March 2007) <https://www.hannesfelixmueller.com/themes/politik/pdf/hm_receo_2007.pdf>; Sutela, 'Privatisation in the Countries of Eastern and Central Europe and of the Former Soviet Union' (n 21); Dabrowski, Gomulka and Rostowski (n 25); World Bank, *Transition, the First Ten Years* (n 30) 103–116; Svejnar (n 35); Dabrowski, Rohozynsky and Sinitsina (n 36); Roháč (n 37); Nestor (n 214); Soós (n 215) 149–159; Mueller (n 216)

[217] Dabrowski, Gomulka and Rostowski (n 25)

more targeted and well-formulated competition policy with straightforward and understandable objectives is required. [218]

It is to add that being successors of restructured committees for prices, national competition agencies of the FSU states still struggle to comprehend their role of advocates of competition (not to mention other state agencies whose duties include the promotion of competition). Regulatory approaches of the EU and US competition agencies have been transplanted light-mindedly – on some occasions, in an attempt to please international observers. It appears that more work is required to empower the region's competition agencies, to ensure that they operate consciously and have effective instruments to promote competition and cooperate with other state agencies (who apprehend and do not antagonise the idea of competition).

The latter is closely connected to the third broad conclusion that Soviet-styled managerial habits are steady and reflex within the FSU. Given the rough initial transition, the so-called 'window of opportunities', having to do with the reformist enthusiasm, was shut down too fast and the FSU governments began to question the necessity to indiscriminately toss out old Soviet methods. Problems with the lack of private enthusiasm and the ineffectiveness of private owners across industries started to be resolved by reinvigorating or establishing new SOEs (e.g. state corporations in Russia and state holding companies in Uzbekistan). Prices containment policies, production and distribution control, the provision of monopoly rights, and support for greater vertical integration and concentration across markets have also been in place to stimulate growth. Numerous external factors, including global and regional financial crises, conflicts within the region, and restraints of cross-border trade of a different nature, have invigorated the relevant trend. [219]

The question that arises is whether these habits have to be broken and replaced or may be readjusted to deliver more positive results by coexisting peacefully with intense competition policies (in line with the gradualist approach offered above). Probably, the Chinese model, where a stagnating, but somewhat foundational state sector co-exists with vibrant private businesses, may be an option with a number of reservations.

If to sum up the above, some natural gravitation forces, created by a specific perception of the transition from socialism to a market economy by both state officials and the general public

[218] David Brown and Álmos Telegdy, 'Where Does Privatisation Work? Understanding the Heterogeneity in Estimated Firm Performance Effects' (2016) 41 Journal of Corporate Finance 329; David Brown, John Earle and Álmos Telegdy, 'The Productivity Effects of Privatisation: Longitudinal Estimates from Hungary, Romania, Russia, and Ukraine' (2006) 114(1) Journal of Political Economy 61; World Bank, *Transition, the First Ten Years* (n 30) 103–116; Svejnar (n 35) Roháč (n 37); Mueller (n 216)

[219] World Bank, *Transition, the First Ten Years* (n 30) 103–116; Svejnar (n 35)

and invigorated by a plethora of contributing factors, tend to pull the FSU states back to the starting point. Attempts to go against the tide are quite hard and cause resistance, while the return to familiar particles is convenient. Some sort of a conflict between the re-established preference for statism and the reluctantly recognised necessity to develop competition is, therefore, in place. In light of that, it appears that some solutions of a gradualist nature have to be found to achieve the most efficient result with minimal losses and lower transitional and political costs. Perhaps, the right approach has to be found to accommodate the adherence to statism through, particularly, the state sector and the existence of a viable region-specific competition policy. For offering some balanced solutions, Chapter 3 of the thesis will analyse the nature, organisation, and reasons for the continued support for statism and the state sector, as subsist in the FSU region. Chapter 4 will try to explore whether the statism expressed in the reliance on the state sector is a popular economic approach outside the FSU, how it coexists with competition policies, and what solutions are proposed to tackle conflicts between them. In conclusive Chapter 5, an attempt will be made to discuss whether any theories and practices from outside the FSU region may be actually applied within it for resolving the discussed conflict and, thus, some greater transition problems.

CHAPTER 3: THE COMPETITION ENVIRONMENT AND THE STATE SECTOR IN THE MODERN FSU STATES

Having analysed the recent economic history of the FSU and, in particular, the transformation of the state sector and the formation of competition regulation in the region, we now move to a more thorough analysis of its current challenges. This Chapter identifies the existing tension between the reliance on the state sector and competitive policies. It critically discusses why SOEs are established and maintained in the FSU and how the relevant reasoning, principles and patterns of the operation of the state sector interfere with the development of regional competitive markets. Identifying and understanding the key challenges faced by the discussed jurisdictions then allows the thesis to focus on possible solutions in Chapter 4, drawing on relevant international experience.

To give a general outline, introductory Section 3.1 of the Charter provides for general observations on the current market environment in the FSU states with the focus on statism, as expressed in significant reliance on SOEs. Section 3.2 analyses why support for nurturing the state sector is still strong in the FSU despite some clear efficiency and competition problems highlighted in the previous Section. Those many rationales justifying the support of SOEs by the FSU governments are looked into (except for the historical reasons discussed in Chapter 2) with a conclusion being, among others, made that their application is often unjustified. Section 3.3 contains analysis of what the region's state sector actually represents and how it operates in a way that cause competition concerns (with medium-sized and large SOEs being in particular attention). Some specific challenges identified by the Section include those ownership and corporate governance arrangements in respect of SOEs that contribute to the fusion between state actors and the state sector; special pricing, production, and public procurement regulatory policies which cause that SOEs operate in a distinct, sometimes, more favourable, regulatory environment than that for private entities; special subsidies and benefits for SOEs, granted to reimburse for their public functions, but often being distortive from the competition perspective. Section 3.4 studies the extent to which the FSU competition authorities may target SOEs' infringements and the above distortions. A concern is expressed that they are often unable to do that, owing to deficiencies in a relevant legislative and methodological basis as well as the fact that they usually have to confront not only relevant SOEs as such, but also state actors who instigate their activities. Section 3.5 summarises the above main findings, setting the ground for a discussion in Chapter 4.

3.1 Basic Observations about the Current Market Environment and Statism within the FSU

As discussed in Chapter 2, in the FSU, the state has been able to accumulate significant market power across different industries by either pro-actively resorting to administrative techniques, including direct and indirect renationalisation of enterprises privatised in the 90s and the establishment of new generously supported SOEs, or just maintaining the status quo by, among others, retaining SOEs created in the Soviet times. From a narrower political perspective, the political configuration of the relevant processes has been different across the FSU with the re-imposition of economic control (the creation of administrative capitalism) in Russia; the desire of vying political groups and large businesses to re-invigorate the state for their own benefit in Ukraine; and the stubborn movement along familiar directive economy pathways in Uzbekistan. From a broader perspective, however, these processes are likely to be explained by similar underlying considerations of decision-makers and the public at large. Paternalistic state oversight and the existence of the constantly expanding state sector has again been seen as a guarantee of stable economic growth and social justice, a successful recipe for avoiding unpredictable shocks and the plundering of 'people's property', a measure to cultivate some basic industries, and, to an extent, an indispensable value in themselves.

Although it is hard to measure statism and to track the relevant trends within the FSU precisely, there are a number of factors and indicators that may be illustrative, some of which were already mentioned in Chapter 2. Such factors and indicators have been tried to be compiled by a number of researchers and research institutions, with the OECD in particular having come up with a generalised indicator of 'state control'[220] (later slightly redesigned as 'distortions induced by stated involvement'[221]). The state control indicator considers several sub-indicators, including 'public ownership' (embracing, in turn, scope of public enterprises, direct control over business enterprises, government involvement in network sectors, and corporate governance of SOEs) and 'government involvement in business operations' (covering volumes of command and control regulation, price control, and public procurement). All these

[220] Organisation for Economic Co-operation and Development, 'The 2013 Update of the OECD's Database on Product Market Regulation: Policy Insights for OECD and Non-OECD Countries' (31 March 2015) 10 <https://www.oecd-ilibrary.org/economics/the-2013-update-of-the-oecd-s-database-on-product-market-regulation_5js3f5d3n2vl-en>

[221] Organisation for Economic Co-operation and Development, 'The 2018 Edition of the OECD Product Market Regulation Indicators and Database: Methodological Improvements and Policy Insights' (23 March 2020) 12 <https://www.oecd-ilibrary.org/economics/the-2018-edition-of-the-oecd-pmr-indicators-and-database-methodological-improvements-and-policy-insights_2cfb622f-en;jsessionid=uZNSn9rJJ3JWtONpAaB-Vvw_.ip-10-240-5-38>

indicators are calculated based on a 1000 question survey. Out of the reviewed jurisdictions, a more or less holistic evaluation is available for Russia with only a passing mention of the other FSU states being made (though it appears that the conclusions made in respect of Russia may to an extent be extrapolated to the FSU generally, including Ukraine and Uzbekistan). The evaluation suggests that in Russia, the general level of state control has not been changing notably since 1998. Although there has been some decline in the volume and coverage of command and control legislation, the state sector has been expanding (i.e. there has been a growth of such indicators as scope of public enterprises and direct control over business enterprises both in terms of the quantity and financial turnover). This is partially similar to the development trajectory of some other countries and regions in transition, e.g. China, Hungary, and Poland – the scope of command and control and price control legislation there has declined, but the state sector has generally retained or strengthened its positions. [222]

Such preference for statism and, particularly, continuous reliance on the state sector within the FSU tends to raise a number of economic efficiency-related concerns. Some studies done within the post-Soviet space show that often, state interventions tend to significantly impair business processes across different markets, while SOEs tend to be highly inefficient as such (as compared to private entities). To give some data, in Russia, in 2018, while having been asked about the business and economic environment in the country by the Analytical Centre under the Government, 42% of responding businessmen said that the state provides more obstacles than help. 46% of the businessmen stated that government actions that undermine competition were among the main reasons for businesses exiting markets, while 40% named unstable regulatory environment as one another key reason. As for the state sector specifically, there are a number of indicators that point at its low efficiency. Hence, for example, in Russia, in 2014, in terms of labour productivity, revenues for fully private companies reached RUB 12.5 million per employee on average, compared to RUB 4.6 million for directly owned SOEs and RUB 11.8 million for SOEs that were indirectly owned by the state. A similar difference not in favour of SOEs may be observed if to compare other revealing indicators, including return on assets, return on equity, and capitalisation. The trend was also accurate for state-owned banks, such indicators of which as net profitability, provisions costs, and the level of non-performing loans were less positive than those of private banks. Only a limited number of SOEs and state-

[222] Organisation for Economic Co-operation and Development, 'The 2013 Update of the OECD's Database on Product Market Regulation' (n 220) 10, 20–21, 31; Organisation for Economic Co-operation and Development, 'The 2018 Edition of the OECD Product Market Regulation Indicators and Database' (n 221) 12, 22-29; Organisation for Economic Co-operation and Development, 'Product Market Regulation: Statistics' (2020) <https://stats.oecd.org/index.aspx?DataSetCode=PMR#> accessed 8 September 2020

owned banks seemed to be out of the trend – for example, such national incumbents as Gazprom, Rosneft, and Sberbank. Similar trends were generally observed in subsequent years in Russia as well as in other countries of the FSU region. [223]

Pro-active statism appears to have strong negative effects on competition. With respect to the reliance on the state sector, in particular, first, private businesses find it harder to enter or to operate in markets where the state sector has visible presence. According to a survey conducted by the Adizes Institute among CEOs and owners of Russia's large private companies in 2018, 90% of Russian private businessmen believe that the state sector becomes larger in competitive markets, while 62% of them think that such an expansion interferes with their business. [224] It is likely that, as will be discussed below, in the environment of statism, SOEs and quasi-commercial state establishments get easier access to state funding as well as resources and facilities that have remained in the hands of the state. They also receive up-to-date commercially-valuable information directly from their state-affiliated shareholders and sources in government and are more successful in withstanding the regulatory burden (i.e. obtaining necessary licenses and permits, complying with regulatory requirements and state standards, going through regulatory investigations and checks). In other words, something called competitive neutrality (as will be described in details further below) is in effect undermined to allow SOEs to enjoy a privileged position in many markets by being, for example, less discreet in their expenditures (a good example here are state-owned banks, which may be way more generous in extending loans). Some indirect indication of the privileged position of SOEs is, in particular, high levels of economic concentration in many markets where they are present across the studied jurisdictions. [225]

Secondly, as in part evinced by data provided in Chapter 2 and further in this Chapter, the FSU states' dominant state sector is likely to be a self-propagating organism, gradually subverting the whole market economy system. As statism remains unquestioned, more and more new

[223] Radchenko and Kovaleva and others (n 42); Miniane and others (n 56) 15–39

[224] Anton Feinberg and Ekaterina Kopalkina, 'The Expansion of the State in the Economy Has Been Noticed by 90% of Russian Companies' (RBC 23 April 2018) <https://www.rbc.ru/economics/23/04/2018/5ad9c50c9a7947276597e5be> accessed 29 September 2018; Anton Feinberg and Ekaterina Kopalkina, 'Business is Tired of Waiting for Privatisation: What Do Entrepreneurs Think of the Growing Share of the State in the Economy?' (RBC 23 April 2018) <https://www.rbc.ru/newspaper/2018/04/23/5ad9c50c9a7947276597e5be> accessed 29 September 2018

[225] See, for example, International Monetary Fund, 'Russian Federation: Selected Issues' (12 September 2018). IMF Country Report 18/276 <https://www.elibrary.imf.org/view/journals/002/2018/276/002.2018.issue-276-en.xml>; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 277–280; Pop and others (n 48) 18–21

SOEs across different markets are established by already existing SOEs (both willingly and under state pressure); more SOEs actively seize those markets wherein they operate; SOEs more generously support each other through various means (providing financial assistance, giving access to their facilities, etc.); and the willingness of state authorities to strengthen their connections with SOEs for resolving momentary tasks increases. Such trends lead to the emergence of a single monolithic state-controlled agglomeration with unrestrained influence and 'bottomless pockets', reminiscent of the Soviet ultra-monolithic state industry. Being assisted by connections with state authorities and restrictive economic policies, this agglomeration may effectively subjugate private players that turns a market economy into an almost administratively controlled one. In such environment, only a limited place remains for private competitors across markets and competition as such; violations of competition laws become widespread and more tolerated. [226]

Lastly, somewhat obviously, the region's policy of nurturing of the state sector has wider competition policy related implications, affecting not only potential private competitors, but also consumers. Having supressed private competitors, SOEs, being already suspected in inherent inertness in many empirical studies, are likely to become completely unwilling to innovate and to work on the quality of their production as well as completely irresponsive to consumers' concerns (to which the Soviet experience is a perfect evidence). Moreover, acting with no less enthusiasm that private companies, dominant SOE are prompt to exploit consumers, using a variety of monopolistic techniques. [227]

Proponents of stastism-oriented policies, among whom, are many conservative state officials across the region and, for example, such powers as the Communist Party of Russia, enjoying substantial public support, dismiss the above concerns as being greatly exaggerated. According to them, the number of SOEs in the given countries is quantitatively insignificant (which seems

[226] Pop and others (n 48) 11–21

[227] It is hard to find some relevant statistics here, but many cases are occasionally reported across the FSU, especially in Russia. For some relevant cases, see Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2019' (n 2); Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2); Victor Talakh, 'Enterprises under Public Ownership and Competition: An Overview of Problems in Ukraine' (Organisation for Economic Co-operation and Development, July 2020). Competition Policy in Eastern Europe And Central Asia 15 <http://www.oecd.org/daf/competition/oecd-gvh-newsletter15-july2020-en.pdf>; Antimonopoly Committee of Uzbekistan, 'Petrol Storage Company Abuses its Dominant Position' (5 August 2020) <https://antimon.gov.uz/ru/zloupotreblenie-monopolnym-polojeniem-neftebazy/> accessed 15 December 2020; Gazeta.uz, 'Antimonopoly Committee Has Opened a Case against UzAuto Motors' (Gazeta.uz 29 July 2020) <https://www.gazeta.uz/ru/2020/07/29/request/> accessed 15 December 2020

to be statically correct, as provided below) and, thus, their activities may not be considered as a hindrance to private businesses or a factor able to render a noticeable negative impact on relevant markets.[228] Further, it is suggested that SOEs are actively supported only in the spheres where national competition is non-existent, insignificant, or undesirable at all, including, for example, the energy, military, and mining industries. SOEs are argued to be the only means to develop the relevant industries in the absence of private investment.[229]

Generally, such counterarguments do not seem to be quite accurate. It is not the quantity of SOEs, but the scale of SOEs' operations and their ability to extract additional benefits that are likely to matter (which are likely to be quite significant, as the estimations provided in Section 2.2 above and further in sub-Section 3.3.1 tend to suggest). Further, in some industries, SOEs continue to operate and be supported despite competition has either already emerged or would have emerged if relevant favouritism was abandoned (out of the three studied jurisdictions, Uzbekistan, wherein SOEs operate in virtually every industry, is a particularly revealing example). Nevertheless, since it is quite hard to make a categorical conclusion owing to a large amount of input data and many ways of its possible interpretation, such arguments may not be completely discarded – at least, for some industries (as also discussed in Section 3.2 below).

In summary, the FSU region's current preference for statism, expressed, in particular, in the great reliance on the state sector, is likely to cause many concerns from the perspective of economic efficiency and, importantly, the need to develop competitive markets. Nevertheless, given the complexity of the matter with a variety of arguments for and against this paternalistic approach being forwarded, it seems necessary to dissect the policy and to carefully scrutinise those ideas and practices that form it. This may allow to identify those elements that engender the tension between the approach and competition development tasks and to elaborate ways to neutralise identified negative factors.

3.2 Reasons for the Reliance on the State Sector

It appears important to begin the above scrutiny with reviewing reasons for the preference for the policy of reliance on the state sector within the FSU. More explanation seems to be needed as to what drives FSU states' governments towards creating or supporting the existence of

[228] Nikita Popov, 'Privatisation 2.0: The State Duma Discusses the Liquidation of State and Municipal Unitary Enterprises' (Daily Storm 28 November 2018) <https://dailystorm.ru/vlast/privatizaciya-2-0-v-gosudarstvennoy-dume-rassuzhdayut-o-likvidacii-gupov-i-mupov> accessed 17 November 2019; Saakyan (n 50)

[229] ibid

SOEs as privileged (or at least substandard in many ways) entities despite concerns related to their efficiency and the capability to distort competitive processes.

Generally, it seems that reasons for the FSU governments' persistence in maintaining the state sector are multiple. Usually, some combination of reasons explains the existence of each SOE (similarly to other regions of the world[230]). As there is no unified legislation on the establishment and maintenance of SOEs, neither in Russia nor in Ukraine or Uzbekistan, there are no single exhaustive lists of relevant reasons, which may be refereed to. Generally, description of the rationales is scattered across different legal acts of a general and specific nature. One of the few legal acts providing a relatively expanded description of the rationales is the Russian law on the establishment of state unitary enterprises (in some sense, the purest legal form of SOEs, owing to the degree of their dependence on the state as the only shareholder and the degree of deviation of relevant corporate mechanisms from those of a regular private company, as will be described below)[231]. It, among others (the list is not exhaustive) refers to the needs to ensure state security and public order, to perform activities in spheres of natural monopolies, to assist people leaving in the Far North and similar territories, and to support activities in the fields of culture, arts, cinematography, and the preservation of cultural values. More specific reasons may usually be found in targeted legal acts and decisions of state authorities on establishing a particular SOE[232], albeit, often, no reasonable explanation is given at all, owing to a seemingly self-explanatory nature of SOE's activities (implied considerations).

All the considerations that seem to be in place, both of a more general nature and more specific ones, express and implied ones, are divided into groups and briefly discussed below. Some of the listed reasons were partially discussed in Chapter 2, where the intricate history of privatisation and re-nationalisation within the FSU was explored. It is notable that many of the

[230] Organisation for Economic Co-operation and Development, 'Privatisation and the Broadening of Ownership of State-Owned Enterprises: Stocktaking of National Practices' (2018) 16–20 <https://www.oecd.org/daf/ca/Privatisation-and-the-Broadening-of-Ownership-of-SOEs-Stocktaking-of-National-Practices.pdf>; PWC, 'State-Owned Enterprises: Catalysts for Public Value Creation?' (April 2015) <https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf>; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 20–21

[231] Article 8 of the Law of the Russian Federation on State and Municipal Unitary Enterprises No. 161-FZ 14 November 2002 (Federal Assembly of the Russian Federation)

[232] To give a few examples (out of quite many), Article 4 of the Law of the Russian Federation on State Corporation for Nuclear Energy 'Rosatom' No. 317-FZ 1 December 2007 (Federal Assembly of the Russian Federation); the Preamble to the Resolution on the Measures for Organising the Activities of 'Uzsharbasanoat' JSC No. PP-3239 23 August 2017 (President of the Republic of Uzbekistan)

considerations below are consonant with the reasons why SOEs may get state aid or some sort of preferential treatment.

3.2.1 Replenishment of the state budget and other economic interests

One of the main reasons for keeping SOEs in the hands of the state within the FSU region seems to be the need to cover budget expenses. In the absence of systematised legislation on dividends of SOEs, which would have clearly limited how and what amount of profits of SOEs may be taken, and given the verticality of relations between state officials and management of SOEs described further below, claiming profits of SOEs has been a relatively straightforward and simple way to get income - as compared with general taxation of SOEs and (or) private entities in particular. The creation of a mature and comprehensive tax system has evidently been a big challenge for region's governments up until very recently with tax evasion being a standard way of doing things for most businesses. [233]

This rationale is likely to be a particular characteristic of large natural resources enterprises, able to ensure receipt of super profits at relatively low costs. Vivid examples here are Russia's Gazprom, Rosneft, and Alrosa (a group of diamond mining companies), Uzbekistan's Almalyk and Navoi Mining and Metallurgical Combines, Ukrainian Naftogaz and seaports, which tend to generate significant revenues for the state budget of the relevant countries indeed. [234]

It is also a practice within the FSU to pressurise profitable SOEs to finance social initiatives of government or to engage in non-core financial activities for creating or spurring development of particular sectors. [235]

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[233] As was noted in Chapter 2, no elaborate taxation system existed in the USSR with profits of enterprises being essentially just transferred to/requisitioned by the state. In this regard, the current approach of 'knocking-out' profits of SOEs as dividends is rather a natural way of development of the Soviet tax system in the FSU – in contrast to the use of a relatively alien tax system of market economies.

[234] YouControl, 'Stability and Work for Defense: Top-50 Profitable State-Owned Enterprises in Ukraine' (31 October 2019) <https://youcontrol.com.ua/ru/data-research/stabilnist-ta-robota-na-oboronu-top-50-prybutkovykh-derzhpidpryiemstv/> accessed 15 May 2020; RBC, 'RBC 500 Ranking: The Largest and Most Profitable Russian Companies' (26 September 2019) <https://www.rbc.ru/economics/26/09/2019/5d89ece69a79474ecbb6b35c> accessed 15 May 2020; Ministry of Finance of the Republic of Uzbekistan, 'Budget for Citizens: Draft for 2019' (2018) <https://www.mf.uz/media/file/press/budget_2019.pdf> accessed 15 February 2019

[235] See, for example, Vedomosti, 'Putin Announced the Mandatory Participation of State-Owned Companies in National Projects' *Vedomosti* (24 October 2018) <https://www.vedomosti.ru/economics/news/2018/10/24/784617-goskompanii-natsionalnih-proektah> accessed 1 September 2019.

At a meeting of the Council for the Strategic Development and National Projects in the Kremlin, Vladimir Putin announced that: 'Participation in the National Projects is mandatory for state-owned companies. This is the purpose they have been created for in the first place. In this regard, we all expect from the

Speaking of broader economic considerations, it is not always direct profits that seem to inform the economic interest of the FSU governments in retaining SOEs. For example, an economic impact of the full privatisation of electricity companies on other markers is generally seen as too unpredictable and it is, thus, deemed feasible to avoid uncertainties by maintaining not quite efficient, but presumably stable SOEs. [236] It is hard to say whether economic reasoning of this kind is always well-grounded, but this, nevertheless, exemplifies how general economic deliberations may be a decisive factor.

3.2.2 Strategic significance

Generally, as a relevant world's practice suggests, some enterprises, for example, those in the military industry, nuclear and power energy, mass media, and infrastructure, may have some obvious strategic or political importance, informed by broader condensations of national security, public order, the stability of supply of some essential resources and of access to some essential facilities. Such enterprises may be classified as 'strategic' in law and remain in the hands of the state until some internal or external factors cause loss of such significance.

The same practice is in place for FSU states, but appears to be subject to abuse. The concept of 'strategic enterprise' is used widely across different legal acts and hundreds of SOEs have classified as such for distinct reasons (about 140 at the federal level in Russia [237], about 100 in Uzbekistan [238], and about 600 in Ukraine [239]). Besides for SOEs operating in such industries as

heads of VEB, Gazprom, Rosatom, Rosneft, Rostec, Rostelecom, and other structures with state participation to submit elaborated proposals on financial, technological, scientific, and personnel contributions to breakthrough programs and projects.'. To clarify, the National Projects are strategic development programmes regularly developed by Russia's government for such spheres as public health, education, housing, roads construction, agriculture, etc.

It is fair to note that oftentimes private entities may experience the same sort of pressure. See, for example, Kyselova (n 172)

[236] Interfax, 'The Cabinet of Ministers of Ukraine Intends to Stop Privatisation of Regional Energy Distribution Companies starting from 1 April 2022 and to Transfer them to the Ministry of Energy' (15 September 2021) <https://interfax.com.ua/news/economic/767948.html> accessed 12 November 2021; Interfax, 'Russia's Ministry of Energy Objects Decreasing the State Share in Rosseti and RusHydro' (6 November 2019) <https://www.interfax.ru/business/683172> accessed 12 November 2021

[237] Decree on the Approval of the List of Strategic Enterprises and Strategic Joint-Stock Companies No. 1009 4 August 2004 (President of the Russian Federation)

[238] Annex to the Resolution on Supporting the Activities of Commercial Companies and Enterprises of Strategic Significance No. PP-3487 22 January 2018 (President of the Republic of Uzbekistan); Annex 1 to Resolution on the Measures for Further Improvement of Corporate Governance in Joint-Stock Companies with a Prevailing State Share No. PP-2635 17 October 2016 (President of the Republic of Uzbekistan)

[239] Minfin, 'The Number of the Day: The Number of State-Owned Enterprises in Ukraine' (22 May 2017) <https://minfin.com.ua/2017/05/22/27947038/> accessed 1 March 2020

national defence, telecommunications, power energy, transportation, and oil and gas, SOEs in healthcare, agriculture, and other sectors have been named 'strategic'. The perception of an SOE as a 'strategic' one, hence, depends on random situational factors of a various nature, rather than on concrete objective criteria. Considering the relevant messiness, it is sometimes unclear what the status of a 'strategic enterprise' exactly implies e.g. the prohibition to privatise, the applicability of price controls, special rules for public procurement or distribution of produced goods, etc. [240] This certainly undermines the logics behind the application of the concept as a principle of economic policy.

A good example of the misuse of 'strategic significance' in the FSU is the Uzbek cotton industry, which has long been distinguished as a 'strategic' sector of the Uzbek economy and transferred under of control of SOEs. [241] There are many indicators that in reality the concept of importance of cotton (in the context of the Uzbek economy in particular) has long become outdated [242], but some political conservatism continues to inform this specific perception of the industry and a misguided belief that its strategic significance should be accentuated in law. Such accentuation, in turn, is likely to have a devasting impact on competition within the sector, as the consequential domination of the state and erected regulatory barriers (price controls, mandated sales, etc., as described further) negate the ability of private companies to enter the sector and to compete effectively.

3.2.3 Development or creation of an industry

Quite often, SOEs are seen as viable legal creatures able to accelerate the development of particular sectors of a national economy or to help with the creation of previously non-existent sectors (particularly, if private entities find it too risky to invest).

Being relatively uncommon in developed market jurisdictions, this approach is widely applied in the FSU region. It seems to reflect a common perception that any notable business endeavour requires some kind of government support, in many ways based on the Soviet experience. Relevant SOEs are often established or maintained in so called fundamental economy sectors (energy, transportation, etc.) with the hope to produce spill-over effects; the

[240] Martinenko and Gluschenko (n 240)

[241] See, among others, the Resolution on the Measures for the Introduction of Modern Forms of Organisation of the Cotton and Textile Production No. 53 25 January 2018 (Cabinet of Ministers of the Republic of Uzbekistan); Annexes 1 and 2, and Section 7 of Annex 3 of the Resolution on Further Implementation of Market Mechanisms for the Sale of Highly Liquid Products, Resources, and Materials No. 57 (n 202)

[242] Pyotr Bologov, 'Why Uzbekistan Cannot Get Rid of the Cotton Curse' (Carnegie Moscow Center 29 May 2017) <https://carnegie.ru/commentary/70093> accessed 21 September 2021

sectors that had functioned successfully in Soviet times and the early 90s, but then started to collapse owing to, among others, lack of proper market infrastructure and organisation (aircraft, shipbuilding, the production of complex equipment, etc.); sectors where expertise should be built up, new technologies should be introduced, or new ways of performing task should be developed (e.g. renewable energy, construction engineering, etc.). Oftentimes, SOEs created for the development purposes imitate activities of foreign corporations not represented in a country. As a rule, the given category of SOEs receives generous funding from the state or gets some other privileges or benefits, designed to facilitate their market entry or the creation of a market.

Many examples of relevant SOEs can be given, including Russian Rusnano – a state-owned joint-stock company created for promoting and commercialising developments in nanotechnologies, and the aforementioned Uzbek National Energy Saving Company created to promote the use of energy saving equipment and technologies. Although such SOEs have essentially the same role, the instruments that are at their disposal may differ – e.g. Rusnano achieves its goals by making equity investments (including venture investments) [243], while the National Energy Saving Company is provided with the exclusive right to supply relevant equipment and technologies to state bodies and SOEs, which are ordered to purchase them. [244]

It is noteworthy that it is common for the FSU states (similarly to China, for example) to have a relatively large number of powerful state-owned banks (in case of all the three studied countries, state-owned banks account for more than half of all bank assets within each country [245]). Generally, it is also the development rationale that is behind this trend - state-owned banks are expected to finance those development projects that would not have been funded otherwise owing to a variety of reasons, including, for example, the general lack of initiative of the private sector to invest into projects where sunk costs are substantial (there is a high degree of mutual distrust between the government and businesses in the FSU region for, *inter alia*, historical reasons) and projects of an experimental nature i.e. those presuming the implementation of some innovative ideas. Usually, each state-owned bank given development tasks has a certain area of responsibility e.g. the development of agriculture through the provision of soft loans (Rosselkhozbank in Russia, Ukrgazbank in Ukraine and

[243] Article 20 of the Law of the Russian Federation on the Russian Corporation of Nanotechnologies No. 139-FZ 19 July 2007 (Federal Assembly of the Russian Federation)

[244] Clause 3 of the Resolution on Further Implementation of Modern Energy Efficiency and Energy Saving Technologies No. PP-3238 (n 204)

[245] Anton Lopatin and Pavel Kaptel, 'Uzbekistan State-Owned Banks – Peer Review 2021: Increasing Asset-Quality Risks, Weak Funding Profiles Amid Ambitious Privatisation Targets' (Fitch Ratings, 6 October 2021); Miniane and others (n 56) 33–34

Agrobank in Uzbekistan). In practice, nevertheless, such specialisation does not prevent state-owned banks from diversifying their financial activities. [246]

Along with regular state-owned banks, special development banks and financial institutions, including export-import agencies, have been established across the FSU – for example, Vneshekonombank (VEB.RF) in Russia, the State Investment Company in Ukraine, and the Fund for Reconstruction and Development in Uzbekistan. As a rule, they operate under a specific model, relying on long-term funding (provided by international financial institutions, bonds, government subsidies) and on-lending or directly lending to firms at below-market rates. Sometimes, development institutions resort to making equity investments. [247]

Generally, it is an immensely hard task to assess whether SOEs, state-owned banks, and state development institutions created for the development purposes actually achieve their targets. As a relevant research of the IMF on state-owned entities across the FSU and the Central, Eastern and South-Eastern Europe regions suggests, that is questionable and such entities tend to underperform, if a comparison is made with private players (i.e. those being pioneers in developing particular spheres), especially where there is no exposure to external competition and corporate governance and operation practices are not aligned with best practices in the private sector. [248] Owing to that, often, consideration of alternative development instruments e.g. horizontal business support schemes may more be reasonable.

From the competition policy perspective, if competition already exists or is likely to emerge in a market deemed to require development support, the impact of creating a development entity is likely to be negative only (though it is usually stressed by the FSU governments that no competitive markets are targeted in relevant cases and the state intervention is envisaged only for a period until relevant markets are mature enough [249]). As a rule, the development role of an entity implies that, as noted above, some volume of exclusive benefits is granted to it and that obviously distorts competitive environment. It is noteworthy in this regard that, usually, since development SOEs are created or entrusted with development tasks by highest acts of law (Laws, Presidential Decrees, Resolutions of the Government, etc.), the region's competition authorities are limited in their powers to question some patterns of their functionality (available incentives, exclusive rights, etc.), as discussed further in Section 3.4. In this regard, as appears, currently limited in the FSU practice of conducting competition pre-screening

[246] Miniane and others (n 56) 33-39, 50, 52; Lopatin and Kaptel (n 245)
[247] Miniane and others (n 56) 33-34, 42-44
[248] ibid 42, 45, 47-48
[249] Putin (n 8)

should be improved to cover cases where a development entity (or, much better, as will be suggested further, any SOE) is created and methodologies to ensure operations equality should be devised.

3.2.4 Global competition and protection of domestic markets

Being partially connected with the rationales above, this one relates to the willingness of government to cultivate so-called national champions for protecting national markets from the absorption by foreign companies and (or) for conquering foreign markets in the context of globalisation and intense international competition. Relevant considerations may be particularly strong in case of sectors of strategic significance (as described above) as well as sectors that are considered well-established and promising from the perspective of country's historical economic traditions and the division of labour in the global economy. Some examples here are the cotton and automotive industries in Uzbekistan; gas, metallurgy, and nuclear energy in Russia; agriculture, agricultural engineering, and aviation in Ukraine. [250]

Often, state-owned national champions of the FSU states serve a buffer between attracted transactional capital and national governments, shielding the state apparatus from risks of direct involvement and allowing part-taking in operational and financial control at the managerial level (among others, for boosting local knowledge and expertise). Hence, incumbent SOEs may act as a public partner in public-private partnership and production sharing projects. [251]

The relevant Chinese experience as well as the experience of South East Asian countries, having been resorting to the practice and having made notable economic breakthrough, indicate that it may be relatively successful. However, for that, as appears, international competition should really be intense and an SOE chosen to be a champion should be really engaged in it. Otherwise, there is a risk that having been shielded from local competition and remaining unexposed to external impacts, the SOE will eventually crystallise as a stagnant local monopolist. Uzbek state-owned cars producing incumbent Uzavtosanoat, whose activities are tried be protected from

[250] It is of interest for example that Gazprom is widely promoted in Russia as a 'national treasure', whereas the cotton industry in Uzbekistan – as a source of 'white gold'.

[251] See, for example, Annex 1 to the Resolution on the Measures for Accelerated Development of the Power Energy Sector No. PP-3981 24 October 2018 (President of the Republic of Uzbekistan); Tanya Maslova, 'Gazprom Completes Deal with Shell for the Sakhalin 2 Project' (Reuters 18 April 2017) <https://www.reuters.com/article/uk-gazprom-shell-sakhalin-completion-idUKL1847581720070418> accessed 25 October 2019

both local and international competition at the detriment of local consumers and potential competitors, is a good example in this regard. [252]

It should also be noted that sometimes, rationales of a similar nature may underpin something called 'regional protectionism' – a situation where regional governments create and actively support regional SOEs for dominating in interregional markets. This is likely to be quite widespread in Russia, as a federal country (for example, in many regions – Chechnya, Dagestan, Tatarstan, etc. – about 90% of public procurement procedures are won by local suppliers, often – SOEs). This is likely to have a clear negative impact on in-country competition and to considerably aggravate the statism-competition conflict. [253]

3.2.5 Provision of public and merit goods and services, goods and services of natural monopolies and the universal service obligation

Like many other governments around the world, governments within the FSU are keen to take control over the sectors that supply the population with something that is understood as 'public goods or services' e.g. knowledge, national security, sewage, flood control systems, and street lighting, and 'merit goods and services' e.g. education, healthcare, welfare services, housing, fire protection, as well as over natural monopoly sectors i.e. the industries where the production requires unique raw materials, technology or similar factors to operate; the industries that have high fixed or start-up costs for conducting a business; and the industries where enterprises would benefit from economies of scale e.g. utilities, railroad transportation, telecommunication networks.

Reasons for that are multiple and include lack of private incentive to invest into these socially import sectors, the desire of the state to counter monopoly pricing in the sectors where private players exist, and a connection with the obligation of the state to ensure provision of universal service for some categories of goods and services i.e. to guarantee access of the general public to postal services, gas, electricity, healthcare, etc. The latter is quite actual for the FSU region, where, as suggest, lack of private investment is felt strongly and there is a large number of remote areas with poorly developed infrastructure and economically vulnerable population (Russia with its some of its vast territories – e.g. those in the Far North – seems to be a perfect

[252] Igor Tsoy, 'Who is Paying the Price for the Ineffectiveness of Monopolies?' (Repost 28 July 2020) <https://repost.uz/monopoly-story> accessed 12 September 2020; Valijon Turakulov and Alisher Umirdinov, 'The Last Bastion of Protectionism in Central Asia: Uzbekistan's Auto Industry in Post-WTO Accession' (2020) 11(2) Trade, Law, and Development 301

[253] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2016' (n 201)

example). In such cases, SOEs are generously subsidised by the state and are largely seen as an indispensable instrument. [254]

If to assess some data for state-owned natural monopolies in particular (which are often also produces of public and merits goods and services), it may be concluded that they occupy a large place within the studied economies. Hence, there are about 5,854 SOEs with this status in Russia [255], 1,645 in Ukraine [256], and 134 in Uzbekistan [257]. On the average, they operate in 15 spheres (as identified by relevant laws), including some subsectors in utilities, transportation, and oil and gas. Their approximate contribution to the national GDP of the countries above is around 15%.

The status of a natural monopoly makes an SOE a subject to price control and, as a rule, entails the emergence of additional responsibilities e.g. to supply particular goods or services to particular categories of consumers. As in case of strategic enterprises, competition experts often complain that the status is given to more enterprises than it should reasonably be given to and relevant control measures are excessively intrusive; some relevant examples here are particular postal services and services in ports - markets where competition seems to have already emerged. Moreover, it is also suggested that not much effort has been made to get away from the situation of a natural monopoly in relevant markets e.g. through liberalisation and unbundling, as will be discussed below. [258]

[254] Federation Council of the Russian Federation, 'The Report on the Meeting of the Council for the Housing Construction and the Promotion of the Development of the Housing and Utilities Complex under the Federation Council of 28 March 2019: State and Municipal Unitary Enterprises Carrying out Activities in the Field of Housing and Communal Services: Legislative Innovations and Law Enforcement Practice' (28 March 2019) <http://council.gov.ru/media/files/0SvPvynFzbuvtAQAdziIrrdLMxYQ7qSy.pdf>

[255] Darya Nikolaeva, 'There are 14 of Them Now, but Only 8 Will Remain: Deputy Head of the FAS Sergey Puzirevsky about the Reform of Regulating State Monopolies' *Kommersant* (1 April 2019) <https://www.kommersant.ru/doc/3929828> accessed 3 September 2019

[256] Dmitriy Goryunov, 'The Country of Monopolies: What is the Real Level of Competition in Ukrainian Markets?' (Delo 26 August 2015) <https://delo.ua/econonomyandpoliticsinukraine/strana-monopolij-kakov-realnyj-uroven-konkurencii-na-ukrainsk-302627/> accessed 3 September 2019; Antimonopoly Committee of Ukraine, 'Companies Having Market Power Behave Aggressively: Interview with First Deputy Chairman of the Antimonopoly Committee of Ukraine Yuriy Kravchenko' (2011) <http://www.amc.gov.ua/amku/control/main/uk/publish/printable_article/92458;jsessionid=3F4CD779C336C19319E5BFA6CDA79EB3.app1> accessed 3 September 2019

[257] Antimonopoly Committee of Uzbekistan, 'The State Register of Natural Monopolies' (2020) <https://antimon.gov.uz/uslugi/otkrytye-dannye/reest-subektov-estvestvennyh-monopoliy> accessed 17 May 2020

[258] Nikolaeva (n 255)

3.2.6 An alternative to market regulation

SOEs may also be created or maintained where government is unable to devise feasible and efficient market regulation and believes that some form of direct ownership will allow to ensure greater control over relevant activities. This is occasionally done where a new industry or practice is developed under the development rationale above or where a natural monopoly operates. Some example of applicability of the rationale in the FSU are certification agencies in various fields, construction design organisations in some areas, electricity, gas, and water supply companies. It is of concern for government that if private players perform relevant functions, service standards may fall below that what is reasonably required, transparency will be low, and it will be hard to monitor market behaviour, including pricing policies. It may also be feared that particular objectives of a public nature e.g. a greater focus on environment protection will not be sufficiently actively pursued by private entities, being focused on profit-making. As was noted above, such kind of suspiciousness is particularly strong within the FSU.

It is noteworthy that governments of the FSU region may feel especially uncomfortable to opt for design and control regulations rather than to create an SOE where some kind of existing state infrastructure has to be used in performing activities in question. That is connected to the fact that they may seriously doubt their own ability to protect state assets from plundering. The regional historical experience has proved that ensuring relevant protection may be an extremely hard task where control mechanisms of national legislation are underdeveloped and institutions are weak.

Generally, it appears that problems informing the rationale are complicated and require complex solutions. From the competition policy perspective, the creation of an SOE as a regulated bottleneck is far from being a desirable solution and it appears that governments should not stop their search for regulatory solutions and should regularly revisit the actuality of the rationale in each particular case.

3.2.7 Social policy considerations

Although being in the same class as the rationale related to the necessity to satisfy public demand for specific goods and services, as discussed in the sub-Clause 3.2.5 above, this consideration is different in terms of that broader social objectives are taken into account. Hence, for example, an SOE may be left as such in cases where employment is an issue e.g. in so-called monotowns or low-income areas or where there are serious environment concerns related to the operation of the enterprise.

As the transition within the FSU has showed, oftentimes, there may also be a strong social demand to keep an enterprise in the hands of the state for historical, social justice reasons. Privatisation of an enterprise created by collective, national efforts may be seen as unacceptable and denying it, government panders to some public perception of the matter and, thus, avoids possible social resentment. It is notable that within the FSU, this consideration is likely to be a factor in many cases where privatisation is considered and to an extent fuels the other discussed rationales.

It is worth noting that the above-cited IMF research suggests that specific social policy rationales for establishing or keeping SOEs are often not quite justified and relevant results are ambiguous across the FSU and the CESEE. Hence, for example, the empirical data analysed by IMF show that though SOEs may serve as employment buffers during economic downturns and tend to employ more people than private entities indeed, they are keener to cut salaries or to delay its payment as well as are less inclined to invest in employees. Similarly, there are indirect indicators that SOEs do not always keep up with their role of developers of social infrastructure – countries of the region with a greater number of SOEs tend to have less developed social infrastructure than those that have opted for privatisation. [259]

3.2.8 Antic-crisis measure

Where potential collapse of a private company may lead to some significant economic or social shocks, government may decide to take control over it through nationalisation or otherwise. Being a common reason for expanding the state sector in developed jurisdictions [260], this practice is likewise widespread in the FSU (some relevant examples were given in Chapter 2, including, for example, the massive rescuing of companies in Russia and Ukraine during the financial crisis of 2007-2008). Undoubtfully, this rationale in some sense intersects with the other described rationales when it comes to considering whether a particular company worth rescuing with strategic and socially important companies being prioritised (hence, for example, starting from 2015, there has been a practice in Russia to maintain a list of so-called 'system-forming enterprises' i.e. enterprises having much economic significance, activities of which are monitored on a regular basis and which may become a priority subject of rescue in case of economic crisis). The main question here is, however, a term of relevant intervention i.e. a term for which a rescued company remains to be controlled by the state. Empirical evidence suggest that in the FSU, such temporal control may be prolonged perpetually until the company

[259] Miniane and others (n 56) 48–51
[260] PWC (n 230)

starts to visibly underperform already in the state hands and the question of privatisation, thus, comes to the forefront. [261]

3.2.9 Difficulties in privatisation

Oftentimes, even where region's government does not mind relinquishing state control over an SOE, there may not be much interest in acquiring it owing to, for example, lack of profitability or unfavourable investment conditions within a region or a country in general. An illustrative example here are numerous smaller SOEs in utilities, housing and communal services. Many technical difficulties being a result of project decisions of the Soviet times, low state-controlled tariffs, poverty of the population, and a long history of indebtedness of such entities' large customers (often, other SOEs) do not allow to find potential purchasers or partners who would operate them based on concession or public private partnership agreements. The same relates to many SOEs rendering infrastructure maintenance service, producing specific goods used by other SOEs, operating touristic or sports facilities, cultural and historical objects, etc. Often, relevant SOEs are close to being zombie firms, being indebted, unprofitable, and inefficient, but securing employment or providing some important services that no one else wants to provide. So, the only option government has is to either liquidate them and to incur related social and other costs or to continue to run them at its own expense. [262]

It is hard to conclude whether relevant failures to privatise have a direct negative impact on the competition environment, but it seems that this may be the case. Hence, a failure to privatise may indicate that pre-privatisation assessment has been made incorrectly e.g. government aims to privatise the whole enterprise instead of its part or sets an unreasonably high price. Being neither used effectively nor privatised, assets (occasionally including some valuable facilities) remain to be withdrawn from relevant markets and that is likely to diminish the potential to develop competition.

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[261] Ministry of Economic Development of the Russian Federation, 'System-Forming Enterprises' (2020) <https://data.economy.gov.ru/> accessed 25 May 2020; Elizaveta Bazanova, Asya Safiullina and Polina Trifonova, 'Authorities Will Restructure Debts of System-Forming Enterprises' *Vedomosti* (24 April 2020) <https://www.vedomosti.ru/economics/articles/2020/04/24/828880-vlasti-restrukturiruyut-dolgi> accessed 25 May 2020

[262] Timofey Dzyadko and Evgeniy Kalyukov, 'The Head of Rosimuschestvo Told about Problems in Carrying out Privatisation' (RBC 4 April 2019) <https://www.rbc.ru/economics/04/04/2019/5ca5c09f9a794769f4e0995c> accessed 21 May 2020; Golos, 'Objects of the Large Privatisation Do not Interest Investors' (28 January 2019) <https://golos.ua/i/661663> accessed 5 June 2020; Federation Council of the Russian Federation (n 254)

To add, it seems that as in case of the presence of a large number of natural monopiles, the relevant trend is to an extent an indicator of that proper competitive environment within relevant markets has not been created and actions of a regulatory character, both general and sector-specific, are needed to improve the market climate. One of the measures that seem to be particularly important is greater protection against nationalisation – given the track regard of the FSU states described in Section 2.2, some concern exists among private investors that region's governments may simply renationalise those privatised enterprises that have benefited from private investment and efficiencies.

3.2.10 Corruption and personal interests

Although corruption is unlikely to be a goal in itself in most cases where SOEs are created or kept in the state hands, it may be a contributing factor. It is not a secret that Russia, Ukraine, and Uzbekistan are ranked highly in all international rankings measuring corruption, for example, having been ranked the 137th, the 126th, and the 153rd respectively in the Corruption Perceptions Index of Transparency International in 2019. [263] Since Soviet-era managerial habits are still strong, as are links between state officials and powerful SOEs' managers, as described further below, certain propensity of the FSU establishment to recent privatisation or to instigate the creation of new SOEs is definitely in place. The existence of SOEs in circumstances where the relevant legal framework is underdeveloped creates a fertile ground for syphoning state assets and getting political scores of a different nature – opportunities that cannot be easily rejected. Numerous examples of corruption scandals connected with SOEs within the FSU region may be given. It is municipal (regional) SOEs who are involved in them particularly often. [264]

Despite the fact that, as suggested above, corrupt interests are likely to represent a contributing motive rather than the one of the main rationales for the SOEs existence (expansion) in the FSU, their capability to affect the competitive environment should not be underestimated and they should, therefore, still be targeted. Nevertheless, as appears, it is not purely competition law instruments that may be of help, but rather ownership and corporate

[263] Transparency International, 'Corruption Perceptions Index 2019' (17 January 2020) <https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf>

[264] Thus, in 2017, having checked 9,000 unitary enterprises in Russia, most of which were municipal unitary enterprises (as described further below), Transparency International identified 600 cases, where the heads of such entities were also engaged in business activities (in contravention to law). In 348 cases, these business activities were in the same sphere as activities of relevant unitary enterprises. See Igor Sergeev and others, 'What is Wrong in SUEs and MUEs? Transparency Has Identified Almost 600 Infringements in Russian SUEs and MUEs' (Transparency International 2018) <https://transparency.org.ru/special/gupsmups/> accessed 18 January 2020

governance techniques and institutional measures that address conflicts of interest and enhance independence of SOEs, as analysed further in Chapter 4.

3.3 Characteristics and Functioning of the State Sector of the FSU

As the above analysis suggests, there are a variety of reasons why SOEs are established and maintained within the FSU. Not all of these considerations seem to be sufficiently valid in each particular case, and, as discussed, a thought-through efficiency and competition assessment is needed every time each of the considerations is given weight to or re-confirmed.

Now, to understand better how the state sector operates in the FSU and to identify those aspects of such operation that affect the region's competition environment, regional SOEs' legal forms, organisational structure, and institutional relations with the state and state regulators have to be explored. A variety of forms, regulatory practices, and managerial techniques are applied in respect of region's SOEs across different industries, but a somewhat rough portrait of an average SOE and, thus, the state sector of the FSU as a whole can still be painted based on some common characteristics. As was described in Chapter 2, different transitional experience has informed slightly different environmental settings in each of the studied countries, but those are not likely to significantly distort the portrait, though will be addressed separately where required.

The below sub-Sections analyse each particular element of the functionality of FSU region's SOEs, starting from their legal form.

3.3.1 Legal forms of SOEs

Various legal forms for the SOEs existence have been elaborated in the FSU to address different needs of the post-Soviet transition. Several most widespread forms, which are currently in use (see relevant statistics below), include (i) regular limited liability and public companies where the state is a member (directly or through other SOEs) or reserves some right to intervene (through e.g. a so-called 'golden share' [265]); (ii) a special form of a state unitary enterprise – a monolithic unit wholly owned by the state or some SOE and using its property based on specially delegated rights of operational control or economic management, as invented yet in the Soviet times; (iii) holding companies, state corporations, or concerns – statutory (chartered) corporations incorporated in accordance with special legal acts and enjoying a specific legal regime framing their activities with some sub-standard functions and objectives

[265] Generally, the right of the state to veto most important shareholders' decisions in respect of a given SOE (e.g. on its liquidation, reorganisation, amendment of its foundation documents, etc.).

being usually attached.[266] Relevant SOEs may be owned and managed at the central or local (municipal) level (except for Uzbekistan[267]) and, as is discussed in sub-Section 3.3.2 below, there are different modes of that how the state may exercise its ownership control.

Speaking of common limited liability and joint-stock companies, it may be hard to determine what size of the state shareholding turns a legal entity into an SOE. As was noted in Section 1.2 of the Introductory Chapter, for the purpose of this research, it may be useful to accept a somewhat flexible definition of the term 'SOE', reflecting the multiplicity of ways of how the state may establish control over a company and aligned with that offered by the OECD and the World Bank. An obvious inclusion here are the companies where the state holds more than 50% of shares as well as affiliates of these companies, where such companies hold more than 50% of shares as well. A less obvious inclusion are companies wherein the state owns minority interest, but is able to control them by other means (e.g. through the abovementioned 'golden share'), as well as, for example, the companies that are de-facto controlled by two major shareholders: the state, which owns less than 50% of shares and a company, which, for example, is wholly owned by another company, wherein the state holds 75% of shares.

Each of the above-named legal forms is usually used in the context of particular circumstances or industries, though it may be hard to draw clear borderlines. Hence, state unitary enterprises are rather widespread in the spheres of minor transportation services, municipal or urban engineering, utilities, servicing works within some industries (e.g. oilfield services, repair services for railways and airports, etc.) i.e. particularly, where an SOE is the final provider of goods or services or has relatively straightforward auxiliary functions. Statutory corporations are usually established in priority industries (for, mainly, the strategic control or development reasons described above) and are, as a rule, major incumbents unifying many SOEs or performing semi-regulatory functions (thus, in some way replacing existed Soviet line ministries). Common private or public companies are, in turn, incorporated where private

[266] Generally, it is these most widespread forms that are discussed in this Chapter and further in the thesis, but it may be useful to remember that some other forms exist. Those are mostly a legacy of the Soviet period and the troubled reforms of the 90s and are generally poorly suited to operate in modern market conditions. The diversity of such forms is particularly visible in Ukraine, where, for example, SOEs in the form of 'subsidiaries' exist with their corporate status being quite unclear. See, among others, Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 59-61, 139-141, 249-250

[267] Article 7 of the Law of the Republic of Uzbekistan on De-Statisation and Privatisation No. 425-XII (n 190) and Article 8 of the Law of the Republic of Uzbekistan on Property No. 152-XII (n 189) provide that the Uzbek Parliament (Oliy Majlis) will issue a resolution on the separation of state property on that owned by the Republic and that owned by the regions. That has, however, never been done in realty and, as a result, everything is owned at the central level with local municipalities managing some property based on the right of operational control, as described further below.

parties' participation in some form is envisaged or the clarity of the corporate structure and functions is of importance. Nevertheless, as mentioned above, the distinction may be blurred in many instances. Hence, for example, Russian Post, being a rather large company, had long operated as a federal state unitary enterprise, while sharing many characteristics with state corporations, as described above, until it was reorganised into a public company for the purpose of attracting foreign investors and improving its corporate governance on 1 October 2018. [268]

Generally, the above forms of SOEs represent different formations in terms of corporate independence and the functionality as full-fledged commercial entities. Hence, unitary enterprises have kept much in common with their Soviet predecessors in many cases being some subservient production or servicing units of state agencies or larger SOEs. In Russia and Ukraine, unitary enterprises may be established based on federal or municipal state property only, based on a decision of federal or municipal executive authorities respectively; in Uzbekistan, they may generally be established based on any type of property by any entity, but, in practice, owing to the rigidity of the form, they are usually created exclusively by central executive bodies and, on rarer occasions, large SOEs with regulatory functions. Though it is executive authorities who are generally empowered to establish unitary enterprises across the studied jurisdictions, they may grant the right to manage them as an owner to any state agency and, in some cases, to SOEs. [269]

A property fund of unitary enterprises represents a single indivisible block, which may not be divided on shares (hence, the name 'unitary enterprise'). Unitary enterprises generally have limited rights to their property, both that received from a founder and that gained as a result

[268] Ministry of Digital Development, Communications, and Mass Media of the Russian Federation, 'Corporatisation of FSUE 'Russian Post'' (2019) <https://digital.gov.ru/ru/activity/directions/337/> accessed 17 October 2019

[269] This research does not pay much attention to region's state establishments (budgetary, treasury, and autonomous establishments as they are also called or categorised in the jurisdictions under review). As was noted above, such establishments are supposed to be created for non-commercial, public policy purposes, albeit being allowed to engage in limited commercial actives. Some examples of relevant entities are educational establishments, medical organisations, public security institutions, theatres and entertainment organisations, sports organisations, providers of state services, etc. They generally operate based on the right of operational control and, thus, resemble treasury enterprises.

Though the operation of state establishments is not analysed in details, it is worth mentioning that, sometimes, they may be notable players in some markets, fiercely competing with private entities. This stresses a broader problem explored in this research that forms of the state interference in the FSU are often improper and that the FSU governments remain inaccurate in their assessment what markets have the potential to become competitive.

The above may also be relevant in case of public institutions, who may occasionally engage into activities being or having a potential to become competitive.

of their activities, and, thus, are limited in their decision making with the majority of their actions requiring a prior consent of the founder or an entity performing his functions. There are two types of unitary enterprises, depending on those rights to property they have - the abovementioned rights of operational control (an echo of the conventional Soviet approach to managing enterprises) and of economic management (elaborated at the beginning of perestroika). Unitary enterprises operating based on the right of operational control or so-called 'treasury enterprises' may not dispose of any of their property without the founder being involved and are usually enterprises performing limited production tasks or enterprises coming quite close to being public establishments e.g. some enterprises in the military industry producing components for larger enterprises, enterprises in healthcare, culture, public education, etc. A founder of a unitary enterprise operating based on the right of operational control has subsidiary liability to perform obligations of the enterprise where it is unable to perform them. Unitary enterprises operating based on the right of economic management are, in turn, more commercially oriented and are generally able to dispose of property under their control without founder's consent, except for immovable property and property expressly locked by the founder. A founder of a unitary enterprise operating based on the right of economic management does not bear liability for its unperformed obligations. [270]

Further, if private (limited liability) and public (joint-stock) companies with state participation represent relatively clear corporate structures and, generally, do not differ from their private counterparts (unless the position of the state as an owner is invigorated by ancillary legal instruments), state corporations or similar by nature state holding companies and concerns are oftentimes a combination of various legal formations and enjoy some uncharacteristic for a commercial entity independence from regulators and powers to influence relevant markets. Usually, being established at the central government level and being given a major task to oversee a specific strategic sector or to promote the development of a certain industry (by providing financial aid to other market players, implementing particular projects, or otherwise), state corporations are given a structure and functionality that help to complete this task in some efficient (or seemingly efficient) way and correspond to relevant markets. To give some example, Uzbek statutory holding companies e.g. Uzdonmakhsulot (an incumbent in wheat processing and bread production) and Uzkimyosanoat (an incumbent in the chemical industry), being public companies, are in fact fully controlled by the state with no shares being

[270]Articles 113, 114, 294-300 of the Civil Code of the Russian Federation 30 November 1994 (Federal Assembly of the Russian Federation); Law of the Russian Federation on State and Municipal Unitary Enterprises No. 161-FZ (n 231); Articles 73-78.1 of the Commercial Code of Ukraine 16 January 2003 (Verkhovna Rada of Ukraine); Articles 70-72, 176-181 of the Civil Code of the Republic of Uzbekistan 21 December 1995 (Oliy Majlis of the Republic of Uzbekistan)

publicly traded, have a rigid corporate structure with particular departments having specific functions of a public nature set by targeted legal acts, and are allowed to manage their affiliates in a directive manner with no corporate veil being in place. [271]

To better understand the extent and the context of use of particular legal forms of SOEs in FSU region, it may also be useful to look at relevant data on the quantities of SOEs of each form. A reservation should, however, be made that, generally, it is not easy to extract the exact numbers from available state statistics of the region, since there is no clear conceptualisation as to what an SOE represents and there is some messiness in maintaining relevant registers of state property. In Russia, where several attempts have been made to come up with centralised statistics, about 65,600 entities wherein the state had some sort of presence were identified by the middle of 2018. About 18,800 of them were unitary enterprises with about 35% of such enterprises being owned at the federal level. About 3,700 of entities with state participation were public or private companies (including, supposedly, state corporations), wherein the state was, in the vast majority of cases (very approximately, 75% of entities), the single or a majority shareholder (often, as provided above, both directly and indirectly i.e. via state institutions, other SOEs, etc.). The remaining entities were mostly state establishments of various levels and with various tasks. The total number of 65,600 was about 1.6% of the total amount of registered legal entities. [272]

It is harder to find reliable statistics for Ukraine and Uzbekistan. In Uzbekistan, according to the data contained in the state registry of companies, there were over 38,000 SOEs and, probably, state establishments, in early 2017 that was about 13,6% of all the registered legal entities (except for agricultural companies). Out of 659 existing joint-stock (public) companies state had direct ownership in 158 (24% of all such companies), while shares in other 329 were owned indirectly through SOEs. [273] In Ukraine, about 18,000 SOEs and, probably, state establishments existed by 2021, about 3,200 of which were SOEs owned at the central government level. This accounts for about 2% of the total number of registered legal entities. [274]

[271] Clauses 2-5, Annexes 1-4 to the Resolution on Improving the Structure for Managing 'Uzkimyosanoat' JSC No. PP-2884 12 April 2017 (President of the Republic of Uzbekistan); Clauses 4-10, Annexes 1-3 to the Resolution on the Transformation of State Corporation 'Uzdonmakhsulot' into 'Uzdonmakhsulot' JSC No. 376 6 August 2004 (Cabinet of Ministers of the Republic of Uzbekistan)

[272] Radchenko and Kovaleva and others (n 42); Radchenko and Parshina and others (n 42)

[273] Abdullaev (n 47)

[274] Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 27–29

Although, according to the official statistics above, the majority of state-owned entities are likely to be municipally owned unitary enterprises and state establishments, it is mainly joint-stock companies wholly or partially owned by the central government and state corporations that represent medium-sized and large SOEs, making some significant contribution to GDP. Hence, for example, 30 SOE included in the list of Russia's top-100 largest companies by capitalisation in 2016, were all joint-stock companies. [275]

Generally, the above qualitative and quantitative analysis suggests that there are many variations of that how SOEs may be organised. Despite such a variety, however, since it is still necessary to make a conclusion as to what a common form of a regular SOE within the post-Soviet space represents, this author will try to depict some averaged form. Overall, it seems, there is some evident intent to give all SOEs, particularly, medium-sized and large ones, a clear corporate structure, corresponding to market economy expectations, mainly, for attracting external financing, but also, to some extent, for equalising regulatory conditions for all market players (for, *inter alia*, improving competition). This explains the recent trend towards transforming unitary enterprises and state corporations into private (limited liability) or public (joint-stock) companies (with the latter being preferred for larger SOEs). With that said, the preservation of state control translates into survival of numerous non-commercial and non-market elements within the functionality of SOEs, including, for example, limited autonomy in decision-making, unlimited access to state resources (including financial, information, and networking ones), and exclusive rights and benefits for conducting activities, the exact configuration of which in each particular case is informed by and dependent on specifically elaborated rationales for state ownership. Considering this, it seems correct to perceive SOEs within the FSU as hybrid formations that take a form and tend to operate like regular commercial companies, but are driven and encumbered by tasks and functionality connected with broader functions of government. Some concrete examples of substandard elements being a part of the SOEs' functionality in addition to those given above, existing because of the SOEs' specific role and tasks, are discussed further below.

One theoretical implication of the above, which is worth mentioning, is that the more goals of a particular SOE are commercially oriented (e.g. it is kept solely for replenishing the state budget) the more likely it is that its legal form and functionality will be aligned with those of a private entity. A question, however, arises whether such an SOE, i.e. an SOE having limited public functionality or kept with no particular purpose at all, should remain to be an SOE. Generally, considering efficiency and competition problems caused by SOEs, it seems that state

[275] Radchenko and Kovaleva and others (n 42); Radchenko and Parshina and others (n 42)

ownership should be abandoned or optimised in such cases. This matter will also be considered further below and in Chapters 4 and 5.

3.3.2 Ownership control

One of the most important aspects of the SOEs' functioning is a government's approach to excising its ownership control over them, which may imply a varying degree of government intervention into their activities and engender varying consequences and effects. A chosen way of organising state ownership may blunt or, vice versa, sharpen SOEs' focus on commercial objectives, removing them from or bringing them closer to operating as regular private companies.

Following some classification elaborated by the OECD, several approaches to owning SOEs may roughly be distinguished, albeit the relevant categorisation may to an extent be formalistic when it comes to determining real effects of state ownership in each particular case. Centralised, decentralised, and dual ownership models are generally identified. Centralised ownership is where there is one government body, such as a ministry or a holding company, responsible for the government's stake in all SOEs. In decentralised ownership, different SOEs are overseen by different ministries. In dual ownership, one single ministry, often, the Ministry of Finance, or another specialised body, performs basis ownership functions for all companies, while some more specific functions for governing SOEs are performed by different ministries for different SOEs. [276]

Speaking of the FSU region, though the countries under review tend to drift towards the centralised approach with specialised state agencies for managing state property being established (the Federal Agency for State Property Management - Rosimuschestvo in Russia [277], the State Property Fund in Ukraine [278], and the State Assets Management Agency in Uzbekistan [279] [280]) and more and more SOEs being transferred to them, the system remains to

[276] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 35–36; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 42–67

[277] Resolution on the Federal Agency for State Property Management No. 432 5 June 2008 (Government of the Russian Federation)

[278] Law of Ukraine on the State Property Fund No. 4107-VI 9 December 2011 (Verkhovna Rada of Ukraine)

[279] Resolution on the Measures for Organising the Activities of the State Assets Management Agency No. PP-4112 14 January 2019 (President of the Republic of Uzbekistan)

[280] It is of interest that, as noted in Chapter 2, the State Assets Management Agency existing in Uzbekistan was merged with the State Committee for Developing Competition from 2012 to 2019. An obvious conflict of interest seems to be in place in such a case, reflecting the conflict between statism

be disorganised, with some SOEs being owned and controlled by relevant sectoral ministries and others (probably, the majority if to take only large and medium-sized SOEs) being subjected to dual control with occasionally, more than two 'managers' being able to exercise control.[281] To give an example, as was noted in sub-Section 2.2.3.2, an Uzbek SOE may be transferred to management of a sectoral holding company (e.g. oil and gas incumbent Uzbekneftegaz), while legal ownership rights may remain to be reserved for the State Assets Management Agency. In addition, the Ministry of Economy and the Ministry of Finance may exercise some form of control, while the Government – appoint managers. Such a mixed form of control seems to be typical for SOEs in the form of private (limited liability) and public (joint-stock) companies, where ownership and control can be more or less easily separated.[282]

With that said, as mentioned, the centralisation tendencies are growing stronger within the FSU (with some slower pace in Ukraine though) and a large number of SOEs have been transfected to the abovementioned state property management agencies, which, as believed, may ensure greater independence of SOEs, better monitoring of cross-sectoral performance, and standardised governance over SOE, not having sectoral bias and being less dependent on industrial policies (albeit, as argued, are less capable to provide sector-specific expertise and to ensure delivering public policy goals being attached to particular SOEs). This, however, oftentimes, does not completely isolate SOEs from interventions of other state agencies, which may still control how particular functions are executed or have reserved powers to make decisions on most important matters.[283]

A specific case to consider is where an SOE is a semi-regulator in itself (either directly or through having much political or 'strategic' significance translated into exclusive powers). Such

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and competition policies analysed in this research. As the relevant experience suggests, in the FSU environment, the functionality related to managing state property and statism policies attached to it tend to supersede the functionality related to enhancing competition if combined within a competition agency, turning the agency into yet another implementer of industrial polices.

[281] Georgiy Malginov and Alexander Radigin, 'State Sector and Privatisation: Trends of 2018' (Gaidar Institute for Economic Policy, 24 April 2019). Russian Economy. Trends and Prospects 40 <https://www.iep.ru/ru/publikatcii/publication/rossiyskaya-ekonomika-v-2018-godu-tendentsii-i-perspektivy-vypusk-40.html>; Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 79–88; Abdullaev (n 47); World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 22-23, 65-71

[282] Abdullaev (n 47)

[283] ibid; Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 146–148; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 22–23, 65-71; Malginov and Radigin (n 281)

SOEs exist in each of the studied jurisdictions and are often direct successors of Soviet line ministries, reorganised in the late 80s – the 90s, as described in Sections 2.1 and 2.2. The practice is particularly widespread in Uzbekistan, where many industries have remained to be controlled by large SOEs, which have been given a special status of 'bodies of economic management' [284]. Examples of relevant SOEs and some of their regulatory or semi-regulatory powers are provided in the table below:

Table 1: SOEs with regulatory and semi-regulatory powers in the FSU states

Country	SOEs with Regulatory or Semi-Regulatory Powers
Russia	*Gazprom* (oil and gas) has the exclusive right to export natural gas through pipelines [285]; *Russian Railways* (railroad transportation services, including the railway facilities management) controls the access to the main railway networks [286].
Ukraine	*Chernomorsk, Yujniy, Mariupolsky*, etc. (sea ports administration and stevedore services) (mainly before 2013, but to some extent, indirectly to this date) participate in setting rules and some tariffs for services at sea ports [287]; *Ukrzaliznytsia* (railroad transportation services, including the railway facilities management) controls the access to the main railway networks [288].
Uzbekistan	*Uzpakhtasanoat* (the cotton industry) develops a unified policy for the processing, transportation, and storage of raw cotton; controls the compliance with state quality and quantity standards for raw cotton and cotton fiber; monitors the introduction of modern technologies and the attraction of investments in the industry [289];

[284] See, for example, the Decree on Improving the System of Bodies of Economic Management No. UP-3366 22 December 2003 (President of the Republic of Uzbekistan)

[285] Article 3 of the Law of the Russian Federation on the Export of Gas No. 117-FZ 18 July 2006 (Federal Assembly of the Russian Federation)

[286] Among others, Clause 1.12 of Rules for the Use of Non-Public Railway Networks No. 26 18 June 2003 (Ministry for Railways)

[287] Andrey Podgayniy, 'Development of Sea Ports in Ukraine Based on Separate Port Departments' (Agrera Law Firm, 9 November 2015) <http://publications.chamber.ua/2016/Sea%20Ports/Brief_Landlord_Port_in_Ukraine_UA.pdf>; Articles 19 and 21 of the Law of Ukraine on Sea Ports No. 4709-VI 17 May 2012 (Verkhovna Rada of Ukraine)

[288] Articles 4 and 5 of the Law of Ukraine on Railway Transport No. 273/96-BP 4 July 1996 (Verkhovna Rada of Ukraine)

[289] Clause 2 of the Resolution on Improving the Management of the Cotton Industry No. PP-3408 28 November 2017 (President of the Republic of Uzbekistan)

	Uzbekneftegas (oil and gas) participates in the development of regulatory policies in the oil and gas industry and is one of decision-makers where licenses for the extraction, use, and sale of oil and gas are issued [290]; *Uzbekistan Railways* (railroad transportation services, including the railway facilities management) controls the access to the main railway networks; coordinates the development of the railway infrastructure within the country; participates in the development of particular technical and qualification standards and standard term contracts for the industry [291].

Where the relevant SOEs are concerned, it may be that the Government manages the state share directly and the line of command is structured in such a way as if a ministry has been established. Although such companies are usually still monitored by specialised ministries, including the Ministry of Finance and the Ministry of Economy, they seem to enjoy greater independence and bargaining powers. Even if the relevant state share has been transferred to a specialised property management agency, its powers of control are usually severely limited. In Russia, for example, lists of strategic or priority SOEs are in place, key decisions in respect of which are reserved for the Government or require broader coordination among several ministries and departments of the Government (e.g. material transactions, the appointment of key managers, distribution of profits, significant changes in the sphere of activities, etc.). [292] The same seems to be accurate for Ukraine and Uzbekistan [293]. [294]

It seems important to note that the OECD categorisation above is likely to have been elaborated with larger centrally-owned SOEs in mind. However, as was provided in sub-Section

[290] Resolution No. 444 12 June 2018 (Cabinet of Ministers of the Republic of Uzbekistan)

[291] Clause 2 of the Resolution the Measures for Organising the Activities of State Joint-Stock Company 'Uzbekiston Temir Yullari' No. 551 14 November 1994 (President of the Republic of Uzbekistan)

[292] Decree on the Approval of the List of Strategic Enterprises and Strategic Joint-Stock Companies No. 1009 (n 237); Malginov and Radigin (n 281)

[293] Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 37–58; Abdullaev (n 47)

[294] As was noted above, all the FSU states under review have also established specialised development banks. Although these institutions are much more commercially oriented than line ministries and state-owned holding companies and are, generally, unwilling to acquire large equity stakes in private entities, they may also be subject to occasional government interference, which may then be transposed to companies, wherein they hold shares. See, among others, Mikhail Korostikov, 'Russian Officials and State-Owned Companies' (French Institute of International Relations, August 2015). Russie Nei Visions 87
<https://www.ifri.org/sites/default/files/atoms/files/ifri_rnv_87_rus_mikhail_korostikov_august_2015.pdf>

3.3.1 above, locally-owned SOEs also form an important part of the SOEs landscape in the FSU (for example, in Russia, more than 60% of SOEs are municipally-owned SOEs, the majority of which operate in the sphere of municipal and urban engineering or utilities [295]). Municipally-owned enterprises, being mainly unitary enterprises, are usually established and owned directly by local executive authorities with no separation of control being in place. A relatively small share of municipal enterprises appears to be under dual or decentralised control – usually, this is the case where some regional autonomy exists (generally, in Russia, which consists of, among its other constituent subjects, 22 autonomous republics, 4 autonomous okrugs and 1 autonomous oblast). Autonomous regions often have own line ministries, which may exercise joint control over regional SOEs. It is worth noting that though it is generally smaller SOEs that are owned at the regional level, relatedly large SOEs are occasionally also owned by regional authorities. [296] To give an example, Tatneft, Russia's fifth largest oil company by the volume of the extraction, is controlled by the Government of autonomous Tatarstan, having consolidated about 36% of the company's shares through its other SOEs and holding a 'golden share'. [297]

If to make some general conclusion for medium-sized and large SOEs primarily, it seems that though an average SOE of the FSU region is usually owned by a specialised centralised property management institution, control over it is, as a rule, dispersed. It is usually line ministries who direct SOEs' market behaviour or bring it to some standardised form by, *inter alia*, elaborating investment and industrial programmes. The Ministries of Finance and Economy along with their subordinate agencies may also be active players by influencing SOEs' pricing decisions and even controlling their supply and distribution polices. Larger SOEs are not protected from some sort of supreme intervention, when the Government, the President, or the Parliament make targeted decisions on their operation or on particular aspects of their activity. This is especially common for SOEs that possess some kind of uniqueness e.g. suppling some unique goods or services, having unique importance in the social context (e.g. town-forming SOEs), or providing large contributions to the state budget.

[295] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2)

[296] Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 109–113; Malginov and Radigin (n 281)

[297] Forbes, 'Russia's 200 Largest Companies: Tatneft' (2020) <https://www.forbes.ru/profile/244795-tatneft> accessed 3 June 2020

3.3.3 Management and corporate governance

Given that the legal form of an average, primarily, a medium-sized or large SOE in the FSU is similar to that of private (limited liability) or public (joint-stock) companies [298], an internal corporate structure of such SOEs is usually based on the common for the FSU two-tier system of corporate governance, where two separate boards – a supervisory board and an executive board – govern a company. While the supervisory board of an SOE decides on some general questions of its operation and oversees how the executive board operates, the executive board, consisting of SOE's main managers, is responsible for day-to-day management of the SOE.

Where the state is a direct shareholder of an SOE (in contrast to situations where an SOE is owned by another SOE and where corporate procedures are relatively straightforward), individuals - state representatives are generally appointed by to represent the state at general meetings of shareholders and the supervisory board of the SOE. The appointment is usually done by a centralised state property management agency or another state body exercising ownership functions. Government officials or experienced private individuals (professional attorneys) may be appointed. The general meeting of shareholders or the supervisory board, in turn, appoints the chief executive officer and other executive directors. [299] In case of SOEs of

[298] Given this observation, not much is said about abovementioned unitary enterprises in this sub-Section. Generally, however, the structure of unitary enterprises is pretty straightforward and is reminiscent of those of state establishments. All chief managers of a unitary enterprise are appointed by a relevant state actor who has created the enterprise and have quite limited decision-making powers, being restricted by law and internal documents of the enterprise.

[299] Clauses 2 and 9 of the Regulations on Managing State-Owned Participatory Interests in Limited Liabilities Companies Created in the Course of Privatisation No. 34 27 January 2012 (Government of the Russian Federation); Clauses 2, 9, 16-22 of the Regulations on Managing Federation-Owned Shares of Joint-Stock Companies and the Use of the Special Right of a 'Golden Share' in Managing a Joint-Stock Company No. 738 3 December 2004 (Government of the Russian Federation); Article 11 of the Law of Ukraine on Managing State Property No. 185-V 21 September 2006 (Verkhovna Rada of Ukraine); Clause 2 and Annex to the Resolution on Certain Matters Related to the Management of State Property No. 143 10 March 2017 (Cabinet of Ministers of Ukraine); Clauses 1, 12-15 and Annex to the Regulation on the Order of Transfer of State Shares (Participatory Interests) for Trust (Fiduciary) Management No. 215 16 October 2006 (Cabinet of Ministers of the Republic of Uzbekistan); Clauses 1, 2-4, 7, 8, 10-13, 15-20 of the Regulation on the Order of Performing the Activity for Managing State Shares (Participatory Interest) in the Charter Fund of Business Entities No. 1473 27 April 2005 (Ministry of Finance of the Republic of Uzbekistan); Clauses 2, 4-20 of Annex 2 to the Resolution on the Measures for Improving Corporate Governance in Privatised Enterprises No. 189 19 April 2003 (Cabinet of Ministers of the Republic of Uzbekistan)

special significance, the right to appoint state representatives and executive directors may be reserved for the Government directly. [300]

There tends to be more flexibility where state corporations (concerns, associations, etc.) are created. In Uzbekistan, for example, the chairperson of the executive board of state-owned associations and concerns (being semi-regulators) is usually appointed by the Cabinet of Ministers and (or) the President and his status is equal to that of the minister. [301] To give an example for Russia, in case of the state corporation Rostec (a holding company unifying hundreds of large heavy industry SOEs), nine members of the supervisory board include four members appointed by the Government and five members, including the chairman, appointed by the President, who also appoints the chief executive officer. [302] Since state corporations sometimes act as semi-regulators or are tasked with developing a particular sector, this variety demonstrates the willingness to find a special approach for a relevant industry. A close proximity to the Government or the President, in turn, indicates the importance of relevant policy goals and the desire to excise greater control over the process of their achievement. [303]

Representatives of the state at general meeting of shareholders and the supervisory board make their decisions based on detailed directives issued by a single centre for managing state property or another authority supervising an SOE based on the ownership structure chosen in a given case (the Government, the Ministry of Economy or others). Directives are mandatory to follow and a representative may not vote if no directives have been received. In effect,

[300] See, for example, Articles 5, 11, and 11.2 of the Law of Ukraine on Managing State Property No. 185-V (n 299); Clauses 18 and 38 of the Resolution on the Competitive Selection of Managers of Entities of the State Sector of the Economy No. 777 3 September 2008 (Cabinet of Ministers of Ukraine); Article 76 of the Law of the Republic of Uzbekistan on Joint-Stock Companies and the Protection of Shareholders' Rights No. 223-I 26 April 1996 (Oliy Majlis of the Republic of Uzbekistan); Clauses 1 and 2 of the Resolution on the Measures for Further Improvement of the System for Managing State Assets No. 356 27 April 2019 (Cabinet of Ministers of the Republic of Uzbekistan)

[301] See, for example, Clause 3 of Resolution on the Measures for Organising the Activities of National Holding Company 'Uzbekneftegaz' No. PP-446 21 August 2006 (President of the Republic of Uzbekistan); Clause 3 of the Resolution on the Measures for Improving the Structure of Managing the Automotive Industry No. 405 23 August 2004 (Cabinet of Ministers of the Republic of Uzbekistan)

[302] Articles 10-16 of the Law of the Russian Federation on State Corporation for Promoting the Development, Production, and Export of High-Tech Industrial Products 'Rostec' No. 270-FZ 23 November 2007 (Federal Assembly of the Russian Federation)

[303] Abdullaev (n 47); Tatiana Arkhipova and others, 'Functions of State-Owned Corporations in the Structure of the Public Sector of the Russian Federation' (2016) 28(1) SHS Web of Conferences 1008 <https://www.shs-conferences.org/articles/shsconf/abs/2016/06/shsconf_rptss2016_01008/shsconf_rptss2016_01008.html>

directives play a highly constraining role, depriving representatives of much of their decision-making powers and, thus, negating any significance of their role. [304]

It is noteworthy that corporate governance codes have been approved in all the studied countries. These codes recommend or make it mandatory for SOEs, mainly, public ones, to have independent members in the supervisory board (or the one-tier board of directors if established) up to a certain number (generally, one third of the board). [305] Although this recommendation has been followed in some major SOEs (e.g. Russia's Sberbank), the majority of SOEs still lack oversight independent from the state, which may have allowed to make relevant SOEs more commercially-focused, adaptive, and market-friendly. Generally, this seems to be explicable by the lack of initiative within state agencies being shareholders of SOEs, partially caused by that the post-Soviet space cannot offer a broad range of professional managers able to contribute some high-profile market expertise and state shareholders are reluctant to take a subjectively unsubstantiated risk of attracting external managers. Usually, a high degree of foreign exposure of an SOE is required to persuade state authorities that independent board members are needed (even at the cost of attracting foreign nationals) – either for formalistic compliance with international standards or for real competition with outside players. [306]

Further, it seems that the role of private minority shareholders in SOEs is relatively limited. As a result of the transition processes of the 90s and 2000s, larger private shareholders within large SOEs tend to be either large financial and industrial groups or big companies partnering with the state in a variety of spheres. Their willingness to be discordant within one corporation

[304] Clauses 2 and 9 of Russia's Regulations on Managing State-Owned Participatory Interests in Limited Liabilities Companies Created in the Course of Privatisation No. 34 (n 299); Clauses 2, 10, 16-20, 22 of Russia's Regulations on Managing Federation-Owned Shares of Joint-Stock Companies and the Use of the Special Right of a 'Golden Share' in Managing a Joint-Stock Company No. 738 (n 299); Article 11 of the Law of Ukraine on Managing State Property No. 185-V (n 299); Clauses 12 and 14 of Uzbekistan's Regulation on the Order of Transfer of State Shares (Participatory Interests) for Trust (Fiduciary) Management No. 215 (n 299); Clauses 7, 8, 10-13, 15-20 of Uzbekistan's Regulation on the Order of Performing the Activity for Managing State Shares (Participatory Interest) in the Charter Fund of Business Entities No. 1473 (n 299); Clauses 7 and 10 of Annex 2 to the Resolution on the Measures for Improving Corporate Governance in Privatised Enterprises No. 189 (n 299)

[305] Article 2.4 of the Code of Corporate Governance 10 April 2014 (Central Bank of Russia); Article 3.5 of the National Code of Corporate Governance 13 March 2020 (National Securities and Stock Market Commission of Ukraine); Articles 18-19 of the Code of Corporate Governance 31 December 2015 (Uzbekistan's State Commission for Increasing Effectiveness of the Activity of Joint-Stock Companies and Improving the System of Corporate Governance). In Ukraine, the relevant requirement has also been fixed in Articles 11 and 11.2 of the Law of Ukraine on Managing State Property No. 185-V (n 299)

[306] A. Zaporojhan, 'Independent Directors and Professional Attorneys in Management Bodies of Joint-Stock Companies with State Share' (2010) 4 Management Consulting 93

is often blunted by the necessity to be accommodating for getting some access to state support in other projects. Non-major shareholders (in some cases, there might be thousands of individuals - former employees of an SOE) are usually unlikely to represent a powerful force, because of both the insignificance of their total shareholding and the inability to act unitedly. Some form of foreign shareholding in SOEs is often considered as a panacea in this regard, as real arm-length commercial relations get a chance to be constructed with the state, which tends to be more pliable when cooperating with foreign investors, hoping to attract funds and foreign expertise.

Generally, considering the above, a somewhat unique statism-oriented model of corporate governance exists within post-Soviet SOEs. This model seems to rest on direct vertical relations between a state agency being a shareholder or, occasionally, a state body being a principal decision-maker within government and the chief executive officer of an SOE. Reminiscent of the Soviet past, this style of governance, built on directives and personal communication, tends to reject elaborate mechanisms of a corporate governance with all the relevant infrastructure being an outer shell. This pattern is perfectly reflected in the Uzbek case, where chief executive officers of largest SOEs are, as noted, equated to ministers and are in fact subordinated only to the Prime Minister and the President. To be accurate, such generalisation and simplification is not correct in each case and collective decision-making may indeed be the case for some SOEs, but this, however, seems to be largely dependent on personal traits of involved state officials and managers (hence, for example, liberal market-oriented views of top managers of Sberbank along with liberal views of officials of the Central Ban, which manages the state share in Sberbank, make the governance system of the bank closer to ideals of Russia's Code of Corporate Governance).

Given such a model of corporate relations, quite a specific conflict of interest exists within region's SOEs. This conflict involves not so much an entity owning an SOE and SOE's management, but rather various state stakeholders controlling the SOE, all driven by different considerations. Hence, for example, while the Ministry of Finance may support some increase of dividends for replenishing the state budget, a relevant line ministry and SOE itself may oppose this as undermining industry development programmes.

It is of interest that some attempts have been made across the post-Soviet space to introduce a mechanism of trust management for SOEs – a mechanism only loosely resembling the respective instrument in English or US law and rather implying external management of SOEs based on relevant contractual arrangements (i.e. fiduciary management). It is fair to note, however, that relevant efforts have been relatively weak (no comprehensive legislative

framework has been elaborated in any FSU country) and the number of cases where some positive results have been achieved seems limited - in many cases, the authority of attracted managers have remained rather restricted. It is hard to say why the instrument has not been developed to an admissible extent to become an alternative to full privatisation, as not much public discussion is in place in this regard. Perhaps, the necessity to exhibit some creativity in developing this essentially foreign instrument and to implant it into a local legal system as well as reasonable concerns about the safety of transferred state property has made the FSU governments resile from its broad application. A possibility to extend the scope of its application will be explored in further Chapters. [307]

In sum, it appears that the existing pattern of corporate relations within region's SOEs does not render a good impact on its competitive environment. The extremely tight connection between state officials and SOEs' management, attempts to go beyond what ordinary corporate control mechanisms would suggest, and the desire of many state stakeholders to utilise SOEs in their departmental interests, erode a commercial component of SOEs, turning them into public establishments. This makes public policies the ultimate priority for SOEs; devalues relevant competition policy considerations; legitimises shielding SOEs from competition rules or relaxing such rules for them; provides numerous opportunities to extract non-market benefits; and grants some authority to act as a hand of the state in regulating relevant markets. Such effects eventually affect private players, who may be unlikely to withstand competition with what is sometimes called 'leviathans in business' (that is partially proved by, for example, the results of the business survey conducted in Russia, as cited above).

3.3.4 Functioning of the state sector

Following the analysis of the ownership structure and the corporate governance mechanisms within post-Soviet SOEs in the previous sub-Sections, it is now possible to move to the analysis of specific aspects of the SOEs' functioning, including their production activities, pricing policies, procurement procedures, and benefits. It is aimed to be understood how specific elements of the SOEs' operation may distort competition in relevant markets of the region.

As was noted above, industries where SOEs operate are diverse in the FSU. Besides for some relatively obvious cases e.g. the state dominance in the military industry, oil and gas, the power

[307] Resolution on the Order of Transfer of Federation-Owned Shares of Joint-Stock Companies Created in the Course of Privatisation for Trust (Fiduciary Management) and the Order of Conclusion of Relevant Agreements No. 989 7 August 1997 (Government of the Russian Federation); Uzbekistan's Regulation on the Order of Transfer of State Shares (Participatory Interests) for Trust (Fiduciary) Management No. 215 (n 299)

industry, utilities, transportation, telecommunications, education and healthcare, state keeps some sort of control over many industries that are usually dominated by private businesses e.g. retail trade in consumer goods (e.g. in cooking oils, salt, sugar, etc.), pharmaceutics, the textile industry, car-manufacturing, the production of alcoholic beverages, etc. Being dominant, SOEs oftentimes produce bottleneck goods or services, or own some essential infrastructure. Besides, SOEs (along with state establishments and institutions) are often dominant consumers.[308]

Many of the above SOEs are vertical incumbents or Soviet-styled agglomerations dominating many markets within a particular industry. Such a trend towards concentration is likely to be tacitly or directly supported by the state, seemingly – all for the same reasons, as during the Soviet period: some apparent easiness of management and control (SOEs are a means to implement government industrial policies) and the willingness to address development problems by means of gigantism and expansionism. Moreover, the notorious transition processes of the 90s have repulsed the readiness to experiment with business formations and it is still feared that given certain underdevelopment of market infrastructure, separate SOEs will not be able to cooperate effectively in the absence of corporative links.

It is worth noting that unbundling experience of Europe and the US has been not readily followed across the FSU. One of few rare examples is the unbundling of the power industry in Russia of the mid-2000s mentioned above. Being pushed through by Russia's liberal reformists, it was aimed at resolving sector's main grievances: the depreciation of obsolete facilities and consequent interruptions in stable power supply; lack of power capacities in the context of growing consumption; lack of competition, pushing up prices and the amount of state subsidies; and lack of interconnections between country' regions. Full ownership unbundling was opted for and state-owned incumbent RAO UES was commercialised and divided into five groups of entities, including those involved in the generation, the high voltage transmission, the local distribution, the retail, and the dispatch control with the majority of generating and retailing entities being subsequently privatised. Some steps were made after privatisation to create the wholesale market, to liberalise tariff policies, and to enhance competition. Consequently, however, mixed results have been achieved: although power generation problems have been largely resolved (albeit with the introduction of state aid programs), the prices have not decreased and a sufficiently competitive market has not been created in any

[308] Yuriy Tsvetkov, 'The Infrastructure of the State Order' [2019] Journal of the Russian Union of Young Scientists 162; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2); Radchenko and Kovaleva and others (n 42); Abdullaev (n 47); Pop and others (n 48) 18–21

of the areas (in the power generation, for example, SOEs have been able to restore their positions). Possible causes of such results are a subject of heated debates with one of the named reasons being the incompleteness of the reforming (kept fixed prices for individuals, the refusal from privatisation of particular generators, state-imposed supply contracts, etc.). [309] Nevertheless, the main conclusion here is that Russia's government did not underestimate the difficulty of the unbundling and having made sure that its concerns were not vain, have remained cautious to move forward (with the same cautiousness having been chosen by other FSU governments).

It is also a characteristic of post-Soviet SOEs to act as private corporations and to diversify their business by investing in non-core activities, including both equity investments into existing private companies and greenfield projects of various kinds (for example, Russia's Gazprom being one of the world's largest vertical incumbents in the gas industry is active in transportation, banking and finance, mass media, the construction industry [310]). [311] Oftentimes, however, such a policy is a result of some pressure rendered by government and represents an attempt to stimulate the development of a particular industry (as described in sub-Section 3.2.3 above).

As discussed in Section 3.1, the above concentration and expansionism of the state sector are rather concerning from the competition perspective. It is also worrying that along with encouraging the sprawling of the state sector, the FSU governments utilise highly intrusive methods of regulatory control in respect of SOEs, which are likely to reinforce the perceived role of the state sector as a hand of the state. Particular aspects of the FSU SOEs' functioning, including their production activities, pricing, procurement, and privileges, as well as specifics of relevant intrusive regulation are considered further below with the aim to uncover how these are likely to impact on the region's competitive environment.

[309] Vladimir Milov, 'What have not reformists of RAO UES been able to achieve?' *Vedomosti* (4 July 2018) <https://www.vedomosti.ru/opinion/articles/2018/07/04/774559-reformatorov-rao-ees> accessed 21 March 2019; Anatoly Chubais, 'How has the Reform of RAO UES Ended?' *Vedomosti* (28 June 2018) <https://www.vedomosti.ru/opinion/articles/2018/06/29/774143-reforma-rao-ees> accessed 21 March 2019; Centre for Strategic Researches 'Severo-Zapad' and Ministry of Energy of the Russian Federation (n 146)

[310] Gazprom PJSC, 'Financial Report for 2020' (2021) <https://www.gazprom.ru/f/posts/57/982072/gazprom-financial-report-2020-ru.pdf>

[311] See, for example, Abdullaev (n 47); Pop and others (n 48) 13–21

3.3.4.1 Production activities of SOEs

Generally, as follows from the above, the pattern of functioning of FSU region's SOEs is in many ways shaped by control of the state and state agencies over them in each sphere of their functioning, including, among others, the production and distribution of outputs, pricing policies, and procurement of inputs. Obviously, an important instrument allowing state agencies to control the relevant practices of SOEs are state's rights as of a shareholder. Where an SOE is not in the hands of a centralised ownership institution and (or) no other measures for ensuring SOEs' greater autonomy have been taken, state agencies and, primarily, sectoral regulators, are keen to intervene significantly for, as was noted above, achieving public policy goals and pursuing their own departmental objectives. Besides for such corporate control, however, there are a variety of regulatory instruments that allow state actors to direct SOEs' activities.

To begin with, the degree of regulatory control over SOEs' production and distribution activities tends to vary across the region and across different strata of the state sector and, thus, it is hard to make generalisations here. The relevant control is likely to be most stringent in Uzbekistan, where the aforementioned material balances - a tool within the administrative economy used to count and allocate production of SOEs - are still in use for so-called 'highly liquid' products, as mentioned in Chapter 2. Generally, under material balances, some part of relevant products is supplied for public sector needs (among others, to SOEs) under directs agreement at regulated prices, some part of products is sold locally through the commodity exchange with regulated prices serving as the starting price, and some part is exported at prices being not lower than regulated prices. Being developed by branch regulators (either ministries or incumbent SOEs – state holding companies with regulatory functions), material balanced are reviewed by the Ministry of Economy, being then approved by the Government.[312] The reasons for using materials balances are numerous and besides for obvious attempts to control important sectors of the economy (for reasons, which are, in turn, explained in Section 3.2), include the desire to ensure efficiency of the state sector and uninterrupted functioning of SOEs.[313]

Where material balances are absent (whether are not used as a tool at all, as in Russia and Ukraine, or are not used with respect to non-strategic goods and services, as in Uzbekistan),

[312] Regulation on the Order of Development and Submission for Approval of Material Balances No. 124 (n 202); Clause 2 and Annex 3 to the Resolution on Further Implementation of Market Mechanisms for the Sale of Highly Liquid Products, Resources, and Materials No. 57 (n 202)

[313] Abdullaev (n 47)

some other forms of rigorous state control may be in place. Hence, detailed production plans are usually developed for unitary enterprises by their owners in cooperation with other state actors in all the three countries under review.[314] Further, SOEs being postal and utility services providers along with many SOEs supplying public and merit goods and services (as described above) usually have the statutory obligation to ensure the provision of particular universal services.[315] Almost the same may apply to SOEs being natural monopolies other than those being a part of the mentioned categories, which are often obliged to supply particular goods or services to the state or specific groups of consumers.[316] Also, the system of state orders (similar to that applied in the early 90s, as mentioned in Chapter 2) may be established, wherein SOEs are mandated to sell some specified part of their production to the state (as, for example, is done in some agricultural sectors in Uzbekistan e.g. in the cotton and grain sectors).[317]

In some cases, a regulator in a relevant sphere or a principle controller (a de facto shareholder) of a SOE, may direct SOE's production and distribution activities by virtue of its statutory rights to take key decisions on the production of new goods or services, the distribution and redistribution of supplies, etc.[318] On particular occasions, targeted legal acts are adopted by the President, the Government or the legislature to shape activities of a particular SOE (particularly often, of state-owned banks, being ordered, for example, to finance some selected projects[319]). Considering dominance of the state in many industries of the FSU, also, some

[314] See, among others, Article 20 of the Law of the Russian Federation on State and Municipal Unitary Enterprises No. 161-FZ (n 231); the Resolution on the Measures for Improving the Effectiveness of Using Federal Property No. 228 10 April 2002 (Government of the Russian Federation); Articles 75, 77, and 78 of the Commercial Code of Ukraine (n 270); Clauses 12 and 13 of the Regulation on State Enterprises No. 215 16 October 2006 (Cabinet of Ministers of the Republic of Uzbekistan)

[315] See, for example, Article 12 of the Law of the Russian Federation on Water Supply and Wastewater Disposal No. 416-FZ 7 December 2011 (Federal Assembly of the Russian Federation); Article 9 of the Law of the Republic of Uzbekistan on the Postal Communication No. 118-II 31 August 2000 (Oliy Majlis of the Republic of Uzbekistan); the Resolution on Ordering the Sale of Goods, Works, and Services to Consumers Subject to the Mandatory Servicing No. 277 24 December 2008 (Cabinet of Ministers of the Republic of Uzbekistan)

[316] See, for example, Articles 17-19 of the Law of the Russian Federation on Sea Ports No. 261-FZ 8 November 2007 (Federal Assembly of the Russian Federation)

[317] Abdullaev (n 47)

[318] This is, for example, the case for the chemical industry of Uzbekistan, where the SOE with regulatory functions Uzkimyosanoat sends out to SOEs in the industry plans for distributing fertilisers produced by them, as prepared based on some preliminary statistical indicators for the consumption of fertilisers approved by the President. To get some understanding, see, for example, Clauses 1 and 2 of the Resolution on the Program for the Development of the Chemical Industry for 2017-2021 No. PP-3236 23 August 2017 (President of the Republic of Uzbekistan)

[319] For example, see Saida Djanizakova, 'Banks Will Finance a New Stage of the Development of Sericulture in Uzbekistan' (Finance.uz 29 January 2018) <https://finance.uz/index.php/ru/fuz-menu-

seemingly neutral legal acts regulating trade in specific goods and services or licensed activities within particular spheres may in fact have an impact on SOEs only. [320]

Speaking of control over SOEs's productions activities through targeted legal acts (literally or de facto), it should be mentioned that the FSU governments often also get deeply involved in investment decisions of SOEs through the adoption, at the national or municipal levels, of comprehensive investment policies such as Investment Programs or Investment Plans or more specific legal acts e.g. acts of the executive on the implementation of particular investment projects (the practice is particularly widespread in Uzbekistan, but to some extent is also in place in Russia and Ukraine). [321] Relevant documents usually provide for detailed description of a project (projects) SOEs are expected to carry out, sources of its (their) financing (as a rule, state subsidies and SOEs' own funds), and target outcomes. [322]

Lastly, it should probably be noted that the more an SOE is interwoven into the system of state governance, the more limited it is in taking independent market-influenced production decisions i.e. public goals and policies of the state have to be considered to a greater extent. Some illustrative examples here are SOEs with a large number of regulatory functions (e.g. Russian Rosatom in the nuclear industry, Uzbek Uzbekneftegaz in oil and gas) and public establishments and institutions actively engaged in the provision of goods and services on a commercial basis (e.g. public notaries in Uzbekistan). The same principle is likely to be in place in case of SOEs' pricing policies, discussed below.

3.3.4.2 SOEs' pricing policies

Various forms of regulatory price control exist across the FSU, including direct price setting (approval of prices), price caps, maximum mark-ups for resellers, maximum margin rates, indirect prices-affecting accountancy rules (e.g. limits for deductible expenses), etc. Although it cannot be said that SOEs are always targeted, given the skewed structure of the economies

economy-ru/2092-banki-profinansiruyut-novyj-etap-v-razvitii-shelkovodstva-v-uzbekistane> accessed 15 March 2020

[320] See, for example, the Rules for the Use of Electric Energy No. 22 12 January 2018 (Cabinet of Ministers of the Republic of Uzbekistan), regulating some aspect of the generation and supply of electricity.

[321] See, for example, the Rules for the Approval of Investment Programs of Entities in Electric Energy No. 977 1 December 2009 (Government of the Russian Federation); Clauses 1-4, 9 of the Resolution on the Measures for the Implementation of the Investment Program of the Republic of Uzbekistan for 2021-2023 No. PP-4937 28 December 2020 (President of the Republic of Uzbekistan)

[322] Higher School of Economics, 'Investment Policy in the Russian Federation during the Economic Crisis' (2010) <https://www.hse.ru/data/758/364/1225/%D0%9B%D0%B5%D0%BA%D1%86%D0%B8%D1%8F%201_%D0%A2%D0%B5%D0%BE%D1%80%D0%B8%D1%8F.pdf> accessed 10 May 2021; Abdullaev (n 47)

of the chosen jurisdictions, it is usually SOEs who are mainly affected. Thus, for example, the direct price setting is likely to be applied where some strategic or socially significant goods or services (e.g. natural gas, oil, uranium, gold, bread, cotton oil, cotton, fertilisers, municipal and urban engineering services) are concerned (mainly produced by SOEs) or in case of natural monopolies (usually being SOEs). [323] In some circumstances, it may be the case that some large SOEs are directly chosen (as may be enlisted in relevant legal acts) and specific price control mechanisms are devised for them. The direct intervention in such a case is usually undertaken by the Government and is often justified by perceived strategic significance of the SOE. [324]

Dwelling on here, it may be added that, on many occasions, it is lower executive bodies, including line ministries, regulatory agencies, or local municipalities, who are authorised to determine prices. Considering the connectedness between state institutions and the state sector described above, it is usually SOEs who fall victims of such powers, especially where the municipal level is concerned – the imposition of pricing policies with respect to SOEs only seems to be simpler and less risky in terms of unwanted externalities.

It is also notable that price regulation within the FSU is usually attached to the competition authorities, who seemingly, as was noted above, try to keep up with their role of successors of the Soviet Price Regulation Committee. Their functions usually combine both participating in setting tariffs (generally, those for natural monopolies) and exercising ex-post control (including reacting to price violations). Speaking of the tariffs setting, the role of the competition authorities in that is particularly pronounced in Russia – the FAS is authorised to set prices and price caps for a wide range of products and services. [325] Despite that in the 90s, a separate tariffs regulating agency was established, it was subsequently liquidated with its functions being transferred to the FAS for, among other things, more coherent control over natural monopolies and more effective protection of consumer rights. Albeit not being

[323] See, among others, the Resolution on the Measures for Ordering the State Prices (Tariffs) Regulation No. 239 7 March 1995 (Government of the Russian Federation); the Law of Ukraine on Prices and the Price Setting No. 5007-VI 21 June 2012 (Verkhovna Rada of Ukraine); the Resolution on the Powers of Executive Authorities and Executive Bodies of City Councils to Regulate Prices (Tariffs) No. 1548 25 December 1996 (Cabinet of Ministers of Ukraine); the List of Socially Significant and Strategic Goods (Services), Prices (Tariffs) for which are Subject to State Regulation No. 259 30 March 2018 (Cabinet of Ministers of the Republic of Uzbekistan); Uzbekistan's Regulation on the Order of Forming, Declaration (Approval) and Setting of Regulated Prices (Tariffs) for Goods (Works, Services) and State Control over Their Application No. 239 (n 201)

[324] See, for example, Paragraph 1 of Annex 1 to the above Resolution on the Measures for Ordering the State Prices (Tariffs) Regulation No. 239 (n 323), wherein Russia's gas incumbent Gazprom is directly referred to.

[325] Clause 5.3 of the Regulation on the Federal Antimonopoly Service No. 331 30 June 2004 (Government of the Russian Federation)

expressly entitled to set tariffs, the competition authorities of Uzbekistan and, to a lesser extent, Ukraine, in turn, also have a say in the tariffs setting, being often consulted with when prices are set - largely, because of their ex-post control powers. Speaking of the ex-post control, besides for the responsibility to monitor the compliance with tariff policies (to check that prices are set correctly)[326], the mandate of the post-Soviet competition authorities commonly includes the right to evaluate prices and to penalise dominant businesses for setting 'monopolistically low' or 'monopolistically high' prices[327].[328] In contrast to many other competition law jurisdictions, where a somewhat similar practice exists to target predatory or excessive pricing, post-Soviet competition regulators seem to be much more active in this area, especially if to compare the practice of excessive pricing control. Hence, for example, a large share of cases reviewed by Russia's FAS tend to relate precisely to excessive pricing in a variety of industries.[329] It seems that this trend is, to some extent, a logical continuation of the Soviet

[326] ibid; Clauses 33-35 of Uzbekistan's Regulation on the Order of Forming, Declaration (Approval) and Setting of Regulated Prices (Tariffs) for Goods (Works, Services) and State Control over Their Application No. 239 (n 201)

[327] Articles 6 and 7 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154); Article 6 of Law of Ukraine on the Protection of Economic Competition No. 2210-III (n 176); Article 13 of the Law of Ukraine on the Protection of Economic Competition No. 2210-III (n 176); Articles 7 and 8 of the Law of the Republic of Uzbekistan on Competition No. ZRU-319 (n 208)

[328] For that purpose, it has long been a practice of the competition authorities across the FSU to maintain so-called registers of dominant undertakings (still being maintained in Uzbekistan). To explain, the competition authorities have identified dominant entities across all markets and included them into the register. Such entities have been obliged to submit information on prices for their goods and services to the competition authorities, which have then monitored them and compared to prices for similar products within relevant markets. If it has been identified that prices set by dominant entities had been increased (decreased) substantially (as a rule, for more than 10%) or have been significantly higher (lower) than other market prices, explanations could have been requested from relevant dominant entities. In case if the explanations have seemed to be unsatisfactory, the competition authorities could have initiated an abuse of dominance case. See the Decree on Forming and Maintaining the Register of Businesses Entities Whose Share within a Particular Market is More than 35% 19 December 2007 (Government of the Russian Federation); the Regulation on the Procedure for Recognising an Economic Entity or a Group of Entities as Dominant in a Commodity or Financial Market and Maintaining the State Register of Economic Entities Occupying a Dominant Position in a Commodity or Financial Market No. 230 20 August 2013 (Cabinet of Ministers of the Republic of Uzbekistan)

[329] It is hard to bring in precise statistics here, as a sufficiently detailed breakdown of cases investigated by the FAS is not publicly available. Nevertheless, the significance of the number of relevant cases is occasionally confirmed by independent researchers and statements of the FAS itself. See, among others, Alexey Ulyanov, 'Monopolies and Rent: The Uselessness of the Antimonopoly Service in the Rental Economy' *Vedomosti* (6 November 2016) <https://www.vedomosti.ru/opinion/articles/2016/11/07/663743-monopolii-renta> accessed 22 January 2019; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2019' (n 2); Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2); Federal

regulatory practices as well as a consequence of the economic turmoil of the 90s when inflation went out of control and many businesses got the opportunity to exploit consumers in most dishonest ways. Moreover, the existing craving for some sort of long-lasting social stability informs the desire to have instruments for targeting occasional price shocks. [330]

If to access the mechanism of price controls generally, it seems that in contrast to its limited use in developed jurisdictions and despite USSR's negative experience with it (revealing numerous efficiency problems of the practice), its application in the FSU is somewhat overused [331]. Some of the main reasons for that correlate to an extent with the rationales for maintaining SOEs (as noted above, both mechanisms are oftentimes used together), though it is likely that the overarching reasons here are the desire to prevent dominant players on highly concentrated markets from extracting monopolistic rents and to push prices down. This is, in turn, informed by objectively low levels of income of the general public within the FSU (a wide spread practice is, for example, as mentioned above, liberalisation of prices charged on businesses and keeping price controls for consumers – individuals).

From the competition policy perspective, the practice of price controls appears to be questionable even if targeted at the sectors where SOEs are dominant only – set prices may be inadequate for private players and cause their exit and (or) prevent their entry; as set prices are usually low, it may legitimise and encourage application of SOEs for state aid and the provision of it; and may render negative impact on competition within adjacent markets. In the context of that, it seems that price control requires more stringent assessment before being imposed in each given case and possible alternatives (e.g. subsidisation of consumers) should be explored before resorting to it.

Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2017' (n 147); Avdasheva and Kryuchkova (n 150)

[330] Non-Commercial Partnership 'Assistance in Developing Competition', 'Analysis of the Key Areas of Activity of the FAS of Russia based on the Results of 2015' (2016) <http://competitionsupport.com/wp-content/uploads/2018/11/Doklad_CEA_FAS_2015.pdf>; Federal Antimonopoly Service (n 150)

[331] No comprehensive data on the scale of price regulation is publicly available, but if to rely on some of available official and semi-official information, more than 42,000 tariffs of a different nature and levels are annually set by the Russian FAS; prices for about 130 categories of products are set in Ukraine; and about 280 SOEs, including those being natural monopolies, are subject to the price regulation regime in Uzbekistan. See Annex 3 to the Resolution No. 33 on the Measures for the Implementation of the Presidential Resolution No. PP-2454 10 February 2016 (Cabinet of Ministers of the Republic of Uzbekistan); Alexandra Vozdvizhenskaya, 'FAS Has Presented a Project of the Reform of the Tariff Regulation' *Rossiyskaya Gazeta* (1 February 2019) <https://fas.gov.ru/publications/17453> accessed 12 May 2021; Better Regulation Delivery Office, 'A New Model of Price Control Will Promote Price Stability and the Development of Competition' (2018) <https://en.brdo.com.ua/main/new-model-price-control-will-promote-price-stability-development-competition/> accessed 12 May 2021

3.3.4.3 Procurement of SOEs

Often, given the scale of presence of the state sector in the post-Soviet economies under review, being dominant suppliers of particular goods or services, SOEs may likewise have significant buyer's power i.e. be dominant consumers of many goods and services provided by private companies and other SOEs. Thus, for example, in Russia, SOEs are amongst the main purchasers of construction works, chemical products, electric power and other utilities, and financial services. As was provided above, according to some data, the share of procurements of SOEs in the national GDP of Russia in 2017 and 2018 accounted for about 24%-40%. [332] In such context, SOEs have much power to influence relevant supplies markets and, often, as provided below, use such power in a way that harms competition.

The relevant procurement is regulated by a system of procurement laws developed within each jurisdiction specifically for state agencies and SOEs. These laws vary slightly across the FSU jurisdictions with the most elaborate system having been established in Russia and the least developed one being in place in Uzbekistan. Some objectives of the relevant laws include the willingness to address corruption, to increase the efficiency of procurements, to improve competition, and to support small and medium-sized private businesses. Different methods for making purchases are provided, including public electronic auctions, requests for quotations, open and closed tenders. Despite these many options and much effort to ensure that some competitive process is in place, it seems that usually a one-supplier option is preferred either directly (as permitted by law in some cases e.g. purchasing production of natural monopolies, purchasing some small amounts, the lack of offers during auctions, etc.) or tacitly (relevant procurement laws tend to provide SOEs with some opportunity to collude with potential suppliers, including by devising procurement methods so that affiliated bidders participate in procurement procedures). [333]

Unsurprisingly, a significant part of SOEs' purchases is outputs of utilities, natural gas, banking services, and other production of dominant SOEs (according to some rough estimates available for Russia, at least 25% of the total public procurement volumes of state institutions, state

[332] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2); Radchenko and Kovaleva and others (n 42); Tsvetkov (n 308)

[333] Law of the Russian Federation on the Contract System in the Area of Procurement of Goods, Works, and Services for State and Municipal Needs No. 44-FZ 5 April 2013 (Federal Assembly of the Russian Federation); Law of the Russian Federation on Procurements of Goods, Works, and Services by Particular Types of Legal Entities No. 223-FZ 18 July 2011 (Federal Assembly of the Russian Federation); Law of Ukraine on Public Procurement No. 922-VII 25 December 2015 (Verkhovna Rada of Ukraine); Law of the Republic of Uzbekistan on Public Procurement No. ZRU-472 9 April 2018 (Oliy Majlis of the Republic of Uzbekistan)

establishments, and SOEs, are covered by SOEs). Forced consumption of products of other SOE is often in place, going hand in hand with forced supply described in sub-Section 3.3.4.1, as implemented through material balances, the system of state orders, centralised planning, or targeted legal acts [334]. To some extent, SOEs - suppliers are also beneficiaries of obscurity and rigidity of the existing procurement regulations even in sector where they are not dominant, as they better navigate in the relevant regime and are often abler to offer low prices, which is usually the main criterion for winning a public procurement procedure. There is, consequently, a large number of interconnections between SOEs, being purchasers of each other's production or being interconnected as purchasers of the same products or service. This tends to have an unambiguously negative impact on the competitive environment within the FSU, nourishing monolithism of the state sector mentioned above, and is likely to cause some more complicated efficiency effects (for example, cause the absence of adequate consumer pressure on SOEs - suppliers), the exact impact of which probably requires separate analysis. [335]

3.3.4.4 State aid and special benefits

Activities of SOEs within the FSU (both their main operations, e.g. the production of particular goods, and ancillary ones, e.g. relevant maintenance services) are often subject to special benefits and incentives provided by the state both directly and indirectly (i.e. arbitrary preferential treatment is in place). This usually includes tax and customs duties reduction and exemptions, the provision of sovereign guarantees, the granting of exclusive rights to supply particular goods, work, and services, and the granting of exclusive access to particular facilities or resources, and others (hence, the Russian Gazprom and Uzbek Uztransgaz have the exclusive right to export gas using the national system of gas pipelines [336]). It is hard to provide an averaged depiction of what such benefits may represent as they may vary from one sector to another and be provided by different pieces of legislation e.g. legal acts on taxation, legal acts on establishing SOEs, or sectoral regulations.

Occasionally, the FSU governments resort to more direct ways of support, including, for, example, the provision of direct financial aid, development grants, soft loans, etc. The state

[334] To give an example, the Uzbek state-owned construction contractor 'Trust 12' is oftentimes an imposed contractor for SOEs, state establishments, and state institutions without any sort of competitive tendering being conducted. See Akmal Burkhanov, 'The Anticorruption Agency Declares that 'Trust 12' is Implementing Projects for UZS 5 trln without Any Tenders' (Gazeta.uz 27 May 2021) <https://www.gazeta.uz/ru/2021/05/27/burkhanov/> accessed 10 June 2021

[335] Radchenko and Kovaleva and others (n 42)

[336] Article 3 of the Law of the Russian Federation on the Export of Gas No. 117-FZ (n 285); Clause 4 of the Resolution on the Measures for Stable Provision of the Economy and the Population with Energy Resources No. PP-4388 9 July 2019 (President of the Republic of Uzbekistan)

(acting through either state agencies or other SOEs) may make monetary or in-kind contributions to SOEs' authorised capital, buy out debts of SOEs, or invest into their bonds or other securities. [337]

It is notable that some FSU countries, including Russia and Ukraine, have developed regulations on state aid, having been inspired by the example of the EU. [338] These regulations provide for an exhausting list of cases when state aid may be provided (albeit some of the relevant categories may be interpreted quite broadly) as well as set a procedure, in accordance with which a pre-approval of a national competition agency has to be obtained before state aid is provided i.e. before the adoption of a legal act or order providing a support mechanism for particular businesses, including SOEs. Notably, nevertheless, that these regulations have begun to work efficiently only relatively recently (in 2009, in Russia and in 2017, in Ukraine) and taking advantage of the inexperience of relevant regulators, state bodies have been able to find many ways to bypass them and to provide state support (for example, by renting or transferring state assets at their disposal at discounted rates). As practice has shown, it may be quite hard to cover all cases of unwanted state support, especially in cases where some complex schemes are utilised e.g. PPP agreements, investment agreements, and so forth, where provision of some incentives is an inherent mechanism of the legal device. Yet another problem is that decisions on the provision of state aid of the highest government authorities (i.e. resolutions of the President or the Government) are usually deliberately excluded from the purview of the control that, among others, indirectly contributes to that state aid is generously granted to large SOEs supervised by such authorities. [339]

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[337] See, for example, Clause 8 of the Resolution on the Measures for Accelerated Development of the Chemical Industry of the Republic of Uzbekistan No. 3983 25 October 2018 (President of the Republic of Uzbekistan), providing for the opportunity for Uzkimyosanoat, an incumbent in the chemical industry of Uzbekistan, and its many dependent companies to get soft loans from the Fund for Reconstruction and Development under the Ministry of Finance; the Road Map for the Development of 5G Mobile Communication Networks 19 November 2020 (Governmental Commission of the Russian Federation for the Digital Development), providing for direct state subsidies to state-owned Rostec and Rostelecom for the development of 5G networks across Russia; or the Resolution on the Approval of the Rules for Making Decisions on the Provision of State Subsidies from the Federal Budget to Legal Entities, 100% of Shares (Participatory Interest) of Which are Owned by the Russian Federation, for Making Investments into Construction Objects Owned by Them and (or) for Purchasing Real Estate Objects No. 1688 29 December 2017 (Government of the Russian Federation), allowing SOEs, as follows from its name, to get subsidies for constructing or purchasing real estate.

[338] Articles 19-21 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154); Law of Ukraine on State Aid to Business Entities No. 1555-VI (n 179)

[339] Denis Plekhanov, 'On Some Issues of Providing State and Municipal Preferences' (2015) 9(58) Actual Problems of Russian Law 103; Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 68-70, 168-170, 201

It is also worth mentioning that in many cases the existence of palpable state benefits for SOEs is likely to lead to a situation where they acquire market advantages of a subtle nature, being tightly connected to provided state benefits. Hence, for example, state-owned financial institutions are widely considered to be more reliable and trustworthy – it is believed that it is unlikely that such institutions may engage in large-scale financial fraud to the detriment of clients; that even if they do or just become insolvent, the state will always take measures to rescue them and will take care of customers; that regulatory investigations and sanctions are unlikely to target them and to cause significant operational disruptions. The same perception is likely to be in place other industries: goods produced by SOEs may appear safer (owing to the belief that SOEs are less interested in profits and will not save on quality, have stricter quality control mechanisms, being enforced by numerous controlling agencies, are more inclined to comply with state standards and regulations); SOEs may seem 'unsinkable'; the very fact of their existence and due operation may seem to be in some way checked and guaranteed by the state. Generally, it is not of any real significance whether such a perception is correct in practice – SOEs are still able to derive competitive advantage because of its existence. Similar phenomena seem to be in place, where SOEs act not as suppliers, but as consumers of particular goods, services, and resources – for example, SOEs are oftentimes seen as more reliable partners (albeit, it is not uncommon for SOEs in the FSU to delay payments and to avoid the fulfilment of their obligations), more trustworthy borrowers, and more attractive employers. Reasons for that are likely to be also similar to those named above – close ties with the state seem to guarantee greater sustainability and stability. [340]

Speaking of benefits that may be given to SOEs, it seems important to mention the other side of the coin, which is special responsibilities that may be placed on SOEs. This question is closely connected with the theme having been discussed above – the reasons for establishing SOEs. The majority of SOEs are expected to achieve some specific purposes or to serve some particular interests (whether those being economically or politically valid or those being corrupt). As was noted, relevant responsibilities may vary and include the responsibility to produce particular goods or services, to ensure supplies to particular regions of the relevant country or to a particular group of the population, to address particular social problems, or to achieve a particular strategic goal. Although in the majority of cases such tasks may be stated in acts of legislation or official decisions of the state as a shareholder, in some cases indirect

[340] See, among others, Evgeniy Mazin, 'Work for the State: Do White-Collar Workers Dream of State Corporations?' (TASS 15 October 2021) <https://tass.ru/obschestvo/12664357> accessed 10 December 2021; Oksana Dyachenko, 'The Myth of Fair Competition' (2018) 3 National Banking Journal; Marina Malkina and A. Ivanova, 'Analysis of the Features of the Development of the Banking System of Russia in the Modern Institutional Environment' (2007) 28 Finance and Credit 268

pressure may be applied (see sub-Section 3.2.1.1 above). Being mindful of potential consequences of their defiance, CEOs of SOEs may have to invest in social projects, keep certain employment rates, provide benefits to their employees and their families, support large-scale state-initiated endeavours of various nature (by providing funds, employees, expertise, facilities, or resources), serve foreign policy ambitions of the state, etc. This tends to necessitate some sort of state support that would be able to cover relevant expenses and to require some closer cooperation with government as a manager steering the process.

As was mentioned above, given the duality of the SOEs' nature (the operation in the form similar or close to that of commercial companies with specific public purposes framing and directing their operations), a number of questions that arise are whether SOEs may and should in principle exist in isolation from their public functionality and if no, whether these functions may in fact be performed if no special benefits and privileges are granted. It appears that answers are negative to both these questions and both elements – special responsibilities and special benefits are likely to be integral elements of the SOEs' functionality. Considering that devastating effect special benefits and privileges may render on the competition environment within relevant markets (the scale of that depends on what kinds of benefits are actually given), it is, however, becomes utterly important that the relevant responsibilities and benefits are properly balanced and the volume of benefits does not allow an SOE to go beyond what the purpose of its establishment demands for, enabling the SOE to render anticompetitive pressure on competitive markets. [341] Where no special functionality is present at all or such functionality is limited, no benefits should be granted to an SOE and, probably, as suggested above, the SOE should not be maintained as such at all, given that the very fact of state ownership may result in obtaining some indirect benefits.

[341] In this regard, it is a worrying fact that even in cases where the governments of the FSU decide to provide direct subsidies to SOEs, such subsidies are rarely a straightforward compensation for the SOEs' performance of public functions. It is quasi-budgetary financing that dominates and the risk of mismatch is substantial in the majority of cases.
Also, although a multi-layered system of control over SOEs is established, as described above, in many cases, there is no much transparency and strict budgetary oversight in respect of that how SOEs spend their funds and how their expenditures correlate with state aid their request and receive (hence, for example, state subsidies for covering so-called capital expenditures (construction and renovation projects, etc.) are occasionally provided without assessing how current expenses of an SOE are made and can be optimised).
See, for examples, Ivailo Izvorski and others, 'Uzbekistan - Public Expenditure Review' (World Bank, 31 December 2019). Report 146409
<http://documents.worldbank.org/curated/en/471601582557360839/Uzbekistan-Public-Expenditure-Review>

In sum, having deduced that exclusive benefits are likely to constitute an important part of the SOEs' functionality (though often being disproportionate in the FSU), we have in some way added the last element to the portrait of an FSU region's common SOE, which shows its specific structure, management systems, and patterns of functioning. As the portrait reveals, the relevant specificity of the SOEs' operation in the FSU is likely to cause much concern from the competition policy perspective, particularly, where the state sector is active on a competitive or a potentially competitive market. The matter of whether this issue, being central for this research, is, in turn, effectively addressed by the FSU region's competition legislation and competition authorities is explored in the next Section.

3.4 SOEs in Competitive Markets: Competition Authorities' Interactions with the State Sector

The above comprehensive analysis of the state sector within the FSU region has explored the nature of post-Soviet SOEs; the reasons for their continued support by region's governments; the specificity of their functioning; and the effects their functioning renders on the competition environment. Attention now turns to the extent to which conflict between the functioning of the state sector and competition policies is actually tackled by the region's competition legislation and competition authorities.

It appears that in the FSU region, the relevant interactions between the state sector and the competition agencies (being the only enforcers of the region's competition laws) is characterised and determined by three-party relations – direct relations between the state sector and the competition authorities themselves; relations between the state sector and the state, represented by its executive bodies or sectoral regulators, which patronise the state sector; and relations between the state, represented by its executive bodies or sectoral regulators, and the competition authorities. This presumption will be discussed below. Prior to starting the analysis, however, it should be noted that as interaction between SOEs with the competition agencies becomes particularly active when competition is clearly distorted as a result of some abuse, it may be useful to look at the relevant relations through the prism of some specific abuse committed by SOEs e.g. an abuse of dominance, which is likely to be one of the most obvious infringements committed by privileged SOEs of the FSU region.

3.4.1 SOEs and competition authorities

As was described in Chapter 2, competition agencies were non-existent in the Soviet Union (not considering the very moment before its collapse), ineffectual in the 90s, and remained a pariah within the government system of the FSU states in the 2000s and for the most part of

the 2010s. Their lack of the advocacy and expert capacity along with the focus on punitive practices, price controls, and somewhat ancillary functions (monitoring privatisation, regulating and controlling advertisement practices, etc.), rather than on the development of competition still cause concerns and demand for improvement. With that said, it would not be fair to deny that they have been developing gradually and, nowadays, play a more visible role of competition law enforcers, being more or less equipped to be taken seriously. They have been increasing their enforcement capacity and, thus, effect of their activities seem to gradually become more palpable for market players.

Generally, competition laws of the FSU region do not shield SOEs from competition scrutiny, conducted whether in case of an alleged abuse, as a part of a merger review, or in other cases.[342] However, where an SOE commits an abuse or there is a risk that a competition distortion will happen as a result of some actions of an SOE (e.g. the establishment of a joint venture with a competitor), the national competition agencies, plagued by the abovementioned problems, seem to face with a challenging situation. First, as there are no relevant practical guidelines, it is substantial methodological difficulties that materialise - hence, for example, it may be hard to determine whether a particular SOE is an independent unit or as a part of a larger SOE or even a monolithic state agglomeration at large. To give another example, it may be difficult to distinguish cases where some justifiable public objectives have been pursued from cases where commercially oriented predatory behaviour has been in place. Secondly, it may turn out that an SOE is clearly driven towards an abuse by the legislation that directs its activity and, thus, it is the regulation and not the SOE that has to be targeted in some way. Thirdly and most importantly, the competition agencies of the region are oftentimes unlikely to be sufficiently institutionally independent to target SOEs, being influenced by other regulators either directly, based on some law, or indirectly, owing to an evolved subordination system. If to speak of relevant contextual factors, in Ukraine, as appears, the competition agency has been caught in the loop of permanent political instability and attempts of numerous actors to determine its role. In Uzbekistan, the agency has long been 'captured' by the state, being suppressed by wider economy considerations of the government that has largely limited the agency's role to performing ancillary tasks. The Russian FAS seems to be relatively strong – it is able to actively discipline SOEs in respect of many aspects of their

[342] The scope of application of competition laws of the all studied FSU states is broad indeed – it generally targets all individuals, legal entities (both commercial and non-commercial), and state bodies (central and regional ones) with no exemptions being provided. See Article 3 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154); Article 2 of the Law of Ukraine on the Protection of Economic Competition No. 2210-III (n 176); Article 3 of the Law of the Republic of Uzbekistan on Competition No. ZRU-319 (n 208).

activity, as case reports suggest, – but, as appears, its power is still insufficient to address fundamental problems that engender SOEs' abuses. [343]

The first of the above challenges seems to be relatively straightforward - currently, in the absence of supporting guidelines, difficult questions are dealt with on a case-by case basis, occasionally, with the reliance on precedents and interpretations of scholars. In case of the second challenge, it is where relations between the competition authorities and the state clearly come to the forefront, since to address a relevant distortion, an action or a legal act of a state body should be addressed (as will be discussed further below). In case of the last of the mentioned challenges, a more detailed explanation seems to be needed. To illustrate, an approach to cases where SOEs abuse dominance are considered.

As was mentioned above, SOEs tend to engage in the same kinds of abusive practices as private companies, including excessive prising (one of the most frequently investigated competition offenses in the FSU), discriminatory pricing, tying, leveraging, refusal to supply, denial of access to essential facilities, and attempts to squeeze competitors. Neither relevant competition framework nor practical methodological approaches of the competition agencies seem to presume any unconventional approach to SOEs in respect of any of these types of an abuse (provided that there is not a targeted legal act or an action of a state body causing an abuse, as noted above). Owing to that, conceptual *ab initio* treatment of SOEs does not differ from that of private entities at all stages of an antimonopoly investigation. [344]

Actual differences, however, become more explicit, if to look at that how investigations go in practice. At the initial stage, usually, the FAS (which should be taken as an example as the most proactive and powerful of the post-Soviet competition agencies) sends a notification pointing at the fact of abuse to an abusing SOE (as this would have happened in case of a private company). Then, they start to explore the problem, working in cooperation, i.e. the SOE provides the FAS with relevant explanations, which are then analysed and tested by the agency for providing counter-arguments, if any. Though conceptually the procedure should be the same as in cases where private companies are investigated, the exchange of opinions is often the stage (and this is what tends to principally differentiate common cases of investigating an

[343] Healey, 'Competition Law and State-Owned Enterprises: Enforcement' (n 62)

[344] This follows from statements of officials of the FSU states' competition authorities and some published information on conducted investigations against SOEs. Somewhat obviously, these data do not objectively assess those situations where investigations are not initiated at all or, as noted below, initiated only upon getting a prior consent of interested state authorities i.e. the competition authorities experience some sort of self-censorship. Nevertheless, considering the number of cases against SOEs, it does not seem that such situations are often (at least, in Russia and Ukraine, albeit it is hard to make a definitive conclusion in this regard).

abuse from cases where an SOE is involved), at which other state stakeholders get involved, taking one of the sides or just sharing their opinion on the matter. These stakeholders may include a state property management agency, line ministries, general ministries, the Government, or municipal authorities. Their interference may be caused by either the FAS or the SOE making the relevant request for an opinion or may be the result of the interest in the outcome of the case. Even if there is no a legal act to that effect, abuses of SOEs may be a reflection of ambitions of interested state stakeholders, leading SOEs towards an abuse, rather than their own initiative. [345]

State stakeholders may support the SOE if it turns out that the abuse is indeed a side effect of the SOE's performance of its social, industrial, or other functions, or may push the SOE towards a compromise with the regulator. In particular cases, where SOE's significance may seem indispensable, the Government acting as the supreme arbiter may pressurise the antimonopoly service to soften its position (the competition regulators are in many ways dependent on the Government in all the considered jurisdictions). In such circumstances, the competition regulator may become more conciliatory and less demanding. With that said, however, two reservation should probably be made. First, though the relevant state interventions happen, it seems to be incorrect to say that they are ubiquitous, at least, in Russia (apparently, the situation is worse in Ukraine and, especially, in Uzbekistan, where strong anticipation of state interference dictates a practice where potential stakeholders are consulted even before the investigation begins). Secondly, it would be incorrect to assume that state shareholders always act homogeneously. As was mentioned above, different state agencies controlling and overseeing a particular SOE may take different stance where particular matters are considered, depending on their own role and considerations. Hence, if to take some real case as an example [346], whereas Russia's Ministry of Energy, aware technical characteristics of the country's oil and gas transportation system, may support an SOE – operator of the relevant facilities, which works in a non-transparent manner and allegedly abuses dominance by applying discriminatory pricing, the Ministry of Economic Development, interested in encouraging the growth of oil and gas transportation, may be inclined to support the relevant uncompromising position of the FAS. [347]

[345] International Competition Network and Moroccan Conseil de la Concurrence, 'State-Owned Enterprises and Competition' (23 April 2014) 51 <https://centrocedec.files.wordpress.com/2015/07/soe-and-competition2014.pdf>

[346] Pogosyan Artyom, 'Gazprom Asks to Protect It from Transparency' *Izvestiya* (21 August 2015) <https://iz.ru/news/590237> accessed 31 March 2020

[347] In the context of the discussed subject, an interesting scenario to consider is where an SOE committing an abuse has regulatory powers i.e. is de-facto a state body. Although, as appears, even in

If to summarise the above, in the absence of relevant special rules, the relations between the competition agencies and SOEs in the FSU generally do not differ from those between the competition agencies and private players (that has both negative and positive facets – whereas on the one hand, it implies that specifics of competition cases involving SOEs are not duly considered, on the other hand, the neutrality of investigation is not undermined, at least, in law). This relationship may, however, get more complicated when a third party – state stakeholders are involved either when they adopt legal acts or take actions that inform anticompetitive behaviour of an SOE or intervene to question antimonopoly investigations, which seems to be the case on many occasions, especially where a large SOE or an SOE having some significance from the viewpoint of public interest is concerned (in part, owing to the ability of such SOEs to quickly accumulate necessary support). In such cases, the advocacy capacity of the competition authorities is likely to be tested and its ability to structure behavioural rules of a compromise nature for the benefit of competition may be an issue.

3.4.2 Competition authorities, the state and state agents

Since, as was deduced above, in the FSU region, the ability of competition agencies to discipline SOEs is in many ways dependent on their ability to discipline or compromise with state authorities that control and regulate those SOEs, relevant relations between the competition authorities and state stakeholders interested in empowering SOEs are worth to be discussed in more detail. Generally, there is some more or less established legal framework allowing the competition authorities to discipline state bodies. Hence, besides for the abovementioned powers to control the provision of state aid, they have the authority (being unique, if to compare with many other jurisdictions) to target legislative acts and decisions of state authorities that distort competitive balance (puts particular categories of entities, oftentimes, SOEs, in a privileged position) in another way, including acts providing particular preferential rights, limiting access of to some important facilities, setting unreasonable requirements for particular entities, imposing unreasonable restrictions on public procurement, providing preferential access to information, etc. There are also competition rules that provide (albeit with a varying degree of specificity) for the prohibitions to confer administrative functions to commercial entities and commercial functions to state authorities; to vest to state authorities the powers, the use of which leads or may lead to hampering competition; and for associations

such a case, an SOE – infringer will not have ab-initio advantages, its power to challenge an intrusion of the competition authorities is likely to be much stronger than that of a regular SOE, primarily, as a result of its political power and the ability to claim that some of its actions are out of reach of competition law, as proceeding from a very peculiar public mandate it has, as given by legal acts of the supreme state bodies (see comments on that in the following sub-Section).

– to interfere with activities of its members (a provision of the Uzbek Law on Competition seeming to target state supported associations). [348] An important reservation here is, however, that, as was mentioned above, the competition agencies are generally not able to target legal acts and decisions of an anticompetitive nature made by the highest state authorities (the Government, the President, and, obviously, the Parliament) by virtue of reservations in relevant provisions or in practice, due to an existing hierarchy of state bodies (in case of Uzbekistan).

Generally, as was described above, where state aid is concerned, a prior consent system is in place, under which state authorities that would like to grant aid must submit a relevant project for review by a competition agency in advance. Where state authorities grant staid aid without getting a competition authorities' prior approval or commit other anticompetitive actions, as noted above, a complaint from a third party or a relevant initiative of the competition regulator may trigger an investigation, which, if brought to an end successfully, may result into that corresponding measures are reversed and fines are imposed on involved state officials. [349]

There have been many cases in Russia and some in Ukraine and Uzbekistan, where the rules for state aid and the above prohibitions have been enforced. According to some official statistics on the competition agencies' actions on relevant cases in Russia in 2018, as summarised in a corresponding FAS annual report, they have stably been the most widespread violations of competition law in the country. Generally, however, the relevant enforcement trend seems to be relatively positive: out of 2,515 of warnings on making an anticompetitive decision (including provision of state aid) issued to state authorities, 2,132 (85%) were duly considered by relevant state authorities and acted upon. Further, out of 2,057 requests for approval of the provision of state aid, 1,608 (78%) were approved by the FAS, whereas in 183 (9%) cases no relevant request had to be sent at all (that may indicate some endeavour of state authorities to comply with law). [350] With that said, somewhat paradoxically, the same report

[348] Article 15 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154); Articles 15-17 of the Law of Ukraine on the Protection of Economic Competition No. 2210-III (n 176); Article 13 of the Law of the Republic of Uzbekistan on Competition No. ZRU-319 (n 208); Irina Knyazeva, 'Anticompetitive Activities of State Authorities: Reasons and Law Enforcement Practices of the Antimonopoly Authorities of Russia' (2015) 1 Development of Territories 62

[349] Articles 15, 19-21, 37 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154); Articles 15-17, 48, 50, 54, 56 of the Law of Ukraine on the Protection of Economic Competition No. 2210-III (n 176); Articles 9-15 of the Law of Ukraine on State Aid to Business Entities No. 1555-VI (n 179); Articles 12, 21, 27, and 29 of the Law of the Republic of Uzbekistan on Competition No. ZRU-319 (n 208)

[350] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2018' (n 2)

states that generally, the situation with state interferences tends to deteriorate and, according to relevant comments of the Head of the FAS, in some regions, is close to resembling 'neo-feudalism' with no important business decisions being taken without involvement of regional authorities, oftentimes, with the involvement of the state sector.[351] Although such a comparison may be an exaggeration aimed to draw attention to the problem, there is undoubtedly some ground under it and the state in Russia (and likewise, in the other FSU states) appears be expansionistic indeed (as the data provided above in this Chapter demonstrate, in particular, with respect to the number of SOEs).

These two opposite trends may evidence that the level of incompetence is still high within the region's competition authorities and other state agencies – in too many cases, state aid and competition distortions are likely to remain unrevealed by the competition agencies and in too many cases, state agencies fail to assess and to report on actions they take, including state aid. These trends may likewise demonstrate that though relevant efforts of the FSU competition authorities are not entirely in vain (at least in Russia), they do not target all the problems that surround distortive activism of the state (expressed, in particular, in nurturing the state sector) i.e. the competition authorities do not have sufficient powers to address all relevant problems. As appears, this can partially be explained by the fact that intrusive power of the state may exhibit itself in many indirect ways. In case of supporting SOEs, for example, the very proximity to state authorities may, as noted above, allow an SOE to get additional benefits. The question of whether competition authorities are in principle capable of addressing this problem will be explored in more detail in next Chapter 4; but it seems that, for example, the establishment of a comprehensive policy of competitive neutrality, as designed in some developed competition law jurisdictions, along with a number of fundamental institutional solutions may be of help to really address such broader problems in the FSU.

As was mentioned in previous sub-Section 3.4.1, it also appears that the advocacy and coordination capacity of the FSU states' competition authorities are not strong enough to counter distortive initiatives of state authorities, especially those coming from atop of government and those, to which some consensual support is given by the majority of involved state actors. This seems to be conditioned by many factors, some of which were already noted above. Obviously, there are institutional problems within the FSU region's competition authorities themselves, which often, as was mentioned, shift (or are forced to shift) their

[351] Igor Artemev, 'Economic Feudalism Predominates in Many Regions: No Private Sector or Capitalist Relations - Only Vassals and Princes' *Vedomosti* (28 November 2018) <https://www.vedomosti.ru/economics/articles/2018/11/30/787794-rukovoditel-fas> accessed 17 July 2019

attention to ancillary tasks, are pre-occupied with social and political objectives, and are not very motivated to engage in the advocacy (owing to the lack of financing, expertise, etc.). Further, there is still not much help from region's consumer protection agencies, consumer organisations and groups, which could have demanded the development of competition in state-dominated sectors from another end. Their organisation remains weak and, in most cases, they are unable to mobilise pressure groups to confront paternalistic polices. Usually, their functioning is reduced to the protection of basic rights of consumers - individuals to goods and services of good quality and honest information about them. As in case of competition and some other institutions, this is probably a consequence of the lack of stimulating mechanisms in relevant legislation, some disregard of the importance of this area of the regional markets' functioning, and certain political governmentality wherein government and ministries are seen as those who know best what is good for consumers. Often, supporting a consumer protection agency and consumer organisations, government also de facto supresses and subordinates them to sectoral regulators.[352] In-depth exploration of all the relevant problematics related to consumer protection institutions, however, seems a valid subject for another extensive research.

Aside from the issues related to internal inefficiency of institutions – advocates of competition, two other important issues are worth mentioning as contributory to the problem. First, it appears that, as was inferred in the Conclusion to Chapter 2, objectives of competition policies are not entirely clear to both state agencies and the competition authorities themselves. While objectives of industrial, social and price controls policies appear understandable and pragmatic, goals of competition law seem too vague and theoretical to be prioritised. There is, therefore, some tendency to dismiss competition policy arguments where acute problems are striven to be resolved.

Secondly, from a more practical perspective, the advocacy capacity of the competition authorities tends to suffer from the lack of robust communication between them and other state agencies. Although there are some ways of communication (both of a general nature, e.g. within the framework of particular state commissions, and more situational, e.g., communication in cases where some conflict arises)[353], there seems to be some lack of

[352] S. Sinitsin, 'Problems of the Development of Consumer Cooperation and the State of the Modern Russian Civil Legislation' (Yurfak 27 April 2019) <https://urfac.ru/?p=1928> accessed 25 March 2020; Khramtsov (n 157); Holovko-Havrysheva (n 184)

[353] Russia may once again be taken as a positive example here. Hence, for example, the FAS there enters in cooperation agreements with ministries and regional executive bodies for joint work on competition enhancement plans and legislation and for cooperation in investigations. See Federal Antimonopoly

formalised standard rules that would have strengthened and given weight to such communication. Furthermore, systematic problems of administration and governance across all state agencies also appear to render a negative impact on the quality of communication. As in case of the competition authorities, there is notable lack of competent experts in many state agencies; a pyramid-like hierarchical structure of governance, wherein all key decisions are taken by heads of agencies and (or) departments; lack of clear strategies and action plans for performing particular tasks; huge workload; and large information losses within chains of command. All these factors together tend to affect how the coordination between state agencies and the competition regulators occurs with much misunderstanding being in place. In matters of high importance, where efficient coordination is required, interventions of some supreme authorities are often needed that help to overcome delays, to speed up processes, to focus attention on resolving most pressing problems.

3.5 Conclusion

Following the historical analysis contained in Chapter 2, Chapter 3 sought to provide a thorough analysis of the relationship between the competitive environment and the state, in the three FSU jurisdictions. It began by identifying the reasons why there is still so much reliance on SOEs: (1) income generation for the state; (2) the perceived strategic significance of key sectors; (3) the development of new industries; (3) protectionism; (4) the provision of public and merit goods; (5) as an alternative to market regulation; (6) for social policy reasons; (7) to remedy market failure; (8) unsuccessful privatisation; and (9) corruption and personal interests. This reasoning appears to be reinforced by a historically formed belief that private ownership is flawed, is aimed at syphoning resources from the state, and is unfair from the perspective of social justice. Although some of the relevant rationales look plausible, there are many specific cases where their application seems unjustified. Hence, for example, a number of 'strategic' SOEs do not appear to be 'strategic' in reality (e.g. cotton enterprises in Uzbekistan), while the capability of the state sector to actually resolve pressing social issues is not quite evident. In many cases, SOEs continue to operate and (or) be actively supported in areas where private competition already exists or may potentially develop. Overall, the large diversity and fluidity of the rationales along with their ubiquitous and, often, unjustified use reflect how SOEs-related policies are typically driven by short-term factors, at the expense of a well thought through regulatory strategy.

Service of the Russian Federation, 'Cooperation Agreements with Executive Bodies' (2020) <https://fas.gov.ru/documents/type_of_documents/76> accessed 7 May 2020

The Chapter went on to examine what form the SOEs tend to take within the FSU, focusing on their legal form, ownership controls, management and corporate governance, as well as how they function in relation to production, pricing, procurement, and state aid. It was discussed that in the current regulatory environment within the FSU, when an SOE is created, its legal form, as a rule, resembles that of a private company. However, in contrast to private entities, which are mainly established for commercial purposes, SOEs are usually given particular public policy tasks and objectives, which define their nature as of hybrid formations, having characteristics of both commercial companies and public establishments, and frame and transform their way of functioning so that to fit those specific purposes. An outstanding example here is state corporations (concerns or holding companies), which have many substandard elements in their functionality.

Speaking of the noted substandard elements in the ownership and corporate governance dimension, first, in contrast to private corporations, many of SOEs suffer from rigorous and heterogeneous control from a state body representing the state as a shareholder and a variety of monitoring agencies checking that public tasks of SOEs are performed. Relevant control is implemented through a large number of instruments, including corporate mechanisms, planning and directive management, reporting requirements, and regular inspections. Secondly, within the FSU, great importance is attached to vertical relations between the CEO of an SOE and a state official of a principal decision-making body, as inefficiencies within corporate and state governance mechanisms demand for quick management tools at hand ensuring necessary simplicity and effectiveness. Such verticality also allows the Government to directly curate the development of particular industries as well as to coordinate administrative processes within a country. Generally, as appears, as a result of such rigorous and multifarious state control, SOEs often merge with political institutions, acting in synchronicity.

As provided in the Chapter, activities of the state sector are also framed by many infrastructural regulations aimed to systematise its operation and to ensure the servicing of chosen objectives. These include prices controls, the system of production orders and material balances, specific procurement methodologies, rules for using facilities, rules for mandatory interactions (exchanging information, being a member of associations, etc.), directive expansion policies (ordering the acquisition of relevant and irrelevant assets, making investments, etc.). This tends to result in growing monolithism within the state sector, its greater dependence on the state and the reinstallation of vertical administrative relations in markets. An even more notable functionality characteristic that tends to distinguish SOEs from private companies is that avalanche of specific benefits that are granted to them – usually, for compensating for performing specific public functions. Though the aim to bring balance appears reasonable,

granted benefits are often disproportionate or do not correlate functionally with relevant responsibilities. Although one or another form of state aid control rules exists in the analysed FSU states (except for Uzbekistan), the diversity of such benefits (information, access to vital assets or resources, looser legal requirements, etc.) as well as the existence of implicit benefits (e.g. the status of a state-owned entity as such) makes it harder to target this by such instruments.

The third and final contribution of this Chapter was to examine the operation of SOEs in competitive markets and the ability of the region's competition authorities to discipline their behaviour. This tends to be characterised by the existence of three-party relationships – the relations between the state and state actors, the competition regulators, and SOEs. The relations between the state sector and the state are often based on the attachment of SOEs to sectoral regulators or, occasionally, the conferring of regulatory powers to SOEs themselves. Usually, SOEs are also controlled by a variety of state actors, who direct SOEs' activities and use them as vehicles for implementing particular public and industrial polices. As a rule, any major initiative of an SOE is sanctioned by one or another state actor. Such close relations between the state and the state sector tend to affect the relations between the state sector and the competition authorities. As it is usually state agents controlling SOEs that induce their anticompetitive behaviour, where a competition agency wants to discipline an SOE, relevant state agents also have to be involved. In the absence of legislation that shields SOEs from competition laws or sets specific material or procedural competition rules for SOEs, such an involvement is likely to represent the main factor that distinguishes the relations between the competition authorities and the state sector from the relations between the competition authorities and private players.

When a state agent is involved, it is the pattern of relations between it and the competition authorities that comes to the forefront. This is when the competition authorities may have to struggle with the overprotective state and statism. It seems, however, that though the FSU competition authorities become increasingly capable to defend their cause, they are still institutionally underpowered and still lack instruments for an effective confrontation and (or) coordination with other state agencies and as a result – for effective disciplining of the state sector. One of important factors contributing to that is, as appears, the lack of clear agenda for competition polices and the lack of understanding of the role of competition institutions within the government system.

In summary, it seems that all the above functionality elements of the state sector, including the pattern of functionality in competitive markets, as developed based on some chosen

rationales, have a rather negative impact on the competitive environment within the FSU states (that is supported by the relevant statistics, opinions of businessmen across all markets within the FSU, and statements of officials of the region's competition authorities, as cited in the Chapter). The fusion of the state and the state sector and the re-employment of relevant administrative techniques throughout the regional economies limit the ability of private players to enter many markets and to effectively compete within them. Even though some of the rationales underpinning the above techniques, as forwarded by FSU governments, seem to be reasonable indeed and the existence of the state sector does not appear to be a clearly negative occurrence in itself, some adjustment of functionality elements applied to and within the state sector is required. Relevant theories and techniques elaborated by researchers and used in other jurisdictions are explored in Chapter 4.

Before proceeding to this, however, it should be noted that statism and the uncontrolled expansion of the state sector are not the only circumstances of concern that may be observed in the FSU region. There are others that fall outside the scope of this thesis, including political governance problems, underdeveloped financial markets and commercial legislation in a variety of areas (albeit relevant gaps are being gradually filled in), and a severe shortage of expertise (with certain problems being more pronounced in particular countries of the region). It is often these other factors that determine how many problems related to the statism–competition policies conflict are resolved – for example, the conflict could have been much less pronounced if judges were more independent and were more aware of considerations that drive competition polices. As this research is somewhat limited in its scope, it seems impossible to duly consider all such relevant factors. Nevertheless, much like as in this Chapter, their existence may and will be acknowledged when the possibility of application of methods and theories studied in the next Chapter within the FSU region will be analysed in Chapter 5.

CHAPTER 4: COMPARATIVE INSIGHTS AND POSSIBLE SOLUTIONS TO THE INTERACTION BETWEEN SOES AND COMPETITION

The analysis of the FSU competition environment in Chapter 3 identified the considerable distortion to competition caused by the persistent statism and presence of SOEs within the FSU region. This Chapter seeks to identify potential solutions in the form of measures that might mitigate the tension between the objectives of statism and competition law. It will do the above through analysing relevant approaches of other countries and theoretical research in the area. As was discussed in Chapter 2, the FSU states are not the only countries in the world that have gone through a painful transition from a socialist economy to market one, have an enduring reliance on administrative techniques, including wide use of SOEs (see relevant statistics in the Section below) and, consequently, have to combat with associated side effects. Some economies seem to be more successful than others in balancing the existence of the state sector with the development of robust competitive markets. It is their experience that is of particular interest and significance for the purposes of this thesis. Though, as was noted in the Introductory Chapter, the EU and its Eastern members, in particular, seem to be especially relevant, owing to, *inter alia*, their historical and cultural closeness to the FSU, the Chinese example with its coexistence of a state economy and competitive markets may also be useful. Interestingly, there are also some countries with a developed market economy that have never embraced the Marxist ideology e.g. Australia, France, Norway, and Sweden, but nevertheless rely heavily on the state sector in their economic model (see the statistics in Section 4.1). They have devised some interesting competition policy approaches to balance this choice. Thus, in Australia, for example, a sophisticated system of checking the so-called competitive neutrality has been elaborated. The experience of these countries will also be referred to. [354]

It should be noted that this Chapter 4 will only outline and analyse the effectiveness of relevant solutions in general, while the assessment of that how they may actually be used in the context of the FSU will be made in Chapter 5, alongside the overall conclusions to this thesis. Generally, as the literature reviewed for the purposes of this Chapter as well as Chapter 3 show, there are three key issues that make the state sector problematic from the competition policy

[354] Organisation for Economic Co-operation and Development, 'The Size and Sectoral Distribution of State-Owned Enterprises' (14 September 2017) <https://www.oecd-ilibrary.org/content/publication/9789264280663-en>; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 23–36; Organisation for Economic Co-operation and Development, 'The 2018 Edition of the OECD Product Market Regulation Indicators and Database' (n 221) 24-25, 52

perspective and for which we require solutions: (i) those related to ownership and corporate governance; (ii) those related to state support and benefits; and (iii) those of an institutional nature. To make the analysis of this Chapter more structured, it is this categorisation that will be accommodated (though obviously, some overlap between the categories is inevitable) and, thus, the structure of this Chapter will in some way conveniently repeat the structure of Chapter 3. To outline briefly, Section 4.1 provides a short description of that how the role of the state sector is accessed by researchers and practitioners outside the FSU. In Section 4.2, sub-Sections 4.2.1, 4.2.2, and 4.2.3 focus on issues related to SOEs' ownership and corporate governance, benefits and privileges, and institutional relations respectively, as explained above. In Section 4.3, similarly to penultimate Section of Chapter 3, the role of competition law and competition institutions in combating the state sector expansionism is assessed, though now, from the theoretical perspective and the perspective of the relevant experience of jurisdictions other than the FSU. Section 4.4 summaries conclusions made throughout the Chapter, providing generally that, as noted above, three groups of measures are needed to address three sorts of respective problems related to the SOEs' functioning and that competition authorities have an important role to play in advocating, devising, and ensuring the implementation of these measures.

4.1 SOEs and Competition: Perspective from outside the FSU

It may be useful to begin the analysis of available solutions with some general overview of how statism and its interaction with competition polices are viewed by theorists and practitioners from outside the FSU. Generally, it seems that no modern country has surrendered entirely to the free market. Indeed, in all economies the government must step in to provide public goods and deal with market failure. After the global wave of massive privatisation of the late 80s – the early 90s, which followed the crisis of the socialist model and consequential discreditation of the government interventionism and state ownership, there have seemed to be no unidirectional movements – while some countries continued privatisation, others have either maintained the status quo or to an extent returned to the policy of state's expansionism (see, for example, recent developments in Poland [355]). [356]

[355] Piotr Kozarzewski and Maciej Baltowski, 'Return of State-Owned Enterprises in Poland' (May 2019). 7th Annual Conference of the Leibniz Institute for East and Southeast European Studies <https://www.researchgate.net/publication/333480750_Return_of_State-owned_Enterprises_in_Poland>

[356] Saul Estrin and Adeline Pelletir, 'Privatization in Developing Countries: What are the Lessons of Recent Experience?' (2018) 33(1) The World Bank Research Observer 65; Mike Peng and others, 'Theories of the State-Owned Firm' (2016) 33 Asia Pacific Journal of Management 293

If to consider some quantitative data on the scale of the reliance on the state sector outside the FSU, it will be confirmed that a visible state sector exists in many countries around the world with only a handful of countries putting almost complete reliance on private companies (Japan and the US are the most notable examples). The relevant data, as collected by different institutions and researchers around the world, do not appear comprehensive – as in case of the FSU, reasons for the that include the absence of the conceptual uniformity in respect of that what criteria define a state-owned entity as well as the messiness in the collection of the data – but are, nevertheless, quite curios. Hence, according to the OECD[357], which have attempted to collect some data in respect of centrally owned SOEs in 40 countries – mainly, in the OECD area – there were 2,467 such SOEs valued at USD 2.4 trillion and employing over 9.2 million people in the relevant countries by the end of 2015. China, whose SOEs were not included in these estimates, but still accounted, somewhat obviously represented a standalone bastion of the state sector proliferation with almost 51,000 SOEs owned by the central government, valued at USD 29.2 trillion, and employing approximately 20.2 million people. In terms of the quantity, China was followed by Hungary (370 SOEs), India (270), Brazil (134), the Czech Republic (133), Lithuania (128), Poland (126) and the Slovak Republic (113) – counties that had once been members of the 'socialist camp' or had actively implemented pro-statism policies. The largest state sectors as a percentage of total non-agricultural employment (a somewhat more illustrative way of comparison) were found in Norway (9.6%), Latvia (6.7%), Estonia (4.8%), Hungary (4.2%), France (3.5%), Finland (3.5%), the Czech Republic (3.4%), the Slovak Republic (3.1%), and Italy (3.1%). As for the sectoral breakdown, the electricity and gas, transportation, telecoms, and other utilities sectors accounted for 51% of all SOEs by value and 70% by employment. Finance was the largest individual sector at 26% of SOEs by value.

Looking at the theoretical framework surrounding the matter of the general economic efficiency of use of the state sector, one can hardly find some straightforward and unequivocal opinions. Though many researchers find extensive use of SOEs as inefficient, empirical research on this point seems to have yielded conflicting results.[358] Hence, some empirical studies[359] point at that when compared to private companies SOEs tend to underperform (in terms of

[357] Organisation for Economic Co-operation and Development, 'The Size and Sectoral Distribution of State-Owned Enterprises' (n 354)

[358] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 29–34; Sokol, 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' (n 60); Lianos (n 63)

[359] Nguyet T Phi and others, 'Performance Differential between Private and State-Owned Enterprises: Analysis of Profitability and Leverage' (Asian Development Bank Institute, May 2019). ADBI Working Paper 950 <https://www.adb.org/sites/default/files/publication/503476/adbi-wp950.pdf>; European Commission, 'State-Owned Enterprises in the EU' (n 70) generally

profitability, productivity, etc.) indeed (expect for few industries) and explain this by, among others, SOEs' lack of initiative to innovate, slowness in responding to market changes, and excessive generosity in supporting employees and social endeavours. Other studies[360] emphasise the ambiguity of relevant findings and suggest that the assumption that SOEs are inherently less efficient and performing that private firms is not supported. They conclude that SOEs are generally focused on public tasks of a varying nature and their efficiency may, thus, not always be gauged in the same way as that of private firms. It is also proposed that SOEs' inefficiencies may be caused by many specific factors surrounding the SOEs' operation, including politicisation of economic decision-making, the transposing of administrative mismanagement to management of SOEs, and burdensome regulatory control, including overcomplicated corporate governance (caused by sophisticated agency problems). Some tackling of those factors, hence, improves the performance. Generally, this second perspective seems to be quite reasonable and to an extent resonates with the relevant experience with the state sector in the Soviet Union and the post-Soviet space, as described in Chapters 2 and 3.[361]

Although the question of the efficiency of SOEs is of significance from a general economic perspective, a more important matter in the context of this research is the impact of the reliance on the state sector on competition. Though many modern competition theories forwarded in developed market economies do not prioritise competition as a value in itself, speaking instead of total or consumer welfare (pointing out the fact that, in particular cases, welfare and efficiencies may be achieved in circumstances where competition is low or is not in place at all), it seems that the whole point of the presence of competition legislation all over the world is the protection of competition as some indispensable value in itself, necessary for economic progress, as discussed further in sub-Section 4.3.3.

Generally, studies from outside the FSU support the conclusions that statism tends to render negative influence on competitive environment provided in Section 3.1 above. Speaking of empirical evidence, in the absence of direct data (in contrast to the FSU, where there seems to be more interest in the subject, at least, from competition authorities), it is mainly secondary information, largely, from developed and relatively developed competition law jurisdictions, that allows to infer that. Hence, for instance, based on a survey held by

[360] Bartosz Kabaciński, Jarosław Kubiak and Katarzyna Szarzec, 'Do State-Owned Enterprises Underperform Compared to Privately Owned Companies? An Examination of the Largest Polish Enterprises' (2020) 56(13) Emerging Markets Finance and Trade 3174; Yair Aharoni, 'The Performance of State-Owned Enterprises' in Pier A Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000)

[361] Abramov and others (n 40)

PricewaterhouseCoopers in 2015 [362], more than 70% of CEOs of well-established companies across Europe, Latin America, Asia Pacific, Africa, North America, and the Middle East believe that government ownership inherently creates a conflict of interest with its regulatory functions, leads to political interference in the marketplace, distorts competition in relevant industries, and discourages the entry of foreign competitors (though a reservation should be made that less than 200 CEOs have been surveyed in this regard). According to the data supplied by the World Trade Organisation (the 'WTO'), more than 20% of the disputes its relevant panel considered in the 2000s related to the provision of anticompetitive subsidies, in many cases - to SOEs. [363] Comparative analysis conducted in Finland and in number of European jurisdictions suggest that SOEs enjoy significant tax benefits not available to private companies (particularly, because SOEs supply services to public establishments). [364]

There are also a number of court cases across developed and relatively developed jurisdictions, evidencing that SOEs may be keen to engage in anticompetitive practices not to a lesser extent than their private counterparts. It follows from these cases that albeit SOEs are not always focused on money-making, their desire to achieve other non-profit goals may turn them expansionistic and make them to resort to non-competitive methods of struggling with rivals, including predatory pricing, leveraging, refusal to deal, etc. [365] This may particularly be linked with SOEs' managers' own political ambitions and key performance indicators ('**KPI'**) systems used within government where huge numbers and indicators of coverage tend to be appreciated. [366]

In line with the analysis in Chapter 3, partially relying on the empirical evidence above, relevant studies from outside the FSU tend to suggest that it is not the state ownership as such that underpin the competition-related problematics, but rather specific aspects of the functioning of SOEs, including, if to divide roughly, particular specifics of ownership and corporate

[362] PWC (n 230)

[363] Organisation for Economic Co-operation and Development, 'Competition, State Aids and Subsidies' (n 53) 17–20

[364] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 125–127

[365] For example, see the EU cases of *Deutsche Post COMP/35.141 (OJ L 125, 5.5.2001)* for fidelity rebates and predatory pricing; *Belgian Post (De Post-La Poste) COMP/37.859 (OJ L 61, 2.3.2002)* for tying; *Deutsche Telekom COMP/C-1/37.451, 37.578, 37.579 [OJ L 263, 2003]* for margin squeezing.

[366] Alain Juppé, 'France: The Politics of State Ownership' *Financial Times* (13 November 2016) <https://www.ft.com/content/9be75d5c-a72e-11e6-8898-79a99e2a4de6> accessed 1 October 2020; David Sappington and Gregory Sidak, 'Competition law for State-Owned Enterprises' (2003) 71 Antitrust Law Journal 479; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 39–42, 57; Cheng (n 58); Cheng, Lianos and Sokol (n 63)

governance, provision of state aid and benefits, and complicated institutional relations. Not denying that some social and welfare objectives may be achieved through SOEs, it is reasonably suggested that the adjustment of these aspects may negate or, at least, mitigate competition concerns, making statism more appropriate in the market economy environment. [367] Relevant solutions implemented around the world or proposed to be implemented based on relevant theoretical research are considered below in Sections 4.2. A potential role of competition authorities in implementing such solutions is considered further in Section 4.3.

As provided in the introduction above, it is largely EU and its Eastern member states as well as, to a lesser extent, such countries as, for example, Australia, China, and South Korea, where the solutions are searched for, owing to the similarity of problems with statism they face. Speaking of the EU's Eastern members in particular, it is of interest that the OECD's indicator of 'state control' ('distortions induced by state involvement') noted in Section 3.1 [368] as well as the transition indicator of the European Bank for Reconstruction and Development (the 'EBRD') [369] show that some of the relevant countries were much more successful in balancing habitual statism of the socialist era with competition policies than others (by, *inter alia*, comparing region's SOEs' corporate governance, access to public funds, exemptions, connectedness with the state, etc.). Hence, while Czech Republic, Estonia, Slovenia, and Slovakia are amongst top implementors of relevant reforms, such countries as Bulgaria, Serbia, and Romania still have much to improve.

4.2 Problematic Aspects and Possible Solutions

4.2.1 Ownership and corporate governance mechanisms

As was discussed in Chapter 3 based on examples from the FSU, ownership and corporate governance mechanisms in SOEs may cause competition distortions. Many studies from outside the FSU share this concern. Hence, by virtue of specific ownership arrangements, SOEs may, for example, be shielded from natural market fluctuations, associated changes in ownership and other consequences of bad performance known to private companies; get access to information and lobbyist privileges unavailable to private players; and be forced

[367] Among others see Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 9-10, 34-37, 47-48; Cheng (n 58); Cheng, Lianos and Sokol (n 63); Capobianco and Christiansen (n 64) 5–10

[368] Organisation for Economic Co-operation and Development, 'The 2018 Edition of the OECD Product Market Regulation Indicators and Database' (n 221) 22-29, 52

[369] European Bank for Reconstruction and Development, 'Transition Report 2020-21' (10 November 2020) <https://www.ebrd.com/news/publications/transition-report/transition-report-202021.html>

(mandated) to act anticompetitively for performing particular public tasks.[370] From the corporate governance perspective, competition problems may be informed by the lack of independent commercially-oriented oversight; a consolidation between SOE's managers and state officials; and looser control over financial arrangements.[371] Considering these factors and the other relevant factors that were considered in Chapter 3, the sub-Sections below analyse solutions elaborated outside the FSU for negating or mitigating relevant anti-competitive effects.

4.2.1.1 Privatisation-like solutions

One may observe that privatisation is oftentimes seen, as noted above, as the principal recipe for addressing SOEs-related competition concerns. Where an SOE cuts ties with government, all causes of relevant statism-related competition problems are effectively resolved, unless another form of government intervention comes in its stead e.g. some targeted legislation.[372] Seeming otherwise plausible, this somewhat radical solution is, however, capable of engendering a conflict with the government's intent to achieve a certain objective or to resolve a particular issue by using an SOE as the key instrument. The justifiability of privatisation should, therefore, be assessed in the context of each particular country or region (as was explored in Chapter 3 in the context of the FSU). Regional specifics may demand a more cautious attitude to privatisation, while, as was noted above, a dispute on the form only (simplistic preference of the private form over the public one) does not seem particularly productive.

With the above said, it is worth noting that for the conflict between privatisation and statism to exist i.e. privatisation be doubted, there should be a situation, where government has a legitimate and justifiable reason to keep an entity as an SOE indeed (rather than, for example, for the sake of giving a tribute to the past, as was noted in Chapter 3). In this regard, a practice that the Government or relevant state agencies regularly (annually, biannually, or biennially) publish and submit to the Parliament a comprehensive report explaining the reasoning for keeping SOEs in the state's hands, as existing in some countries (for example, in Australia,

[370] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 35–38; Sokol, 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' (n 60); PWC (n 230)

[371] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 54-55, 296–299; Kovacic, 'Competition Policy and State-Owned Enterprises in China' (n 59); Sokol, 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' (n 60); PWC (n 230)

[372] Organisation for Economic Co-operation and Development, 'Privatisation and the Broadening of Ownership of State-Owned Enterprises' (n 230) 16–20

Czech Republic, Finland, Germany, Hungary, and Sweden, as well as to an extent in Russia, but not comprehensively, as discussed in Chapter 5), looks like a solid approach.[373] Probably, an even deeper analytical approach is potentially beneficial, under which not only the rationale behind the status quo is generally explained, but it is also explained whether and why no viable regulatory alternatives exist. As appears, this may, among others, be helpful for shaping a specific regulatory regime for SOEs as unique purpose-driven commercial establishments.

Where outright privatisation seems too radical, alternative measures being close to it may be considered e.g. trust management or similar instruments. As was noted in Chapter 3, the mechanism of fiduciary management, existing in the FSU, for example, represents a transfer of state assets or state shares to private companies, who manage them as their administrators (without receiving legal title) and get a fixed or, more often, variable remuneration, while promising to ensure a particular level of dividend profitability for the state and (or) to achieve other performance goals. This mechanism comes very close to management contracts, occasionally used in some other jurisdictions in respect of particular types of property, and, to some extent, looks like a version of a public-private partnership arrangement, implying a lease or a concession-based transfer of property.[374]

If to assess the mechanism from the competition policy perspective, it looks as a welcomed option, since the Government or a responsible ownership agency, relations with which are the most likely sources of competitive distortions, become effectively separated or, at least, more removed from relevant SOEs (albeit, a series of questions arise, including, for example, on that how trustees are chosen i.e. whether competitive standards for the private manager selection procedure have been clearly set and are strictly followed). Nevertheless, it seems the mechanism has remained to be relatively underused around the world, including the EU and its Eastern members, being cautiously applied in specific sectors, where government may lack expertise (water treatment, hospitality facilities management, etc.). Among possible reasons for that are high risks of an abuse of relevant state interests by a private trustee (e.g. through the syphoning of assets) and high control costs. Moreover, there seems to be much difficulty in implanting true trust-like instruments in non-common law jurisdictions, which are generally unprepared to deal with a variety of potential issues related to the subject. Sometimes, getting state property, a trustee remains to be limited in his powers to use such property freely, on

[373] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 33–35; Organisation for Economic Co-operation and Development, 'Ownership and Governance of State-Owned Enterprises' (n 52) 35–41

[374] Markus Puder and Anton Rudokvas, 'How Trust-Like is Russia's Fiduciary Management? Answers from Louisiana' (2019) 79(4) Louisiana Law Review 1072

market terms and has the same responsibilities in respect of the property that were imposed on the state agency that managed it before the transfer (e.g. ensuring that that effective oversight from other state agencies is maintained). In this regard, albeit the instrument looks like an interesting solution for the competition policy - statism conflict, some right devising is needed to actually achieve competition enhancement purposes. [375]

A wide array of other instruments that facilitate cooperation of the state and the state sector and private entities in using state-owned assets (already existing ones or those supposed to be created) have also been developed. These include abovementioned public private partnerships (or, as they are also known in some countries (e.g. the UK), private finance initiatives), concession agreements, regulatory contracts, joint investment arrangements, and tax increment funding schemes. If devised thoroughly, these instruments are likely to be quite efficient and more usable than trust management arrangements. Hence, they may allow government to get access to private finance when it lacks its own means, may be more adaptable within varying legal contexts, and may ensure effective combination of private and public expertise for the benefit of both parties. As trust management mechanisms, they are able to ensure that government is effectively separated from assets it may or is supposed to control and the state sector does, thus, not exploit those competitive benefits it might have had. Furthermore, since the majority of these instruments also imply pre-assessment through the so-called Public Sector Comparator [376], and, at a later stage, the conduct of competitive bidding, their use directly or indirectly instigates competition and may stimulate SOEs to be more efficient. [377]

The above reasons seem to have driven active promotion of the relevant instruments globally and in Europe in particular across a variety of sectors - often, in so-called 'services of general

[375] Kai Lyu, 'Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis' (2015) 36(3) Loyola of Los Angeles International and Comparative Law Review 447; Andrew Smith and Michael Trebilcock, 'State-Owned Enterprises in Less Developed Countries: Privatisation and Alternative Reform Strategies' (2001) 12 European Journal of Law and Economics 217; Ira Lieberman, Stilpon Nestor and Raj Desai, 'Between State and Market: Mass Privatisation in Transition Economies' (World Bank; Organisation for Economic Co-operation and Development, 24 October 1997). Study of Economies in Transformation 23; Estrin and Pelletir (n 356); Puder and Rudokvas (n 374)

[376] A tool used by governments in determining the proper service provider for a public sector project. It consists of an estimate of the cost that government would pay were it to deliver a service by itself (e.g. through its SOEs).

[377] National Audit Office (UK), 'PFI and PF2' (12 January 2018). NAO Reports 718 <https://www.nao.org.uk/report/pfi-and-pf2/>; Public-Private-Partnership Legal Resource Centre, 'Leases and Affermage Contracts' (2016) <https://ppp.worldbank.org/public-private-partnership/agreements/leases-and-affermage-contracts> accessed 17 June 2020; Smith and Trebilcock (n 375)

economic interest' (i.e. the provision of access to such basic publicly demanded goods and services as e.g. power energy, transportation, education, and healthcare). In Europe, such countries as Croatia, Hungary, Spain, Portugal, Slovenia, and the UK have been amongst the most active implementors of relevant projects, while some countries, e.g. the Baltic states, have created quite a solid legal base for such projects' functioning, albeit have not been very active in their actual implementation. [378] Evidences from these countries suggest that private-public projects may bring the abovementioned efficiency gains indeed and be positive from the competition perspective by, among others, bringing new private players to previously state-dominated sectors (particularly, in Eastern Europe). With that said, the dynamics of initiating new public-private projects has been decreasing recently within the region with some countries having almost completely halted the launching of new projects (e.g. Hungary, Poland, Portugal). It is suggested that active engagement in new projects eventually becomes too burdensome for the state (relevant arrangements generally last for a long period of time and are not easily terminated); such projects demand for substantial monitoring efforts; occasionally suffer from misplacement of goals, affecting consumers; and are often at risk to become significantly costlier than relevant initial estimates envisaged and as compared to the use of SOEs or some form of public procurement that may make government step back in (that is particularly often in transportation, see cases of the M1/M15 motorway in Hungary, the Trakia Highway in Bulgaria, etc.). It follows that as in case with management contracts, the application of the discussed instruments should be well thought-through and relatively limited (probably being focused on sectors proved to be suitable for relevant projects – e.g. power energy, air transportation infrastructure). Relevant assessment analysis and competition standards should be applied more strictly and be well coordinated across government by a connected system of institutions, having strong expert capabilities. Failed projects here eventually lead to that the role of the private sector is discretised again and the state sector is expanded at a higher cost. [379]

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[378] Mirco Tomasi, 'Public Private Partnerships in Member States' (2 March 2016) <https://ec.europa.eu/economy_finance/events/2016/20160302-pfn/documents/03_tomasi_presentation_on_en.pdf>; The Economist Intelligence Unit, 'Evaluating the Environment for Public Private Partnerships in Eastern Europe and the Commonwealth of Independent States' (The Economist Intelligence Unit, 2012) <https://www.ebrd.com/downloads/news/eecis.pdf>

[379] European Public Service Union and European Network on Debt and Development, 'Why Public Private Partnerships are Still not Delivering' (European Public Service Union; European Network on Debt and Development, 14 December 2020) <https://www.eurodad.org/why_public_private_partnerships_are_still_not_delivering#:~:text=There%20are%20eight%20main%20reasons,ultimate%20risk%20of%20project%20failure.>; Dechev (n 69); National Audit Office (UK), 'PFI and PF2' (n 377); The Economist Intelligence Unit (n 378)

4.2.1.2 Commercialisation measures

Less drastic ownership and corporate control measures may represent one or another form of an attempt of government to distance itself and (or) to decrease the ambit of its control over SOEs i.e. de-statisaton in some narrow sense (as that is defined in the FSU) or commercialisation (as that is called in the rest of the world). The first set of such measures (being comparatively severe) includes corporatisation and restructuring. Often, they precede privatisation or the implementation of the privatisation like solutions described above. Corporatisation presumes changing rigid legal forms of some SOEs e.g., unitary enterprises described in sub-Section 3.3.1, into forms similar to those of private entities (usually, limited liability or joint-stock companies). This may help to standardise and straightforward management processes in SOEs, put SOEs on a par with private corporations, and allow using some conventional methods for conducting privatisation e.g., through share offering.[380] Restructuring, in turn, represents some structural optimisation of an SOE and may be implemented by separating SOE's core and non-core assets and activities, commercial and non-commercial activities, those activities that are regulated by an SOE itself from its other activities, dissolving a state-owned holding company, breaking up an SOE into several smaller competing SOEs[381], unbundling vertically integrated incumbents. Assets and relevant functional tasks of an SOE being restructured may be redistributed among existing or new SOEs, state agencies, SOE's own internal divisions (in cases where some softer approach to the transformation is opted for), or be privatised. It is often suggested that if privatisation of an SOE is not an option for whatever reasons, it may be desirable to at least 'trim' the enterprise to the extent where it continues to perform only its core activities, which are non-dispensable from some policy perspective and supposedly cannot be efficiently performed by private players. Where even privatisation of non-core assets and activities is not considered (for example, owing to interconnectedness of technical or commercial processes of different

[380] Maria Vagliasindi, 'Governance Arrangements for State-Owned Enterprises' (World Bank, 2008). Policy Research Working Paper 4542 <https://openknowledge.worldbank.org/handle/10986/6564>; Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 33–34; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 54-55, 330-331; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 187–188

[381] Such kind of restructuring seems to be particularly popular in countries with a large state sector and a determined statism-oriented economic policy (e.g. in China). In light of the unwillingness to launch privatisation and to engage the private sector by using alternative mechanisms in particular markets, the breaking up of large SOEs is seen as one of few available ways to spur competition. See European Union Chamber of Commerce in China, 'The European Business in China Position Paper 2019/2020' (2019) <https://www.europeanchamber.com.cn/en/press-releases/3057>

activities in a particular state-controlled industry), it is seen as rational to at least unbundle an SOE so that to distribute its functions among different completely or partially independent SOEs (ownership or legal unbundling respectively), modelling a more market-oriented approach. This is supposed to bring in competitiveness in each respective subsector as well as to ensure more focused management over relevant activities. [382]

Generally, both measures seem beneficial from the competition policy perspective and not much can be said in objection whether in case they accompany other measures or are applied on their own (though the application of these measures isolation is likely to be less effective). Hence, speaking of corporatisation, the putting of SOEs on equal footing with private companies implied by it is likely to evoke only positive effects for competitive environment and, thus, represents an import step in forming robust market environment. In the context of the transition in Eastern Europe for example, the vast majority of SOEs have been corporatized with only specific SOEs (Hungary) and (or) narrow categories of SOEs, primarily in utilities (Czech Republic, Poland, Slovakia, Slovenia), having retained specific forms. [383] The existence of relevant exceptions reflects the idea that in particular cases an SOE may represent quite a specific and not a purely commercial formation, for which corporatisation may become unnecessary and burdensome. Not speaking of SOEs in utilities (whose corporatisation may be beneficial in many cases), that may be the case for SOEs in the military industry, where no competition may be needed at the interstate level (as the state has a monopoly), while additional managerial costs (e.g. those procedural requirements that are imposed on public companies or private companies with a large number of shareholders) may only engender production inefficiencies. It is likewise noteworthy that, occasionally, corporatisation (particularly, if incomplete) may also loosen control of the state as a shareholder e.g., soften budget constraints, that may, in turn, cause anticompetitive effects. It is usually advised in this regard that if corporatisation is implemented, control mechanisms should be redefined by choosing those, for example, used in the private sector, so that the state maintains functional oversight. To give some example, problems of a similar nature existed in the UK in the late 40s

[382] Asian Development Bank, 'State-Owned Enterprise Engagement and Reform' (6 November 2018) 10–16 <https://www.adb.org/documents/state-owned-enterprise-engagement-and-reform>; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 49-50, 195, 269, 368-369; Miniane and others (n 56) 68–76; European Commission, 'State-Owned Enterprises in the EU' (n 70) 19–20, etc.

[383] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 25–31; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 36-37, 161-163, 187-188; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 17–18

and the early 50s, when after nationalisation of certain companies e.g., British Rail, government's attempts to establish arm's-length relationship with them (limited rights to dismiss directors, limited monitoring of financial expenses, etc.), aimed at addressing private players' concerns about government excessive interference, resulted in unreasonable weakening of state's ownership control. [384]

Restructuring in its many forms is, in turn, likely to be an effective measure that is often resorted to even in private companies; non-core assets, are, for example, bought and sold by private companies for different reasons, including the intent to make an extra profit, to improve efficiency, or to enhance competitiveness. There have been many successfully instances of restructuring of SOEs around the world where restructured SOEs have achieved greater production efficiency and profitability and, hence, have become more independent from the state and more market oriented and competition friendly in their operation. Some relevant examples from Europe are long-lasting and socially painful, but eventually effective restructuring of Polish Railways with gradual abolishment of company's regulatory functions, corporatisation, redistribution of commercial and public functions, workforce optimisation, and divestment of non-core assets as well as similar restructuring of Hungarian oil and gas incumbent MOL and of Slovak state aluminium monopoly ZSNP, both being then partially privatised. [385]

It may be argued that restructuring of SOEs is a somewhat unnatural process, as it is oftentimes forced upon them based on some public policy considerations rather than is a result of some internal deliberations informed by financial and market conditions. It may hence be considered as something undermining the principle of non-acceptability of intrusive government interventions in the SOEs' functioning (as is rightfully advocated by some researchers, pointing at the necessity to have a buffer between the state and SOEs) and thus having a potential to render an adverse impact on relevant competitive environment e.g. a restructured SOE may opt to recoup related losses by engaging in more aggressive anticompetitive behaviour. With that said, however, considering that, essentially, every SOE is a government-formed creature supposed to deliver a particular result, such intrusions seem to be inevitable and, generally, do not seem to diverge significantly from what a determined shareholder of a private company may decide to do. Moreover, palpable and somewhat obvious positives from restructuring seem to outweigh somewhat ambiguous potential negatives. With that said, considering that the state itself is a substandard shareholder (being highly susceptible to political fluctuations),

[384] Vagliasindi (n 380)

[385] Zoltan Buzady, 'The Emergence of a CEE-Regional Multinational – A Narrative of the MOL Group Plc.' (2010) 15(1) Journal for East European Management Studies 59; Miniane and others (n 56) 68–70

clear-cut policies in this respect (both general and specific ones for each SOE, being, for example, incorporated in their foundation documents), determining what activities SOEs may or may not engage into, seem to be required to avoid subsequent intrusive restructuring. [386]

One specific type of restructuring that seems to attract much attention is the unbundling of vertically integrated enterprises in regulated industries. There is much literature touching upon the subject, particularly with regard to the unbundling in gas and electricity markets in different jurisdictions. Based on relevant papers referring to the EU experience in power energy in particular [387], the unbundling may be effective for improving sector's competitive environment indeed – hence, many private players seem to have entered the EU electricity market since staged transformation reforms had been initiated within the sector in the 90s. Despite this, however, relevant empirical data suggest that not all goals of the reforms have been actually achieved - though there have been many new entrants, the market has remained to be highly concentrated across all its main segments (generation, transmission, and distribution) in the majority of the member states; consumer prices have continued to increase rapidly; and investments in infrastructure have remained insufficient (with some of the member states being, however, more successful than others, e.g. the Czech Republic and Poland in Eastern Europe [388]). Many factors are likely to dictate such mixed results, included volatile gas and coal prices. Nevertheless, it is tended to be suggested that though a departure from a vertically integrated market structure is beneficial as such, some notable progress here may only be achieved where the relevant reforms are implemented responsibly with the unbundling being complete and real (not to formalistically comply with some regional legislation) as well as where all accompanying 'liberalisation' reforms are fully carried out with no regulatory or structural restrictions of a statism nature remaining a hindrance. [389] As evidenced by the Russian example for the electricity market described in sub-Section 3.3.4, such a conclusion is likely to be correct in respect of any jurisdictions, irrespectively of a dominating legal system.

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[386] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 29–31; Arrobbio and others (n 57) 49–59, 271-272

[387] See, for example, Vidmantas Jankauskas, 'Implementation of Different Unbundling Options in Electricity and Gas Sectors of the CEE EU Member States' (2014) 60(1) Energetika 44; Barrett (n 71); Byanova (n 72); Lowe and others (n 73); Schülke (n 74) 10

[388] The relevant experience of the Czech Republic seems particularly successful. Some part of its electricity sector was privatised, predominantly, to foreign companies, while the state-owned incumbent CEZ was effectively restructured through unbundling and divestment of non-core assets. For now, the Czech electricity markets have become relatively competitive (particularly, supply), while CEZ has increased its efficiency and, by learning from foreign competitors operating locally, has been able to successfully enter the markets of some neighbouring countries. See Pula (n 68); Schülke (n 74) 118-119, 168-170

[389] Barrett (n 71); Byanova (n 72); Jankauskas (n 387)

It also appears that this conclusion may be extrapolated to other types of restructuring and, therefore, where restructuring is done, it should be checked whether relevant pro-statism mechanisms left unchanged do not negate its effects (for example, as Chinese experience in the shipbuilding industry suggests, if a dominant SOE has been broken into several smaller SOEs, but price controls in some form in the relevant or related markets has remained intact, there is a high possibility that some form of collusion will take place and the unity of the state sector within a particular industry will be restored [390]).

In the context of the restructuring measures, as a part of the 'trimming' of SOEs, an opinion is also often expressed that where possible the state and SOEs themselves may outsource some part of SOEs' functions to private entities – generally, through public procurement mechanisms, but also through concessions, PPPs and other more sophisticated instruments noted above. As suggested, that may help to eliminate conflicts between tasks of a relevant SOE, to promote competition (provided competitiveness of the outsourcing process is ensured), and to boost the SOE's efficiency (partially, due to the involved competitive process). If the majority of functions of an SOE have been outsourced, it may still have a role to play by serving as of a buffer between public authorities and the private sector and performing general monitoring and coordination functions (that may be useful where, for example, some regular technical monitoring is needed). [391]

If to briefly comment on this approach, it seems that the creation of a well-established outsourcing system replacing suppressing and non-transparent paternalistic monolithism may significantly contribute to enhancing competition and ensuring greater efficiency and, thus, should definitely be considered. With that said, the creation of such a system and, in particular, a functioning public procurement regime, is undoubtedly a challenge in itself, since, as in case with the other restructuring solutions, a set of accompanying measures may have to be taken

[390] Russell Smyth and Xin Deng, 'Restructuring State-Owned Big Business in Former Planned Economies: The Case of China's Shipbuilding Industry' (2004) 6(1) New Zealand Journal of Asian Studies; European Union Chamber of Commerce in China (n 381)

[391] Organisation for Economic Co-operation and Development, 'Public Procurement in Kazakhstan: Reforming for Efficiency' (6 December 2019) 369-389, etc. <https://www.oecd-ilibrary.org/governance/public-procurement-in-kazakhstan_c11183ae-en>; Organisation for Economic Co-operation and Development, 'Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation' (22 October 2019) 3, 14-22, etc. <https://www.oecd-ilibrary.org/content/publication/1de41738-en>; Asian Development Bank, 'State-Owned Enterprises: Guidance Note on Procurement' (June 2018) <https://www.adb.org/sites/default/files/procurement-state-owned-enterprises.pdf>; Sanchez-Graells (n 67)

to ensure the effectiveness of the approach. As recommended by the OECD, for example [392], a professional public procurement institution operating a centralised monitoring system should better be established and a number of efficiency support mechanisms (e.g. framework agreements) should be implemented. If no solid basis for the procurement system is created, there is a risk that the ubiquitous use of competitive public procurement procedures will become ritualistic and neither competitive nor efficient. [393] This is already the case in some jurisdictions that have tried to rely on the approach. For example, empirical evidence from Germany, having used to rely heavily on the outsourcing at the municipal level, suggests that effective procurement may be challenging, owing to, among others, red tape within the procurement system and problems with effective monitoring. [394]

The second set of commercialisation measures encompasses a large number of instruments of a softer nature equalising particular ownership and corporate governance mechanisms in SOEs to those of private entities. In contrast to all the above solutions, these instruments appear applicable not only in cases where the state wholly owns a company, but also in cases where the state owns a part of a company, but is able to exert some significant influence. One of the main measures here is, as appears, the creation of the so-called Chinese walls i.e. the ensuring of that government does not interfere in regular activities of an SOE with its role being effectively limited to that of a regular shareholder of a private corporation. This presumes that supervisory (or one-tier) boards of SOEs are empowered and instead of regular interventions and detailed guidance, some general guidelines are developed for them (or as a case may be, representatives of the state in them), providing for a general strategy as to how an SOE should operate and what objectives of a public and commercial nature are to be achieved. Such guidelines may reflect more general ownership policies for state institutions exercising ownership functions in SOEs (the development of which is an important separate task – in

[392] Organisation for Economic Co-operation and Development, 'Public Procurement in Kazakhstan' (n 391) 9-10, etc.; Organisation for Economic Co-operation and Development, 'Reforming Public Procurement' (n 391) 71–98

[393] National Infrastructure Commission (UK), 'Strategic Investment and Public Confidence' (October 2019). NIC Reports <https://nic.org.uk/app/uploads/NIC-Strategic-Investment-Public-Confidence-October-2019.pdf>; Lyubov Andreeva, 'The Theory of Public Procurement in Business Law Science' (2016) 11 Bulletin of Kutafin Moscow State Law University; Organisation for Economic Co-operation and Development, 'Public Procurement in Kazakhstan' (n 391) generally; Organisation for Economic Co-operation and Development, 'Reforming Public Procurement' (n 391) 71–98

[394] Benjamin Friedländer, Manfred Röber and Christina Schaefer, 'Institutional Differentiation of Public Service Provision in Germany: Corporatisation, Privatisation and Re-Municipalisation' in Sabine Kuhlmann and others (eds), *Public Administration in Germany* (Palgrave Macmillan 2021); Caroline Stiel, 'Modern Public Enterprises: Organisational Innovation and Productivity' (German Institute for Economic Research, 20 December 2017). DIW Berlin Discussion Paper 1713

Eastern Europe, for instance, they for now exist only in Albania, Kosovo, Latvia, Lithuania, Poland, and Slovenia, though are in development in some other countries of the region).[395]

A separate measure aimed to support the above is the appointment of independent managers to the board, who do not receive any direct or indirect instructions from government, but are able to express their independent professional judgement. This practice has been increasingly applied around the world with a requirement being in place in some jurisdictions that at least half or the majority of managers in the board of an SOEs must be independent (in Eastern Europe, this is the case in, for example, the Czech Republic, Hungary, Latvia, and Slovakia[396]; in Poland, the requirement that a half of the board must be independent members has had to be reconsidered owing to practical difficulties in staffing large boards and, now, it is that at least 2 members must be independent[397]). Undoubtedly, as in case with corporatisation, greater independence of the board puts government at some risk that necessary control over SOEs will be weakened. It is, therefore, of importance to ensure that safeguards for preventing the shareholders – management conflict, as used in private companies, are effectively introduced in SOEs after the state abandons its all-pervasive control (greater transparency, independent audit, etc.).[398]

Besides for the above measures, aimed at greater independence of the board of SOEs and hence, lesser connectedness between SOEs and the state, there are many other 'softer' solutions. Speaking of ownership practices, relevant measures include the transition of the state ownership system towards the centralised ownership model (as discussed in sub-Section 4.2.3 on the institutional solutions below), the introduction of clearer and more transparent reporting practices, among others ensuring greater transparency of state control, and the introduction of mechanisms for protecting rights of minority shareholders. In the corporate governance dimension, additional solutions of relevance are depoliticization of board and CEO nomination, appointment, and remuneration practices (that may be outsourced to

[395] Bower (n 56); Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 30-35, 40-41; Miniane and others (n 56) 54–57; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 25–27; Asian Development Bank, 'State-Owned Enterprise Engagement and Reform' (n 382) 10-11, 39-40

[396] Organisation for Economic Co-operation and Development, 'Ownership and Governance of State-Owned Enterprises' (n 52) 64–69; Bower (n 56)

[397] Magdalena Jerzemowska and Anna Golec, 'Corporate Governance in Poland: Strengths, Weaknesses and Challenges' (National Science Center of Poland, June 2013) <https://www.researchgate.net/publication/315779018_Corporate_governance_in_Poland_strengths_weaknesses_and_challenges>

[398] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 40-43, 71-72, 74-76; Arrobbio and others (n 57) 215–242

independent agencies, which may, in turn, engage SOEs' internal committees with relevant competence) and the raising of professionalism of board members and management in general (including competition law awareness). [399]

In concluding this Section 4.2.1.2 on commercialisation measures, it is worth reiterating that it is not an axiom that all the ownership and corporate governance techniques described in here may be equally beneficial for all kinds SOEs, as some of them tend to reveal their unique nature, i.e. that of special purpose creations, to a greater extent than others (for example, as noted above, SOEs in the military industry or SOEs that have universal service obligations only e.g. SOEs operating post offices like, for example, British Post Office Ltd). In this regard, it appears that comprehensive and accurate inventory and clear classification of SOEs should be made before relevant solutions are implemented (that is often not the case even in most advanced administrative and corporate law jurisdictions [400], not to mention jurisdictions in transition, albeit there have been positive trends recently thanks to, among others, wider application of information technology means [401]). One of possible options of how SOEs and state establishments may be classified for regulatory purposes is, as proposed by experts of the World Bank [402], the division into commercial companies, policy-oriented companies, and budget-depended establishments. Some example of a jurisdiction where a similar categorisation is effectively applied is South Korea, where state-owned enterprises, quasi-governmental organisations, and other public establishments are distinguished. To be classified as a 'state-owned enterprise', a public entity has to have more than 50 employees and generate at least 50% of its total revenues itself. With an own-revenue share of more than 85%, it would be further categorised as a 'commercial state-owned enterprise' - otherwise, it would be a 'semi-commercial state-owned enterprise'. Depending on a relevant category, different ownership and corporate governance regulations apply to a state entity and a varying degree of independence is granted. [403] Interestingly, the Korean categorisation, taking into consideration a number of employees in SOEs, seems to reasonably suggest that the size of an

[399] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) generally; Miniane and others (n 56) 53–57; Arrobbio and others (n 57) 69-100, 159-256; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 19–47

[400] See, for example, the report on companies in government produced by UK's National Audit Office in 2015: National Audit Office (UK), 'Companies in Government' (December 2015). NAO Reports <https://www.nao.org.uk/report/companies-in-government/>

[401] Organisation for Economic Co-operation and Development, 'Ownership and Governance of State-Owned Enterprises' (n 52) 35–39

[402] Arrobbio and others (n 57) 104

[403] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 171–172; Arrobbio and others (n 57) 27

SOE may also be important for applying particular regulatory standards. Hence, it may be unfeasible to elaborate complicated commercialisation measures for small SOEs (the creation of the board with independent directors, the establishment of complicated reporting procedures, etc.). It may just be sufficient to corporatize them (e.g. turn into limited liability companies), to ensure that no persons being state officials are appointed as managers, and to set clear goals and transparency standards.

4.2.2 Benefits and privileges

Although ownership and corporate governance practices in respect of SOEs may have a great distortive impact on competitive environment, a greater danger may come from, as was noted in Chapter 3 and is suggested by many researchers[404], those benefits, privileges, and exemptions that are granted to SOEs by the state (being generally referred to as benefits below). In contrast to the previous category of problems, which scale up in proportion to the degree of state control over an SOE (and, thus, the applicability of the discussed solutions varies correspondingly), the problem of benefits is likely to be relevant for all kinds of SOEs (and, thus, corresponding measures are universally actual).

As the nature of non-competitive benefits that are granted to SOEs may vary significantly (as was discussed in sub-Section 3.3.4.4 above), it is generally unreasonable to suggest that a standardised approach, e.g. some clear-cut prohibition, may be elaborated to deal with all categories of cases. The right approach here, thus, as usually proposed, consists in developing rules that would presume case-by-case analysis, preferably targeting the provision of uncompetitive benefits at some early stages.

4.2.2.1 Policy of competitive neutrality

Generally, it is the concept of competitive neutrality, which in some sense determines the principal idea behind this research, that has been developed by studies to address the matter. The concept presumes that SOEs and private entities should be subject to the same or almost the same corporate, competition, tax, employment, property, bankruptcy, and other regulations. Besides for the equal regulatory treatment, no discriminatory practices should be in place, including, for example, provision of direct or indirect subsidies (e.g. soft loans), the creation of formal or informal networks between SOEs and state agencies, facilitation of access

[404] See, for example, Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 34–37; Organisation for Economic Co-operation and Development, 'Competition, State Aids and Subsidies' (n 53) 20-26 and further throughout the paper

to commercially valuable information, and provision of assistance in satisfying regulatory requirements. The introduction of a competitive neutrality framework involves a systematic review of the legislative and administrative landscape in which SOEs operate and the reforming of that landscape so that the conditions in which SOEs operate are as closely matched to those faced by private sector competitors as possible. [405]

Although the approach has been applied in some forms in many jurisdictions around the world, it seems that it is Australian lawmakers who have managed to make it comprehensive and organised. In 1993, the government initiated a review of the country's competition policy, resulted in a document known as the Hilmer Report. That review found that while subjecting government business activities to the provisions of competition law was important, this would not address all concerns about the cost advantage and pricing policies of government businesses. Considering this, based on relevant suggestions contained in the Hilmer Report, a governmental agreement of 1995, signed by all Australian governments, introduced a comprehensive policy of competitive neutrality. [406] It is of interest that though the policy was a part of the broader competition law review, it was not completely integrated with the competition law framework and was rather implemented within the government – by the Australian Treasury and the National Competition Council and the Productivity Commission (and its dedicated autonomous body, the Australian Government Competitive Neutrality Complaints Office). [407]

The key principles of how the policy applies are: where there is a market; to significant government business activities (this is where the gains are greatest); to all levels of governments; and only to the extent that the benefits outweigh the costs of the implementation. It does not apply to non-business, non-profit activities. The main components under competitive neutrality are:

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[405] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 50–54; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 9–11; Healey, 'Australian Experience with Competition Law' (n 61); Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Capobianco and Christiansen (n 64) 11–12

[406] It is noteworthy that the Hilmer Report also contained other recommendations for addressing competition-related problems caused by SOEs, including on structures of public monopolies, access to essential facilities, and price controls. See Healey, 'Australian Experience with Competition Law' (n 61)

[407] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 53–54; Healey, 'Australian Experience with Competition Law' (n 61); Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Capobianco and Christiansen (n 64) 15–16

- regulatory neutrality, which means that SOEs should not be advantaged by operating in special regulatory environment;
- tax neutrality, which means that SOEs should not be advantaged by tax exemptions or incentives not available to their private rivals;
- debt neutrality, which means that SOEs' borrowing costs should be similar to those of their private rivals;
- a commercial rate of return approach, which means that SOEs should be reasonably profitable and should distribute some reasonable dividends;
- a prices reflect costs approach, which means that SOEs should set prices reflecting full costs attributable to their activities;
- a well thought out subsidising policy, which means that if the state subsidises SOEs for performing public tasks, it should do so in a transparent manner and not excessively, making sure that it pays reasonable prices and no cross-subsidising of commercial activities happens within SOEs. [408]

One of the above components – regulatory neutrality, seems to partially include corporatisation and the equalisation of governance structures in SOEs with those of private companies, as described in sub-Section 4.2.1.2.

In the EU, a policy of competitive neutrality is also in place to an extent, being linked with the region's competition policy framework. Hence, Articles 101 and 102 of the Treaty on the Functioning of the European Union [409] (the 'TFEU'), dealing with anticompetitive agreements (concerted practices) and abuse of dominance respectively, apply to all categories of 'undertakings', which are defined broadly as any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed [410] (i.e. embrace SOEs and even state bodies in so far as they are engaged in commercial activities). Further, Article 106 of the TFEU, as cited below, specifically provides that services performed by public entities or private entities at the behest of the state should be subject to the competition provisions of the TFEU

[408] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 53–54; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 9–11; Healey, 'Australian Experience with Competition Law' (n 61); Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Capobianco and Christiansen (n 64) 15–16

[409] Consolidated Version of the Treaty on the Functioning of the European Union 26 October 2012

[410] *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] C-41/90, [1991] European Court Reports I-01979 (General Court)

unless the application of such rules obstructs the performance of particular public policy tasks: [411]

> '1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
>
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
>
> 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.'.

It is, thus, an approach in the EU that private and public companies are subject to the same scrutiny under competition rules and the member states of the EU are not entitled to take measures contrary to this rule. The EU Commission, acting as a supranational governing and competition policy authority, is empowered to discipline SOEs and the member states unwilling to restrain their state sector for ensuring that effective competition is maintained. [412]

In addition to the above, the EU has a comparatively well-established legal regime covering subsidies and state aid that the member states or other public bodies may provide to any company, public or private. Yet another tool used by the Commission to achieve competitive neutrality between public and private firms is Transparency Directive 2006/111/EC [413], which concerns financial relationships between public bodies and public companies. The Directive

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[411] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 51-52, 233-243; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 18–19; Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Cheng, Lianos and Sokol (n 63); Capobianco and Christiansen (n 64) 14–15

[412] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 51-52, 233-243; Capobianco and Christiansen (n 64) 14–15

[413] Directive 2006/111/EC on the Transparency of Financial Relations between Member States and Public Undertakings as well as on Financial Transparency within Certain Undertakings (codified version) 17 November 2006 (European Commission)

requires separate accountability with public companies that have both commercial and non-commercial activities having to separate their accounts to demonstrate how their budget is divided between commercial and non-commercial activities. These tools have been used in many sectors, including the postal, energy, and transport sectors. [414]

The above pan-EU approach has generally been implanted into the legislation of all the EU member states, including the Eastern-European members, with some of them (e.g. Hungary, Spain, Sweden) having developed additional mechanisms to ensure competitive neutrality. It is worth noting that though the level of transposition of the relevant EU rules into national legal systems of the member states has been quite high, practical adherence to them has been incomplete in many member states and ways have been devised to circumvent the rules for supporting the state sector, as will be discussed further. [415]

Generally, the concept of competitive neutrality seems to be a plausible solution and is likely to be helpful for addressing the challenges faced by the three post-Soviet countries chosen for the research indeed. The use of the instrument may represent a compromise option, which allows taking into account public policy-oriented pro-statism considerations of post-Soviet governments, but reconcile them with concerns raised by competition scholars. In applying this policy, however, a number of the right choices have to be made and some relevant institutional infrastructure has to be built, as explored below.

4.2.2.2 Instruments for implementing the policy of competitive neutrality

As the general principles of the functioning of the competitive neutrality policy are described, it may be useful to highlight some of the most important specific instruments that may allow to implement it effectively. Hence, to begin with, a competition regulator may be tasked to review all drafts of legal acts for compliance with competition neutrality principles as well as to elaborate some relevant guidelines on developing economic legislation in each sphere for lawmakers and regulators. Such practices may help to achieve regulatory, taxation, and some of the other types of neutrality noted above. The practice of competition pre-screening in

[414] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 51-52, 233-243; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 36, 42, 45, 52, 54, 60, 68, 70; Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Cheng, Lianos and Sokol (n 63); Capobianco and Christiansen (n 64) 14–15

[415] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) among others, 38-41, 55-57, 61-62; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 14-16, 21, 36, 45, 52, 64, 70; Hölscher, Nulsh and Stephan (n 66)

particular is already applied at, for example, the pan-EU level and in the majority of the EU member states, being usually a part of a more general regulatory impact assessment (though there is varying degree of comprehensiveness of the-pre-screening amongst the member states with such countries as, for example, Germany, Spain, Sweden, and the UK[416] in the West of the EU and the Czech Republic, Hungary, Estonia, and Slovakia in the East having a more holistic and systematised approaches with a greater number of drafts being regularly checked).[417] Based on the EU member states' experience, it seems important to ensure that the pre-screening is sufficiently structured and transparent and may be performed properly i.e. competition authorities are properly staffed and have enough time to analyse each act in question. Besides for competition authorities, this work can also be done by sectoral regulators themselves provided they have sufficient competition expertise. The matter of who should have the leading institutional role in bringing forward the competitive neutrality policy will be discussed further in sub-Section 4.3.3.

It is worth noting that ex-post screening of existing regulations may be as beneficial as the assessment of drafts of new legislation. However, relevant experience of countries outside the FSU suggests that compared to the pre-screening the creation of such a system may require more effort and be costlier. Hence, in the EU, besides for EU Commission's periodic review of all-EU acts, only a handful of member states have created a systematised and transparent regime of ex-post regulatory impact assessment (e.g. Germany, Italy, the UK in the West of the EU and, to a much lower extent, Estonia and Poland, in the East) with the UK being the only member state that systematically compares the effects of existing regulations to alternative actions.[418] For now, ex-post assessment of competition effects of legal acts is carried out mainly on an ad hoc basis through advocacy and enforcement instruments, as discussed in Section 4.3 below.[419] Probably, though the introduction of comprehensive ex-post monitoring is useful, a more realistic initial option here is the systematic monitoring of the main legislative

[416] For the avoidance of ambiguities and greater simplicity, the UK is still considered as a member of the EU in this thesis.

[417] Organisation for Economic Co-operation and Development, 'Better Regulation Practices across the European Union' (19 March 2019) <https://read.oecd-ilibrary.org/governance/better-regulation-practices-across-the-european-union_9789264311732-en#page1>; Organisation for Economic Co-operation and Development, 'Experiences with Competition Assessment: Report on the Implementation of the 2009 OECD Recommendation' (2014) <https://www.oecd.org/daf/competition/Comp-Assessment-ImplementationReport2014.pdf>; Lianos (n 63)

[418] Organisation for Economic Co-operation and Development, 'Better Regulation Practices across the European Union' (n 417)

[419] Organisation for Economic Co-operation and Development, 'Experiences with Competition Assessment' (n 417)

act only or the assessment of those acts that meet particular criteria (e.g. the scope of coverage, the degree of impact on the main economic sectors, etc.).

Although, as mentioned above, anticompetitive legislative measures may take different forms, specific types of legislation that have higher potential to affect competitive neutrality should probably be mentioned separately. These categories include industrial policies for SOEs-dominated sectors, price control legislation, and public procurement regulations. Industrial polices of a vertical nature[420] in SOEs-dominated industries, often classified as 'strategic', 'pillar', or 'new emerging technology' sectors, usually invigorate SOEs to support growth in relevant industries. They are relatively widespread all over the world and tend to be neglectful towards needs of potential private entrants. It is noteworthy that some of more advanced economies, e.g. the EU, try to decrease the scope of applying vertical measures in general, as part of their commitment to develop competition.[421] Price regulating legislation in some industries may, in turn, be discriminatory or be drafted relying on the data that is accurate for SOEs mainly. In case of the latter, relevant formulas and rules may be unadjusted for private entities and, thus, affect their ability to effectively compete with SOEs, which often set below-market prices, relying on direct and indirect state support and benefits (relevant distortions seem, for example, widespread in China). It is, thus, usually suggested that relevant limitations should be abandoned, or, if applied, should be drafted more carefully with market benchmarks at hand.[422] As for public procurement, relevant legislation is sometimes used for providing disguised state aid to SOEs, which act as suppliers, or is structured in such a way that is it SOEs that are the main beneficiaries of the relevant regime. Mindful of relevant issues, some countries have devised competitive neutrality rules that specifically target the area of public procurement. Australia is once again an example here, as only SOEs compliant with competitive

[420] Industrial polices may generally be divided into vertical and horizontal ones. Vertical policies promote specific industries, regions, or enterprises through government intervention that overrides the market. Horizontal policies support selected economic activities, such as research and development and innovation, without discrimination regarding specific industries, regions, or enterprises, and without displacing competitive market processes. See, for example, relevant explanations in Kovacic, 'Competition Policy and State-Owned Enterprises in China' (n 59)

[421] Marcin Szczepański and Ioannis Zachariadis, 'EU Industrial Policy at the Crossroads: Current State of Affairs, Challenges and Way Forward' (December 2019) PE 644.201 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/644201/EPRS_IDA(2019)644201_EN.pdf>; Kovacic, 'Competition Policy and State-Owned Enterprises in China' (n 59)

[422] Nguyen Anh Tuan, 'The Role of State-Owned Enterprises in Shaping Vietnam's Competitive Landscape' in Deborah Healey (ed), *Competitive Neutrality and Its Application in Selected Developing Countries* (United Nations Conference on Trade and Development 2014); Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 40–42; Kovacic, 'Competition Policy and State-Owned Enterprises in China' (n 59)

neutrality policies are allowed to participate in procurement procedures there. Some relevant rules have also been elaborated in, for example, Korea as well at the EU level and in some of the EU member states, including Denmark and Sweden (it is of interest that in Denmark, SOEs are completely prohibited from participating in most public procurement procedures). [423]

Another instrument of the competitive neutrality framework is targeting anticompetitive benefits by relevant legislation on state aid, which, however, has to be all-encompassing enough to cover all possible cases where state aid is provided. The EU has, for example, as was noted above, developed a relatively strong regime for controlling state aid, which covers many types of aid (including e.g. outright grants, tax relief, provision of goods and services on preferential terms, transfers of land or buildings gratuitously or on favourable terms) and combines ex-ante and ex-post elements. Procedurally, pursuant to Article 108 of the TFEU, the European Commission is given the task to control state aid and the member states are required to inform the Commission about any plan to grant state aid in advance by sending a relevant notification or requesting guidance. Implementing new state aid without notification leads to such state aid being 'unlawful' and the Commission or a national judge may request the member state to suspend such aid or to take all measures necessary to recover such aid from a beneficiary. The Commission also has the power to review existing state aid. At any moment, it may find that, due to changed market conditions, such state aid is no longer compatible with the common market and has to be terminated. Natural or legal person may, under certain conditions, initiate proceedings against the Commission's decisions in front of the court of justice. The regime, thus, seems to be well-balanced. It is also noteworthy that there many official guidelines and frameworks on the state aid policy (including those explaining when state aid is permissible), which make the regime more transparent and less burdensome. [424]

Instruments to ensure the functioning of the EU state aid regime have been introduced in national legislation of all the members states with specific state bodies being designated in each state to monitor compliance. Speaking of the East European member states' experience in particular, it should be noted that the practice of providing substantial and unsystematised staid aid had been quite widespread in them prior to that they joined the EU in the early 2000s,

[423] Grith S Ølykke and Albert Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing 2016); Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 73–76; Sanchez-Graells (n 67)

[424] Department for Business, Innovation, and Skills (UK), 'The State Aid Manual' (July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949159/withdrawn-state-aid-manual.pdf>; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 418–422; Organisation for Economic Co-operation and Development, 'Competition, State Aids and Subsidies' (n 53) 21-23, 105-113

being aimed mainly at rescuing SOEs suffering from the post-socialist transition. There is much evidence that after the joining, the situation with the provision of aid has improved rapidly with relevant regulations being developed responsibly and enforcement being rather pro-active (or at least at level compatible with that in the old member states). With that said, it appears occasional attempts are still made to disguise unallowed subsidies (e.g. direct operating aid) as those being comparable with the regime (e.g. horizontal aid for research and development). A conclusion that may be drawn here is that strong commitment is needed to set the functioning state aid regime with transparency and independent oversight and pressure being important factors (some example here is the European Commission's efforts to cease the provision of unsubstantiated subsidies to state-owned ports in Poland in the late 2000s that broke the vicious circle of unconditional support of these incumbents).[425] As was mentioned in sub-Section 3.3.4.4, a regime for addressing state aid has already been adopted in the FSU in some form, but it seems more adjustments are needed to invigorate it - partially based on the EU experience, but probably to a greater extent for being even more comprehensive (since even the EU regime does not seem to address all possible variations of state aid to SOEs, owing to the complexity of the relations between the state and SOEs), as will be discussed in Chapter 5.

Some approaches being closely connected to the matter of state aid, but worth separate mentioning are the abovementioned policies of reasonable compensation to SOEs for the public duties and of debt neutrality. In case of the former, it is of significance that there is an exact match between the volume of state subsidies (if provided) and costs related to the performance of public obligations, including a reasonable profit margin. To facilitate this, such measures are, among others, necessary as clear separation of accounting in respect of public and non-public activities of SOEs, a regular independent audit, the introduction of clear reporting standards and risk assessment mechanisms and methodologies. In the EU, paying excessive compensation for SOEs' public duties constitutes state aid (relevant criteria were defined in the landmark Altmark case[426]). In this regard, the member states have established strict control over financial flows of SOEs with the above measures being, *inter alia*, taken. Some strong performers here are France, Estonia, Hungary, Germany, Poland, Spain, Sweden, and the UK. It is a widespread practice that the actual provision of public services for SOEs is closely monitored with any overpayments being claimed back by the state (see, for example, the relevant practices in Hungary and Poland).[427]

[425] Hashi (n 65); Hölscher, Nulsh and Stephan (n 66)

[426] *Altmark Trans GmbH* (2003) 280/00 European Court Reports I-07747 (European Court of Justice)

[427] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 55–57; Organisation for Economic Co-

Debt neutrality, in turn, implies that SOEs do not have access to debt financing on non-market terms or preferential state support in this regard (e.g. state guaranties of any kind). To ensure debt neutrality, in Australia, larger SOEs have to obtain a credit evaluation under a counterfactual assumption of private ownership. Loans from the state are granted on market terms, based on the evaluation. Where loans from private sources are obtained on preferential terms, SOEs must adjust their cost base and, therefore, prices as if loans have been granted on market terms as well as may have to pay a debt neutrality payment to the Office of Public Accounts. Within the EU, the provision of soft loans by the state may constitute state aid and be, thus, targeted accordingly. In the UK, SOEs are generally not allowed to borrow from the open market and must instead obtain finance from the National Loans Fund. The Fund must generally ensure that such loans are extended on commercial terms. [428]

The last set of instruments worth noting in the context of a broader competitive neutrality policy is pro-active deprivation of SOEs of those inherent benefits they may have as a result of their specific market position as long-existing state-supported incumbents, often, former natural monopolies, including control over important infrastructure; a broad base of customers, having to remain loyal for regulatory or other reasons; or an established rigid network of business relations built up with the support of the state (so-called 'incumbency advantages'). Relevant countermeasures here may generally include the unbundling and other forms of restructuring analysed in sub-Section 4.2.1; the provision of indiscriminatory access to SOEs-owned 'essential facilities' or resources, including information; or abolishment of regulatory measures, pre-determining a relevant market structure. [429] Many examples of relevant measures may be given. Hence, there have been many regulatory changes as well as restructuring and competition law enforcement efforts across the EU to ensure access of competitive entities to economically important facilities owned by dominant incumbents, including those being SOEs (in the utilities and transportation sectors in particular). [430]

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operation and Development, 'Competitive Neutrality: National Practices' (n 51) 52–58; Miniane and others (n 56) 57–60

[428] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 73–74; Miniane and others (n 56) 59–60; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 77

[429] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 35-42, 54–55, 301-305; Arrobbio and others (n 57) 36–43

[430] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 162, 163-166, 196-197, 377; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 31, 80; European Commission, 'State-Owned Enterprises in the EU' (n 70) 29–31

It should probably be noted that, as was mentioned in sub-Section 3.3.4.4 above, some types of SOEs' incumbency advantages may be subtler than others – hence, SOEs may be perceived as more trustworthy customers, clients, borrowers or employers by default. In such cases for example, wider promotion and clarification work from the side of competition authorities, competitive neutrality institutions, and sectoral regulators may be needed for improving the image of private business and raising the awareness about the equality of private and public entities. Some guidance on a more objective assessment of SOEs as counterparties and partners may also be implanted in industrial regulations and guidelines (e.g. those for banks and other financial institutions in particular). SOEs should also become more transparent and may even be obliged to declare that their status does not provide them with any advantages. Hence, for example, in New Zealand, loan documentation for SOEs' borrowings is required to have an explicit disclaimer making clear that the Crown does not guarantee the repayment of relevant debts. [431]

In conclusion of this sub-Section 4.2.2, it may be noted that the elimination of anticompetitive benefits provided to SOEs with the help of the specially designed for that concept of competitive neutrality seems the key measure for resolving competition problems caused by the excessive reliance on the state sector. It looks like an axiom that where SOEs enter into competition with private entities, a level playing field should be created to the extent possible. It is useful to remember, however, that the goal of the competitive neutrality policy is not to supress the state sector as such, but to allow more competition. In this regard, the application of the policy should not translate into the total equalisation and should be considerate of that specific nature SOEs have (as was discussed throughout Chapter 3). Benefits given to the state sector are often aimed at compensating SOEs for their special public functions and the policy of competitive neutrality should, thus, be well-balanced enough not to undermine the effective performance of such functions. A useful guide in this regard is the policy for state aid in the EU, which, though being quite strict, allows to ensure due provision of services of general public interest and to grant state aid for some other permitted purposes.

4.2.3 Institutional relations between the state and the state sector

Institutional relations between the state and the state sector may also be a notable area of concern from the competition perspective. As was discussed in sub-Sections 3.3.2 - 3.3.4, if these relations are too close and too politicised, state actors and SOEs tend to fuse together to the detriment of private businesses. This problem is closely connected with the two subjects

[431] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 7, 70-73

discussed above and particularly with the subject of mechanisms of state ownership. It is worth noting that as in case with state ownership and corporate governance practices, the significance of problems and, accordingly, the actuality of solutions here are higher in SOEs fully controlled by the state.

Generally, it seems the relations between the state and the state sector are in many ways determined by an ownership pattern institutionalised within a jurisdiction and that what and how industrial and economic policies are pursued by government. Speaking of the first, there is a clear trend worldwide that the centralised ownership model is accepted, which, as was discussed in sub-Section 3.3.2, consists in that the exercise of ownership rights is centralised in a single ownership entity. There are different approaches to the actual implementation of this model - though a separate ownership agency is, as a rule, established for performing coordinated ownership functions, its role may vary and be sometimes limited to that of rather an advisory body, for example, where SOEs operate in so diverse sectors that complete centralisation, implying some standardised control, is not a feasible option. The exact form of the ownership institution usually depends on the relevant functions it has – it may be an independent agency; a department of the Ministry of Finance, the Ministry of Economy, or another general economic regulator; a holding company; or an intragovernmental commission. In the UK, for example, UK Government Investments Limited under HM Treasury has been established as a holding company with advisory and limited executive functions. Likewise, in Hungary, the state holding company MNV Zrt, run by the National State Holding Board, is mainly focused on passive ownership functions. Interestingly, in Poland, a standalone centralised state agency, the Ministry of Treasury with extensive executive functions, existed before 2017. It was then dissolved in 2017 and state assets were distributed among line ministries with a specialised advisory agency having been created. Nevertheless, in December 2019, the new Ministry of State Assets was established and is once again taking over the centralised oversight of SOEs. It is still too early to tell whether Poland has transitioned back to the centralised model, but it appears to be on track to do so. Generally, speaking of the Eastern European region, only a small number countries have yet fully institutionalised the centralised ownership model (besides for Hungary, this is the case only in Estonia, Kosovo, Macedonia, Slovenia, and Romania), but the trend to move towards it has been growing steadily. [432]

[432] Organisation for Economic Co-operation and Development, 'Ownership and Governance of State-Owned Enterprises' (n 52) 23–34; Bower (n 56); Miniane and others (n 56) 54–55; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 21–24, 65-71

As was briefly discussed in sub-Section 3.3.2, the creation of a centralised unit to exercise ownership functions is meant to resolve a number of institutional problems, some of which are often a characteristic of the decentralised and dual models. One of the key tasks of the centralisation from the competition perspective is to avoid merging between sectoral regulators and the state sector, which may lead to that regulator act in the interests of SOEs (the so-called 'regulatory capture'), while SOEs are, in turn, being exploited by state actors for achieving narrow industrial or departmental goals. The centralisation may also be useful for eliminating the scope for political interference; avoiding fragmentation of ownership responsibilities and diffused accountability; bringing in sufficient ownership capacity; and coping with a lack of adequate oversight over the state sector as a whole (that may be a major problem in institutionally weak jurisdictions).[433] As one may see, these reasons for pursuing the centralisation in many ways correlate with the tasks of the policy of competitive neutrality described above. It is worth noting that despite the advantages of the centralisation approach, as, among others, the abovementioned Polish experience seems to suggest, strict centralisation may also have some flaws. Hence, a centralised ownership agency may become overpowered and with the general ownership system getting disbalanced, it may become harder to control its activities and, thus, to ensure that qualified management is maintained. Further, such an agency may struggle with the lack of sufficient industrial expertise and its decision-making may, hence, become slow and inefficient.[434]

In light of the latter, some middle ground should probably be searched for, where a centralised ownership agency has some pro-active ownership powers, but acts in coordination and based on advice of line ministries and sector-specific regulators, while providing, in turn, advisory services where the Government or line ministries retain control over particular SOEs. The latter should, however, not remain widespread, as a risk increases that the agency's capacity will be too weak and it will not be able to substantially influence on ownership practices. This, for example, was the case for the UK Shareholder Executive, an ownership agency under the Department for Business, Innovation and Skills, being a predecessor of UK Government Investments Limited. Generally, it is nowadays a common practice for government ownership

[433] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 35–36; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 39–49, 195-196; Bower (n 56); Miniane and others (n 56) 54–55; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 19–24

[434] Chenxia Shi, 'Recent Ownership Reform and Control of Central State-Owned Enterprises in China: Taking One Step at a Time' (2007) 30(3) University of New South Wales Law Journal; Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 36–37; Arrobbio and others (n 57) 93–95

agencies to have the following functions within their scope: contributing to the development of relevant laws, regulations, and policies; assisting or managing the board nominating process; monitoring financial and operational performance; monitoring and (potentially) recommending remuneration levels; monitoring regulatory compliance; coordinating activities with other government agencies; preparing for shareholder participation at annual shareholders' meetings; promoting and guiding relevant reforms; maintaining consolidated information and reporting on companies' performance. [435]

The exact scope of interference of other agencies within a more balanced centralised model tends to vary significantly across different sectors and jurisdictions and include opining on a variety of matters related to SOE's activities with binding or non-binding guidance being provided or some additional monitoring being performed (albeit this brings the approach quite close to the dual model). It seems, that, generally, it is desirable for non-ownership agencies to limit their role to providing advice on particular industrial problems and executing some limited financial oversight. With that said, there seems to be nothing in the modern institutional theory that would advocate against that non-ownership agencies exercise regular regulatory control over SOEs to an extent similar to that over private entities. [436]

If to expand on the latter a little bit, it seems that the need for the construction of the right institutional relations goes hand in hand with the above-described necessity to adopt the policy of regulatory neutrality. It has been a widespread practice in many jurisdictions (including the FSU, China, and many countries in Eastern Europe) that state actors try to involve SOEs into the implementation of particular industrial or social projects. For doing that, targeted legislative acts of different levels are often issued in bypassing the primary control of an ownership agency. In this regard, a measure that seems required is the shielding of SOEs from legislative interventions to the extent possible and crystallisation of the SOEs' functioning in a way similar to that of private companies. [437] An important role here maybe played by, among others, the establishment of independent regulators, which, as will be explained below, may serve as a buffer between ministries or other policy-making institutions and SOEs.

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[435] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 35–43; Arrobbio and others (n 57) 78–98; World Bank, 'Corporate Governance of State-Owned Enterprises in Europe and Central Asia' (n 57) 23–24, 65-71

[436] Arrobbio and others (n 57) 79, 96–98

[437] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 31-32, 45-46; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 66–67; Kovacic, 'Competition Policy and State-Owned Enterprises in China' (n 59)

A question that was already touched upon in passing above is whether SOEs, considering their specific role of conveyors of particular public policies, may in principle be effectively and comprehensively protected from government interventions and opportunism. It appears that the roots of problematics here go quite deep and may not explored fully within this thesis. The question is likely to be closely connected with principles of the functioning of states as such and the dedication of particular governments to acting in a liberal market-oriented manner. Nothing and no one (including SOEs) may be protected from government interventionism in authoritarian economically conservative systems. No less unpredictable are staggering democratic regimes, where radical changes within government may inform rapid changes in approaches to controlling SOEs. Generally, it seems that constant and persistent advocacy work of competition professionals is needed to form a stable market-oriented institutional approach. Apparently, even within authoritarian and unstable systems, some region-specific institutional balance may be found, where no one except for the supreme authorities intervene into activities of SOEs and, thus, only the largest and most important SOEs remain vulnerable.[438] Possible approaches for the FSU in the context of the region's specific environment will be discussed further in Chapter 5.

4.3 Role of Competition Law and Competition Authorities

Having discussed the three sets of possible solutions that may be useful for addressing the statism – competition policies conflict, we may now move to the discussion of that what role competition law and competition authorities may potentially play in implementing these solutions and negating the conflict generally. An important question that arises in this regard is whether competition law is actually able to target the matter of statism at all, as related problems seem more complex than unrestrained accumulation of significant market power by particular SOEs, being rather a reflection of government's specific economic and political choices, as was discussed in Section 3.4. Generally, it seems that, as suggested by some researchers[439] and will be explored further below, since the policy of statism intrudes into the domain of competition policies, it may in principle be addressed through competition law means as a part of some wider array of available instruments.[440] A three-dimensional approach

[438] Cheng, Lianos and Sokol (n 63); Lianos (n 63)

[439] See, for example, Lianos (n 63)

[440] Some opposite views are, however, worth noting. Hence, for example, it seems to be a fundamental legal position in the US that 'the democratic process contains many flaws, but curing them is no antitrust's assignment'. Given that the concept of 'democratic process' applies to all aspects of the operation of the US government, a relatively limited role has been assigned for antitrust in responding to state actions and misbehaviour of SOEs. See ibid

may actually be offered in this regard, which consists of pro-active enforcement of competition rules against SOEs and the state, wider use of instruments of competition advocacy, and a greater role of competition authorities in building the capacity of relevant institutions.

4.3.1 Enforcement of competition rules against SOEs and the state

The pro-active enforcement noted above implies pro-active, unbiased, and well thought-through application of competition ex-post and ex-ante legislation to SOEs as well as pro-active targeting of anticompetitive actions of state authorities. In case of the first, it is of principal significance that competition law is applied equally to SOEs and private companies with no immunity or exemptions for SOEs being set in law (in line with the policy of regulatory neutrality above). Generally, it seems that this principle is duly complied with in the majority of advanced competition law jurisdictions and the enforcement of competition law is generally neutral as to the ownership structure of companies - in the EU, for example, by virtue of that the definition of an 'undertaking' is rather all-encompassing, as explained in sub-Section 4.2.2.1. With that said, some direct and indirect exceptions have still been devised, e.g. in the EU, these have been provided in Article 106(2) TFEU cited above; though theoretically the relevant exemptions for companies providing services of general economic interest may be relied upon by all categories of undertakings, they somewhat clearly gravitate to favouring SOEs. Though the pan-EU regulatory regime has been to a large extent effectively transposed into national legislation of the member states, some specific exemptions may still be found in individual states, including Lithuania, Hungary, and Poland in Eastern Europe. In Hungary, for example, the government can exempt concentrations from merger clearance obligations, if they are of national strategic importance, which is often relevant for transactions involving SOEs. In many jurisdictions (e.g. the US, the EU and many of its member states, including Germany, France, Hungary, and Spain), the so-called state defence is also available, which implies that a business entity may claim that it is government intervention in its activities or a particular form of government pressure that has forced it to commit an anticompetitive infringement. It is SOEs who often resort to this defence, being a common instrument of government interventionism. [441]

[441] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 10, 44-45, 51-52, 233-243; Organisation for Economic Co-operation and Development, 'Competition Law and State-Owned Enterprises' (n 51) 8–11; Healey, 'Competition Law and State-Owned Enterprises: Enforcement' (n 62); International Competition Network and Moroccan Conseil de la Concurrence (n 345) 15–27

Besides for the necessity to ensure that competition law applies to SOEs to the full extent possible, it may be necessary to consider those specific difficulties with which enforcement against SOEs may face in practice, as were partially described in sub-Section 3.4.1. Hence, given that SOEs may ignore requests of competition authorities, relying on their status, and state authorities may intervene in relevant enforcement or obstruct it in some way, transparency and publicity of the enforcement is required. Further, clear guidelines for enforcement against SOEs should be developed, so that methodological unclarities (related to, for examples, calculating SOEs' costs for proving predatory pricing or determining whether colluding SOEs represent the same group) do not lead enforcement procedures to a dead end and do not compromise competition authorities when other regulators or courts get involved. As cases from the EU and beyond suggest, it is methodological difficulties that often prompt under-enforcement against SOEs (and also, some incrimination of competition authorities (in, for example, Eastern Europe) to limit their enforcement activities to specific categories of cases in specific industries). [442]

It is occasionally suggested that competition law should not only be applied equally to private companies and SOEs, but should be applied more strictly and more inventively where SOEs are involved so that to restraint anticompetitive advancements of statism. It is advocated, among other things, that behavioural and structural remedies should be used more often through M&A and anti-abuse rules to render a lasting effect on markets. Measures of a behavioural nature may include rules for tariffs setting and access to essential facilities, while structural measures – divesture of assets or shares in companies being a part of an integrated structure. Generally, this kind of approach seems to be reasonable and correlates with the ownership and corporate governance solutions proposed for SOEs above. A concern here is, however, that competition agencies will effectively transform into sectoral regulators (substituting conventional ex-ante regulation with own ex-post practices), whereas expertise-building and monitoring costs may turn to be very high. It, therefore, appears that this approach may not be used ubiquitously and should be resorted to only to remedy obvious regulatory failures, e.g. the EU Commission powers to enforce competition law are sometimes used to fill in regularity gaps in legislation of member states to facilitate achievement of broader competition policy

[442] Jens Hölscher and Johannes Stephan, 'Competition and Antitrust Policy in the Enlarged European Union: A Level Playing Field?' (2009) 47(4) JCMS Journal of Common Market Studies 863; Organisation for Economic Co-operation and Development, 'Competition Law and State-Owned Enterprises' (n 51) 17–27; Healey, 'Competition Law and State-Owned Enterprises: Enforcement' (n 62)

objectives e.g. deregulation in the network industries (albeit it is worth noting that the EU Commission generally has a broad regulatory mandate).[443]

In some jurisdictions, competition authorities also take part in regulating prices (in sectors where prices are determined by the state) and oversee public procurement procedures.[444] Where this is the case, it is generally advised in the context of the considered problem that greater effort should be made to ensure competitive neutrality. In case of price regulation, this means that prices set whether directly or in some indirect way should be ensure that both private and state-owned companies are able to recoup expenses and to make profit and, thus, stimulate private companies to enter relevant markets. In case of public procurement, this implies that as many as possible purchases of state authorities and SOEs should be carried out through competitive procedures (competitive biddings, competitive proposals, etc.) with transparent and equal rules being set for all categories of bidders (not being skewed in favour of SOEs).[445]

As was noted above, competition laws are expected to be pro-actively applied not only to SOEs, but also to state actions distorting competition and (or) facilitating SOEs to infringe competition law (actions forming the situation of an 'administrative monopoly', as it is, for example, called in China). Relevant measures usually include rules against arbitrary state aid and rules against anticompetitive state interventions (such as e.g. discriminatory licensing regulations, the provision of particular rights, etc.). Hence, if to look at the EU again, besides for the rules for targeting state aid discussed above, there are also some rules targeted at anticompetitive state actions. In contrast to the holistic and strong state aid regime, however, these rules are based on relatively underdeveloped and generalist case law proceeding from Article 106 TFEU above[446] and outlawing state measures hampering the effectiveness of the EU competition rules. As provided in the ECJ ruling in *GB-Inno-BM* of 1977 '…the Treaty imposes a duty on member states not to adopt or maintain in force any measure which could deprive [provisions of the Treaty] of [their] effectiveness… [and in particular] member states may not enact

[443] Organisation for Economic Co-operation and Development, 'Competition Law and State-Owned Enterprises' (n 51) 21–24; Healey, 'Competition Law and State-Owned Enterprises: Enforcement' (n 62); Capobianco and Christiansen (n 64) 21–26

[444] Jenny (n 78) 8

[445] Sanchez-Graells (n 67); Asian Development Bank, 'State-Owned Enterprises' (n 391); Organisation for Economic Co-operation and Development, 'Public Procurement in Kazakhstan' (n 391) generally; Organisation for Economic Co-operation and Development, 'Reforming Public Procurement' (n 391) generally

[446] *Van Eycke v ASPA* (1988) 267/86 ECR no 4769 (European Court of Justice); *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* (1977) 13-77 ECR no 2115 (European Court of Justice)

measures enabling private undertakings to escape from the constraints imposed by Articles [81] to [89] of the Treaty [(Articles 101-109 TFEU respectively)]'. [447]

The relevant principles have generally been mirrored in legislation of many member states, but some member states have developed more elaborate rules for preventing anticompetitive state interventionism (for example, Germany, Hungary, Italy, France, and Spain). From the procedural perspective, as in case where non-sanctioned state aid has been given, such rules operate in a way that competition agencies may intervene *post-factum*, requesting relevant state agencies to reconsider their actions or, if their statements have been ignored, to apply to court. In other words, monitoring powers of competition agencies are enhanced to keep state agencies in check (generally, it seems that such rules come close to a more holistic competitive neutrality regime, as, for example, in Australia). In a number of the EU member states, of which Poland and the UK (to a lesser extent) are an example, no meaningful framework in respect of state interventionism has, however, been created, but that is to some extent compensated by the fact that other instruments e.g. institutional cooperation, self-regulation, and advocacy, as will be explored below, are intensively used. [448]

4.3.2 Competition advocacy

The second extensive set of competition policy measures that may be needed to facilitate the implementation of solutions discussed in Section 4.2 and, particularly, the functioning of the policy of competitive neutrally is competition advocacy. This is commonly defined as all activities of competition authorities that are intended to promote competition apart from those that involve the enforcement of competition law. [449] To be specific, as suggested by John

[447] Zhanjiang Zhang and Baiding Wu, 'Governing China's Administrative Monopolies under the Antimonopoly Law: A Ten-Year Review (2008-2018) and Beyond' (2019) 15(1) Journal of Competition Law and Economics 718; Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 42–43, 238-239; Capobianco and Christiansen (n 64) 25–26; International Competition Network and Moroccan Conseil de la Concurrence (n 345) 20–27

[448] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 51–52, 464-466; International Competition Network and Moroccan Conseil de la Concurrence (n 345) 20–27

[449] Tanja Goodwin and Martha Martinez Licetti, 'Transforming Markets through Competition: New Developments and Recent Trends in Competition Advocacy' (World Bank, 13 April 2016). Publication 104806 <http://documents.worldbank.org/curated/en/640191467990945906/Transforming-markets-through-competition-new-developments-and-recent-trends-in-competition-advocacy>; Niamh Dunne, 'Strategies for Competition Advocacy' (Organisation for Economic Co-operation and Development, 16 August 2010). OECD Background Note for the Latin American Competition Forum on 8-9 September 2010 in San Jose, Costa Rica <http://www.oecd.org/competition/latinamerica/2010LACF-Strategies-for-competition-advocacy.pdf>

Clark[450], four principal forms in which competition authorities practice advocacy may roughly be distinguished: i) active participation in and oversight over privatisation processes; ii) legislation, government policy, and regulatory reform (regular review and commenting on proposed legislation that can affect competition, the promotion of trade liberalisation, the development of state aid policies, improvement of procurement policies, etc.); iii) competition policy in regulation (engagement in studies and evaluations of regulated sectors, advising to regulators, communications to government, etc.); and iv) building a competition culture (publication of competition agency decisions, promulgation of enforcement guidelines, publication of annual reports, regular communications with the press and electronic media, the conducting of seminars and conferences, etc.).

Competition advocacy targeted at statism in particular may embrace many different measures out of those noted above with such of them as oversight over regulatory reforms and privatisation, review of proposed and acting legislation (as discussed in sub-Section 4.2.2.2 above), and the development of relevant legislative proposals seeming particularly important. It may appear that relevant advocacy efforts are futile in countries with stronger predisposition to adhere to statism (particularly, when competition authorities act at their own initiative rather than are instructed by government or have a relevant statutory obligation), but albeit these concerns are not unfounded, there have been much empirical evidence that the relevant measures may be effective even in such environment. Speaking of Eastern Europe for example, the competition authorities in such states as Poland and Hungary have been relatively successful in opposing or, at least, mitigating many SOEs-favoured reforms in utilities.[451] The relevant experience of these and other countries suggests that for advocacy measures to be effective, it is necessary to elaborate and institutionalise infrastructural instruments that facilitate and systematise communication and cooperation between competition agencies and other state agencies. Relevant infrastructure may include memoranda of understanding between competition agencies and regulators (this practice is widespread in, for example, Finland); guidelines on cooperation in regulatory investigations and preparation of regulatory instruments; market reports prepared by competition agencies and provided to regulators; reasoned opinions, issued by the competition authority and made available publicly and (or) sent directly to the relevant government department or body; recommendations to government as to how the market could be improved by state action; *amicus curiae* briefs filed in civil or criminal litigation or in administrative regulatory proceedings, etc. One of major tasks

[450] John Clark, 'Competition Advocacy: Challenges for Developing Countries' (2005) 6(4) OECD Journal of Competition Law and Policy 69

[451] International Competition Network and Moroccan Conseil de la Concurrence (n 345) 51–53

here is to ensure that opinion and concerns of competition authorities do not remain unheard and are always considered and reacted to by other state actors. [452]

One sphere of advocacy that should probably be mentioned separately is the advocacy promoting informed consumption. Competition authorities (especially if tasked to perform consumer protection functions) may play an important role in supporting consumer control, choice and autonomy, including in cases where statism-caused externalities are an issue. It may be within competition authorities' powers to ensure that consumers receive comprehensive information about markets within which they are active and that the process of making an informed choice is not too costly. For example, in the banking industry, competition authorities may work on ensuring that consumers are able to get necessary basic information about both state-owned banks and private banks; are not mislead in respect of how safe and efficient each category of banks is; a change of a bank is not too costly; tied services (for example, state services provided through banks) are equally accessible for clients of private and state-owned banks, etc. The same scope is equally relevant for the utilities, healthcare, and many other industries. As in case with other measures related to competition advocacy, institutional and infrastructural instruments are also likely to be helpful here – hence, consumers may benefit from competition authorities' enhanced and more systematised communication with consumer associations and consumer purchase groups. [453]

4.3.3 Institutional capacity building

4.3.3.1 Structuring institutions and developing their capacity

A third dimension of competition authorities' activities that are important for addressing the conflict between competition and statism is their contribution to designing institutional changes within government that would enhance competition. Hence, competition authorities may play an important role in advising government on structuring economic governance in a way that ensures that competition policy considerations, including those related to competitive neutrality, are duly taken into account by all state actors; facilitates competition advocacy; and ensures pro-active and unbiased enforcement of competition law. Although researchers seem to rarely consider the relevant task as the one for a competition agency, it

[452] ibid; Organisation for Economic Co-operation and Development, 'Experiences with Competition Assessment' (n 417); Dunne (n 448); Clark (n 449)

[453] Mike Featherstone, 'Consumer Culture and Its Futures' in Evgeniia Krůsteva-Blagoeva (ed), *Approaching Consumer Culture: Global Flows and Local Contexts* (Springer 2018); Kati Cseres, 'The Impact of Consumer Protection on Competition and Competition Law: The Case of Deregulated Markets' (Amsterdam Centre for Law and Economics, 19 May 2006). Working Paper 2006-05

appears that it is it who should be pro-active and push government towards structural reforms strengthening competition.

Generally, a variety of models of institutionalised interaction in the area of competition have been elaborated to, among others, better address the issues of government interventionism and the overdominance of SOEs. Although some general principle is that each country should shape an institutional system that would reflect its specific needs, priorities, and conditions, some common standards and theories are still likely to be applied or, at least, acknowledged around the world, as discussed below.

To begin with, though the matter of interaction of competition authorities with other regulators is of principal significance, that how the internal structure, governance, and functionality of a competition agency itself are organised is also important. One of the ideas being most relevant for this research is that competition authorities should be as independent as possible, being not a part of the executive, but having the status of a separate agency not associated with any ministry or department. Generally, a four-component system of independence is usually meant, presuming structural, operational, organisational, and financial independence. Such independence is aimed at insulating a competition agency from interferences and excessive influence of various state actors (which may, among others, be inclined to patronise SOEs) and ensuring greater flexibility and purposefulness of competition agency's decision-making. [454]

Independent competition authorities are usually allowed to advocate their position at governmental meetings or report directly to the head of state or Parliament. Some other measures for enhancing the independence (within the above 4-elements pattern) may be budgetary autonomy; a balanced appointment system for the head of the authority or its board (i.e. members are appointed for a fixed term and cannot be removed from office except for cause); the absence of judicial review of agency decisions; the absence of or severe limits upon the ability of citizens, nongovernment bodies, or commercial entities to monitor competition agency's operations; etc. An important question that sometimes arises in the context of such independence is, however, that how mechanisms of accountability for a competition agency

[454] Organisation for Economic Co-operation and Development, 'Summary of Discussion of the Roundtable on Changes in Institutional Design' (31 March 2016) DAF/COMP/M(2015)1/ANN9/FINAL <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN6/FINAL&docLanguage=en>; Simon Peart, 'Australia and New Zealand: Their Competition Law Systems' in Eleanor Fox and Michael Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013); Jenny (n 78) 28–29

can be devised, as the lack of it may, in turn, trigger problems related to regulatory capture (especially if there are powerful unregulated economic actors in a relevant country e.g. oligarchs in Ukraine), lack of coherence between competition policies and broader regularly agenda, and lesser opportunities for competition advocacy. In this regard, balanced accountability rules are tried to be elaborated that would not encourage government interventions, but would allow to keep a competition authority more integrated into the general system of governance and more focused on its tasks. For example, in the UK, the Government provides the Competition and Markets Authority with a strategic steer, whereas in some other jurisdictions, performance indicators are used. Attempts to find a balance between the independence and the accountability sometimes result into internal restructuring within a competition authority, e.g. the separation of investigation and adjudication functions, the transferring of adjuration functions to general courts or a separate tribunal, etc. [455]

As noted above, the matter of how functions to oversee competition are distributed among a competition agency and other state actors (primarily, sectoral regulators and line ministries) and how relevant interactions happen is even more important. Different models are used in different jurisdictions with no single approach being in place even in jurisdictions having common problems related to statism. If to imagine the relevant variety of approaches as a spectrum, one side of it will be represented by jurisdictions, where competition authorities are also entrusted with regulatory functions (in the EU, the relevant structural reform was, for example, implemented in Estonia in 2008, where the competition authority was given regulatory functions in the energy, rail, and telecom sectors; in Spain in 2013, where the competition authority became the airports, audio visual products, energy, rail, post, and telecom regulator; and in Lithuania in 2009 and 2011, where the competition authority became the rail regulator), while the other side – by countries, where sectoral regulators apply competition law concurrently with a competition agency (as is, for example, done in the UK by regulators in energy, water and sewerage services in England, Wales, and Northern Ireland and regulators in rail, air traffic control, airport operations, telecoms, broadcasting, spectrum and postal service, healthcare in England). [456] Some arguments in favour of entrusting competition authorities with regulatory functions include the availability of a more flexible range of instruments to promote and maintain competition, particularly in newly deregulated sectors; a better ability to detect and to manage conflicts between regulatory and competition policies; and greater resistance to regulatory capture. With that said, a number of negatives are also

[455] Jenny (n 78) 29–34; Organisation for Economic Co-operation and Development, 'Summary of Discussion of the Roundtable on Changes in Institutional Design' (n 453); Peart (n 453)

[456] Jenny (n 78) 15–16

present. They generally relate to that heterogeneous activities are combined within one agency and include the complexity in managing different functions; the loss of competition between sectoral regulators and competition authorities in advocating regulatory changes for regulated sectors; the ambiguity of goals that should be ascribed to an institution being both a competition policy enforcer and a sectoral regulator. Moreover, different regulatory solutions may have to be elaborated for different industries and some standardised approach chosen by a single agency may be counterproductive. For example, deregulation and the establishment of a competitive market may be needed for a previously monopolised sector and addressing this through purely competition law instruments is unlikely to be effective (it is *ex-ante* regulatory policies that are usually applied in such situations rather than competition protection norms). Some of the above issues, e.g. potential conflicts between competition law principles and regulatory objectives, may also become acute where sectoral regulators apply competition rules concurrently. [457]

Being cautious to merge the functionality of a competition agency and sectoral regulators owing to the above concerns, many countries, in turn, prefer a more conventional middle approach with competition and sectoral regulators being fully separated, but occasionally cooperating in particular matters. In this case, it becomes particularly important how regulators interact, as was briefly discussed in sub-Section 4.3.2. Special commissions may be set up for working on particular categories of cases, official meetings may be regularly conducted based on memorandums of understanding or guidelines, as mentioned above, etc. Thus, for example, the French competition authority has the duty when it deals with a competition issue in a regulated sector to ask for opinion of a relevant sectoral regulator on technical issues underlying the competition question it deals with. The opinion of the sectoral regulator is not binding on the competition authority, but it is made public and the competition authority must explain in its decision why it departs from the opinion. Likewise, when a technical regulator deals with a technical issue that may have an impact on competition, it must consult with the competition authority on implications of the matter for competition. [458]

A greater degree of integration may be envisaged under the middle approach. Hence the same investigation or advisory units may be used by both regulators and competition authorities,

[457] Organisation for Economic Co-operation and Development, 'The Relationship Between Competition Authorities and Sectoral Regulators' (n 55); Jenny (n 78) 16–18; Organisation for Economic Co-operation and Development, 'Summary of Discussion of the Roundtable on Changes in Institutional Design' (n 453)
[458] Organisation for Economic Co-operation and Development, 'The Relationship Between Competition Authorities and Sectoral Regulators' (n 55); Jenny (n 78) 18; Organisation for Economic Co-operation and Development, 'Summary of Discussion of the Roundtable on Changes in Institutional Design' (n 453)

they may share some managerial bodies, or a specialised common appeal path may be established. To give some examples of the latter, which appears the most complex mechanism of the proposed ones as some third actor is involved, in Poland, the Antimonopoly Court has jurisdiction both over competition authority cases and over appeals of regulatory decisions. This allows to ensure greater consistency in applying competition rules without merging institutions or elaborating more sophisticated instruments of cooperation as well as to nurture more experienced and multi-oriented adjudication bodies. It is noteworthy that such a common appeal mechanism may also be important in the context of jurisdictions where the concurrent application of competition law is in place, as the constituency may be an issue (in the UK, for example, the Competition Appeal Tribunal decides cases involving competition or economic regulatory issues prior to any appeal to common higher instances). [459]

Particular significance of the matter of the relations between competition authorities and sector regulators for this research stems from, among others, an important practical question as to that considerations of which institution should take primacy in cases where an SOE in a regulated industry allegedly infringes competition law. As was discussed in Section 3.4 and above in this Section, relevant situations may be ambiguous and sectoral regulators may be quite inclined to support SOEs – often, since it is their instructions or policies that have driven SOEs towards an abuse. Generally, it seems that owing to the presumption that some sort of antagonism may indeed be in place between competition and regulatory analysis in relevant cases, two general approaches have been elaborated in developed neo-liberal competition law jurisdictions to address the issue. Under the first one, competition expertise is used as a measure to contain anticompetitive advancement of statism and competition authorities (or competition departments of merged regulatory institutions) are allowed to exercise some form of control over regulatory decisions (or, at least, to opine on them); under the second one, though some decree of the competition oversight may be present, competition considerations underpin the entire economic regulatory regime of a jurisdiction and one or another form of competition assessment of government interventions and anticompetitive behaviour is expected from all state actors, including a separate sectoral regulator investigating particular cases. Some examples of these two approaches are the French and British institutional regimes respectively, as described above. [460]

[459] Organisation for Economic Co-operation and Development, 'The Relationship Between Competition Authorities and Sectoral Regulators' (n 55); Organisation for Economic Co-operation and Development, 'Summary of Discussion of the Roundtable on Changes in Institutional Design' (n 453)

[460] Lianos (n 63)

A more modern theoretical view of the matter is more flexible and calls for a situational assessment of how the mandate for resolving competition matters should be distributed in each case or for each specific category of cases. Such an approach tends to deny inherent antagonism between competition and regulatory action, while insisting that modern state agencies represent sophisticated internally diversified structures, being capable to resolve complicated matters by assessing a variety of conflicting considerations. In other words, modern institutions differ from earlier bureaucratic formations, being stuck in ritualism and adherence to formalistic regulatory tasks, and may give due consideration to all legitimate policy objectives. In this theoretical dimension, a so-called bureaucracy-centred theory is of particular interest. It suggests that initially, at the macro-level, it is important to analyse the value structure foundations on which competition law enforcement is built by looking to the degree of intrusion of specific values in the design and operation of relevant institutions. Then, at the micro-level, the knowledge base, the skills and the disciplinary and professional background of government bureaucracies needs to be explored in depth, before concluding on which institution is most appropriate to deal with a relevant case. To give an example, in case of Germany and the UK, following the ordo-liberal doctrine and the 'third way' management approach respectively, the significance of competition as an underpinning regulatory value seems to be effectively perceived by the majority of economic regulators and it is, thus, the matter of greater expertise in particular matters or industries that comes to the forefront. Hence, British Monitor (now, a part of NHS Improvement), a healthcare economic regulator, can be seen as a relatively positive example of an institution capable of balancing cooperation and competition in the traditionally monolithic state-dominated sector and being well placed to develop the technical expertise and acquire necessary information to guarantee the preservation of integrated patient care (that is unlikely to be the case for competition agencies or courts, being too generalist). [461]

Speaking of sectoral regulators, which, as discussed, may play a greater role in enhancing competition, yet another measure that seems worth advocating in the context of the studied conflict is the ensuring of their greater independence. As in case with competition authorities, such independence is supposed to consist of the four components listed above and, among others, implies operational independence from the executive, clear procedures for determining the budget, and transparent appointment and dismissal of senior decision-makers. It seems that from the competition law perspective, the independence of sectoral regulators may bring a number of palpable positives, albeit it may be not as important as the

[461] ibid

independence of competition authorities (owing to a variety of reasons, including the breadth of impact of the activities of competition authorities). Specifically, independent regulators may be less exposed to political whims of changing governments (i.e. the-called 'state capture') and serve as a useful buffer between political decision-makers (i.e. the Government and ministries) and markets for the benefit of, among others, competitive neutrality. Coupled with the independence of competition authorities, certain independence of state property management agencies and reasonable transparency of ministries, the independence of regulators may serve as a sound platform for creating a transparently functioning regulation system for all market players. Undoubtedly, despite being independent, sectoral regulators should still get some general steer from ministries or the Government or operate based on clear guidelines as well as meet some performance indicators. In some cases, a relatively limited form of the independence may be preferable, for example, where the regulatory function must be closely integrated into the activities of a ministry or the environment being regulated is subject to rapid change with relevant policies being still developed. [462] Within the EU, providing some degree of independence to sectoral regulators has long been a practice in some of the member states e.g. the UK. The creation of independent regulators in all the members has become increasingly mandatory in the context of the pan-EU liberalisation and restructuring efforts in network industries. This is now a requirement for such industries, as electricity, gas, telecommunications, postal services, and rail as well as, de facto, airports management and audio-visuals. It is of interest that the relevant regulators in the Eastern European member states of the EU tend to generally be less independent that their counterparts in the Western part of the EU. This may probably be explicable by difficulties in the transition from the socialism-influenced governance model and associated concerns about regulatory capture. [463]

Another institutional measure that may be considered is the establishment of a separate institution for dealing with competitive neutrality complaints. As was described above, this is the case in Australia, where the Australian Government Competitive Neutrality Complaints Office ('AGCNCO') under the Productivity Commission (which, in turn, operates as an

[462] Stephen Littlechild, 'Life before Economic Regulation' (Centre for Competition Policy of the University of East Anglia, September 2019). Research Bulletin 38; Organisation for Economic Co-operation and Development, 'The Governance of Regulators' (29 July 2014) <https://www.oecd-ilibrary.org/content/publication/9789264209015-en>; Ennis (n 75); Bauer (n 76)

[463] Nevena Zhelyazkova, 'Regulatory Independence in the European Union: A Top-Down View on the Network Industries' (Dauphine University, 23 November 2016) 2016/01 <https://chairgovreg.fondation-dauphine.fr/sites/chairgovreg.fondation-dauphine.fr/files/attachments/201601_GovRegWP_Zhelyazkova.pdf>

independent advisory group under the Treasury) handles relevant claims. To give another example, in the EU, the EU Commission serves as a supranational agency considering state aid related claims and enforcing the relevant rules. In addition, some internal institutions of the EU member states also have powers to address particular issues related to competitive neutrality, though, as a rule, to some limited extent, e.g. in Spain, the Ministry of Economy and Finance determines the additional costs involved in the obligations and responsibilities associated to public services that SOEs are required to undertake and estimates the extra cost of debt, bank guarantees, and safeguards, associated with being a public undertaking. The same is done by the financial authorities of Austria, Estonia, Slovakia, Slovenia, and some other member states. Many jurisdictions do not, however, have specialised institutions dealing with competitive neutrality issues at all and they are dealt with (to the extent they are addressed by legislation) by competition authorities. It seems, thus, that the matter of whether the institutions is required indeed depends on each country's individual challenges and the market environment. Generally, the creation of a dedicated institution may ensure greater focus on the problem of statism as well as that objectives of either competition or regulatory policies do not interfere with relevant competitive neutrality policy goals with all consideration being duly accounted. It may also be useful to deal with statism at the governmental level with a powerful government-wide institution being able to influence on a general policy agenda, especially where distortive state actions are taken higher than at the level of sectoral regulators or there are no special sectoral regulators in a given industry at all (some condition being, however, that such a competitive neutrality institution should enjoy a certain degree of independence). A specific scope of functions of the institution may vary – if to look back at the examples above, the Australian Government Competitive Neutrality Complaints Office has mainly advisory functions, sending relevant statements to infringing SOEs and state agencies as well as submitting summary reports to regulators (mainly, the Australian Competition and Consumer Commission) and the legislature, whereas the EU Commission may act as an adjudicator and has the powers to take remedial actions. There is no single view of whether a separate competitive neutrality agency should be able to act as adjudicator and enforcer or to play a supporting role – it appears that it may be too risky or politically difficult to make such an agency a strong enforcement institution (at least, at the intra-national level) and, thus, it may be more reasonable to form it as an agency with warning, advisory, and mediation functions, who may forward claims to adjudicating institutions, the Government, the President, and (or) the Parliament, if its concerns and requests are ignored. [464]

[464] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 51-54, 464-466; Organisation for Economic Co-operation and

4.3.3.2 Identifying policy goals for shaping institutions

As was noted throughout the above sub-Section, it is country-specific or region-specific environmental factors and fundamental values that shape institutions applying or interacting with competition policies. Basic values inform what goals of competition policies are chosen and altogether they influence on how institutions and inter-institutional infrastructure are structured and operate. That, in turn, influences on what tasks are prioritised and how chosen policy objectives translate into practice. A set of initial drivers is also likely to define what attitude to statism will be preferred and how competition law will co-exist with it, *inter alia*, from the institutional perspective. Hence, where ordo-liberal values shape the economic policy, competition may become a goal in itself (that used to be the case for the EU legislation - Article 3(1)(g) of the Treaty of European Communities [465] recognised the vital importance of establishing 'a system ensuring that competition in the internal market is not distorted') and eventually result in that competition law becomes to be applied concurrently by regulators with regulators themselves being reformed so that to enhance competition. Where government takes more responsibility for economic growth and the so-called total welfare objective is chosen, influence of competition-related considerations may be less pronounced: there may be clearer delineation of duties between regulators and competition authorities and competition authorities may have to take a broader set of economic factors into account in making decisions. In China, socialist values have been directly reflected in the Antimonopoly Law [466], some of declared purposes of which are protecting the public interest and promoting the socialist market economy. This Law also makes emphasis on the important role of SOEs and trade associations in industrial development. [467] In many countries, competition laws refer to many values and objectives, provide for those being rather vague, or contain no mentioning of those at all and it is, thus, harder to identify clear correlation between values, policy objectives, and the institutional framework there, albeit such approaches may indicate that the role of

Development, 'Competitive Neutrality: National Practices' (n 51) 20–22; Healey, 'Australian Experience with Competition Law' (n 61); Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Capobianco and Christiansen (n 64) 13–16

[465] Treaty Establishing the European Community (consolidated version 2002) 24 December 2002

[466] Articles 1 and 4 of the Antimonopoly Law of the People's Republic of China 30 August 2007 (National People's Congress)

[467] ibid, Articles 7 and 11

competition policies and institutions in relevant countries is rather formalistic or purely technical. [468]

With the above said, it is worth noting that though there has been much difference in basic values across countries and how completion laws and institutions have been shaped based on such values, it is also true that in the majority of jurisdictions, competition regulations provide for the primacy of consumers' interests as the main objective either directly or indirectly. That indicates that though value foundations may differ, there may be some common, basic understanding of and expectations from the introduction of a competition law system and the angle of its treatment of statism in particular. [469]

An important question that stems from the speculation above is whether, while considering that a particular set of values exists in each country and region, some optimal objectives may be chosen for competition policies that would best satisfy the expectations attached to such polices and would help to get some anticipated economic efficiencies (and, hence, some optimal institutional approach may consequently be devised). As the examples above suggest, a wide variety of goals may be in place within a particular jurisdiction and may, for example, include economic objectives related to consumer surplus or total economic welfare, objectives related to ensuring robust competition and preventing excessive concentration of market power in the hands of private players or the state, or objectives associated with a plethora of public policy goals or socio-political values. A great number of theories have been forwarded in relation to that which of these objectives should be preferred as universally efficient and whether and how they should be combined. Thus, for example, although the consumer welfare standard has long been applied in the US and, to an extent, the EU, there seems to be growing criticism of it now from followers of the so-called neo-Brandeisian movement, concerned that in pursuance of consumer welfare, the basic task of competition law of promoting competition and struggling with monopolistic concentrations has been neglected. This concern is a reflection of a wider view that competition law should embrace some public policy goals, play greater redistribution role, and assist in promoting social justice. [470]

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[468] Organisation for Economic Co-operation and Development, 'The Objectives of Competition Law and Policy' (29 January 2003) CCNM/GF/COMP(2003)3 <http://www.oecd.org/daf/competition/2486329.pdf>; Jenny (n 78) 3–6

[469] Jenny (n 78) 3–5; Organisation for Economic Co-operation and Development, 'The Objectives of Competition Law and Policy' (n 467)

[470] James Bernard, Rebecca Kirk Fair and Daniel Sokol, 'Why Does the Consumer Welfare Standard Work? Matching Methods to Markets' (20 November 2019). Competition Policy International Antitrust Chronicle <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3490353>; Oles Andriychuk, 'Can We

Without delving into the discussion on the subject, though many arguments for and against each approach may be considered, the author of this paper tends to support a somewhat conservative view that the competition regime, if established, should stick to its obvious goals of promoting consumer welfare and supporting competition as an indispensable and progressive process in itself[471]. Although the appeal towards the consumer welfare standard may look unoriginal, it seems hard to argue that competition policies do not strive to ensure that consumers enjoy lower prices, better quality, and a wider selection of goods and services. The same relates to the idea of the indispensability of the need to maintain structurally robust and effective competition, which is likely to underpin the whole concept of competition law. With these two objectives serving as the main drivers of the competition law enactment and application, competition authorities should nevertheless be open to other economic or non-economic considerations, accepting them on a case-by-case basis and, namely, in cases where strong evidence is in place that such considerations are valid and capable of having some pronounced impact in one or another social or economic dimension (to give some example, if competition law intervention results into the dismissal of a large number of healthcare professionals and, therefore, a significant deterioration in the provision of health services, this may be considered as a reason being valid enough to review a competition law enforcement approach).[472]

To add, though the consumer welfare standard as well as the focus on competition as a process appear to be universally efficient, they seem to be particularly important in such transitional countries as the FSU states, where difficulties in setting up market mechanisms may persist. Likewise, some specific difficulties present within such countries may demand that other economic or non-economic standards or goals are added to this list of primary objectives for a period until relevant problems are resolved. To explain, where particular economic or social challenges become so pronounced that effective achievement of the abovementioned fundamental competition law objectives and effective application of competition laws may in fact become impossible, the drive to overcome such challenges through competition law may

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Protect Competition without Protecting Consumers?' (2009) 6(1) The Competition Law Review <https://core.ac.uk/reader/2773550>; Jenny (n 78) 3–6; Hovenkamp (n 79); Organisation for Economic Co-operation and Development, 'The Objectives of Competition Law and Policy' (n 467)

[471] Or, as more eloquently provided in the OECD secretariat note of 2003, 'to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants'. See Organisation for Economic Co-operation and Development, 'The Objectives of Competition Law and Policy' (n 467)

[472] Svend Albaek, 'Consumer Welfare in EU Competition Policy' in Caroline Heide-Jørgensen and others (eds), *Aims and Values in Competition Law* (1st ed. DJØF Publishing 2013); Hovenkamp (n 79); Andriychuk (n 469); Bernard, Kirk Fair and Sokol (n 469)

justifiably evolve into another fundamental sub-objective. This reflects those general ideas that competition legislation represents a system of rules mirroring policy choices of a legislator, should be flexible enough to address actual market economy distortions, and should consider specifics of particular national and regional markets. [473] The following Chapter aims to look into relevant specifics in the FSU region, where the problem of uncontrolled state interventionism through, among others, SOEs is a particular challenge (though statism as a foundational value is unlikely to be problematic in itself).

In summary, going back to the matter of institutional design, the above view of the setting of objectives for the competition regulation implies that the focus of competition authorities on competition and consumers should be undistorted and, thus, a strong and independent competition agency should exist. With that said, its functional capacity should be subject to constant adjustment and be responsive to particular regional conditions and challenges. Hence, challenges related to statism and stronger focus on competition in this regard may, as discussed further in Chapter 5, require that the ambit of competition law is expanded and competition authorities establish stronger relations with various state actors, in particular, sectoral regulators, and ensure that state actors themselves become more active in promoting and enforcing competition policies, which is, as discussed, the case at the pan-EU level and in, for example, the UK. This reflects the idea above that though best international practices should be considered and may be approbated, the exact institutional configuration should be identified by regional competition authorities themselves after assessing all relevant baseline factors.

4.4 Conclusion

The main purpose of this Chapter 4 was to look at the experience with statism through SOEs of countries outside the FSU and relevant theoretical studies for identifying solutions to address the conflict between statism and competition policies experienced in the FSU states, as explored in Chapter 3. As discussed in Section 4.1, statism has to a varying extent is in place in many countries around the world, including some members of the EU, particularly, in Eastern Europe; Australia; and China. Usually, the expansion of the state sector engenders a conflict between it and competition policies, as the degree of connectedness between the state and SOEs and concomitant favouritism tend to grow exponentially, undermining the ability of private companies to compete effectively.

[473] Hovenkamp (n 79); Andriychuk (n 469); Bernard, Kirk Fair and Sokol (n 469)

As discussed, it seems that it is not the state ownership as such, but three main categories of factors that cause the state sector to hamper competition. These are: 1) specific state ownership policies in respect of SOEs, structuring of SOEs, and their corporate governance; 2) benefits and privileges granted to SOEs by government or obtained as a result of their particular status as well-established incumbents; and 3) distorted institutional relations between the state and the state sector (that is, however, closely connected with the first set of factors). Relevant modern theory suggests that these three broad categories of contributing factors may, in turn, be addressed by three categories of corresponding measures, including: 1) measures related to ownership, corporate governance, and corporate structuring practices; 2) the so-called policy of competitive neutrality (embracing a number of existing practices around the world e.g. the state aid policy in the EU, the struggle with so-called administrative monopolies in China, etc.); and 3) the policy of improving a relevant institutional framework with stronger and more independent state property management institutions.

Despite some ongoing disputes on the role of competition policy and competition authorities in the implementation of these measures, this role appears to be important. Generally, as the analysis suggests, this role should embrace activities in three dimensions: 1) pro-active enforcement (application) of competition rules to the state sector and the state (including acting against anticompetitive abuses of SOEs, interventions of state authorities, provision of state aid, etc.); 2) competition advocacy in its different forms e.g. competition screening of acts and regulations, active interaction with other regulators, building of a competition culture among general public, etc.; and 3) the assistance in creating a competition-stimulating instructional framework (by proposing some thought-through structuring to the Government or the Parliament and contributing to relevant capacity building). All these measures are complementary and seem to be equally effective in any context. It should be noted, however, that the implementation of them and, especially, the institutional capacity building requires some clearly articulated policy objectives and clear understanding of what particular competition and statism related issues are aimed to be addressed.

With the above said, it is worth noting that even though the conflict between statism and competition policies should, as appears, be tried to be tackled by using competition law instruments, relevant problems may undoubtedly be informed by many factors outside the ambit of competition legislation and agencies. Thus, many countries (especially, developing ones and those in transition) experience significant fundamental problems with establishing a stable democratic regime (with state powers being duly balanced and kept under control); systematising state management; filling in legislative gaps or, vice versa, optimising large

volumes of regulation; enhancing professionalism and independence of state officials, members of Parliament and judges; combating corruption; creating stable banking and financial markets as well as overcoming transitional barriers in existing economic practices informed by, among other things, the lack of legal, economic, and political understanding of government policies among the general public. Problems related to statism may also be engendered by the very foundations of the relevant legal order, including an established system of property relations (e.g. all land belongs to the state, while individuals and private companies may only lease it for some term); rules for communication with the outside world (e.g. foreign trade is controlled by the state and may only be carried out through state-controlled intermediaries); a tax system; a system of getting access to public facilities and resources; etc. Although in such cases the competition measures listed above (e.g. competition advocacy promoting targeted legal changes) may still be successful in harnessing statism and the state sector and restoring some balance, it seems that a more holistic approach is required with strong political support being provided by several state institutions and, often, affected society at large.

CHAPTER 5: RESOLVING THE STATE SECTOR - COMPETITION POLICIES CONFLICT

This concluding Chapter serves two functions. It firstly summarises the key findings and conclusions of Chapters 2-4 and then provides a detailed discussion of policy recommendations for the FSU region. In doing so, it provides a critical discussion of how the possible solutions and techniques identified in the comparative insights of Chapter 4 might be used in the FSU in the context of the region's specific environment and what their actual adaption may be. It thereby completes the main objective of this research in recommending specific measures needed to be taken to address the negative impact of the state sector on the competitive environment within the region and, thus, to make another step towards breaking the region's transitional deadlock in this respect.

Given the above, Section 5.1 of the Chapter provides a brief summary of the main conclusions drawn in the previous Chapters to remind of the context of the studied conflict in the analysed FSU states, as described in Chapters 2 and 3, and of those solutions that may be appropriate to address it, as described in Chapter 4. Section 5.2, then provides a critical discussion of the suitability and application of the found solutions to Russia, Ukraine, and Uzbekistan. In Section 5.3, a general strategy for implementing the suggested reforms and the problem of reluctance of the FSU governments to conduct reforms are discussed (as follows from Chapters 2 and 3, the FSU governments may not be quite ready to forego direct benefits from SOEs in exchange for more indirect benefits created by competition). Section 5.4 provides some final concluding remarks for the thesis, highlighting novelties of this research and suggesting directions for future research.

5.1 Main Findings of Chapters 2 – 4: Context of the Studied Conflict and Possible Solutions

To begin with, the Soviet period continues to have a lasting impact on today's economic and competitive environment within the FSU i.e. so-called path dependence is evidently in place. This influence is significant and multifarious, being expressed in the economic behaviour and mentality of the region's population, the governance and managerial habits of people in government, and those infrastructural and industrial conditions that exist in the region. At the governance level in particular, paternalistic tools and SOEs are still seen as important and useful instruments of economic policy, while competition is viewed as something secondary and, to some extent, harmful (in the sense that efforts are wasted if competition is encouraged in contrast to direct planning). This has much to do with the Soviet attitude to economic tasks,

in which the political economy and utilitarianism dominated with no much deliberation over economic efficiency being in place and with priorities being shifted to solving social tasks.

As was discussed in Chapter 2, the Soviet period is not the only historical period that continues to render a notable impact on the today's economic environment in the FSU region. Failures of perestroika of the late 80s and the subsequent privatisation of the 90s have also played their part. The experience of dishonest business practices, greed, and the inability of private players to address public demands have led to the re-establishment of the belief that only direct state control can ensure efficient use of economic resources. Though effects of the experimental reforms of the 80-90s were most pronounced in Russia, other FSU states, including Ukraine and Uzbekistan, also suffered and were in many ways discouraged to rely on liberalisation by the Russian experience.

The general conclusion that was drawn from the analysis of the above historical factors, is that attempts to tackle statism and promote competition must proceed with caution and that liberalisation measures targeting the state sector may meet resistance, not be effectively implemented, and may not coexist well with other existing polices, many of which are informed by the Soviet legacy. Moreover, some of the concerns related to the liberalisation are undoubtedly not unfounded. There are many economic areas where, for example, the regulatory framework is still underdeveloped and leaves considerable space for manipulations of private actors or where the private sector is still not ready to take over something that has long been a functional task of public entities.

As the latter thought was further developed in Chapter 3, there are a considerable number of reasons besides those of a historical nature for why the reliance on the state sector is still a preferred policy in the FSU (both explicitly provided by law and implicit). Such reasons include, for example, the necessity to provide indispensable goods or services, the production of which is not of much commercial interest to private companies; the necessity to provide services in remote areas; and the disputable, but understandable desire to control large profits from the natural resource industries. Many of the relevant rationales are reasonable indeed, though, as appears, some abuse is in place and governments of the FSU region tend to resort to them too often, neglecting conducting relevant analysis on a case by case basis.

Given that a number of public policy considerations (however formalistic, inert, and driven by historical considerations) are in place when a paternalistic measure to create or to support an SOE is taken, SOEs of the FSU region generally represent substandard dual nature establishments, being commercial-like entities bearing specific public responsibilities. This informs the fact that SOEs may have to function sub-standardly, are tightly connected with a

variety of state authorities, and are provided with direct and indirect benefits, aimed to facilitate their performance. As both the degree of connectedness of region's SOEs to the state and the amount of the benefits they get are often disproportionate to the role they have, SOEs take quite a specific position in competitive markets and are able to compete aggressively and to exclude private players from relevant markets.

The above issue of the anticompetitive capabilities of SOEs in the region seems to be exaggerated by the fact that the ability of the region's competition authorities to discipline SOEs is limited. This is, among others, informed by a somewhat downplayed role of the competition authorities and competition legislation and the existence of tight institutional and operational links between state authorities and SOEs. Actions of SOEs are a continuation of particular public policies sanctioned and implemented by state institutions controlling the SOE. Having to struggle with state stakeholders causing or directing particular SOE's anticompetitive actions or boosting its competitive position, the competition authorities do not always have sufficiently complex legal basis, independence, advocacy capacity, and communication channels to defend their position.

The above problems are equally acute in all the three FSU jurisdictions under review, but it seems they are especially pronounced in Uzbekistan, which has chosen a gradualist approach to the transition with many enterprises having remained in the state's hands. In Ukraine, large private players have become influential enough to take control over a number of markets, where the state may have remained active otherwise – the power industry, coal mining, etc., and that has, to an extent, undermined the monolithism of the state sector, making its less supressing. In Russia, owing to its more well-established state institutions and larger markets with a greater number of private participants, statism is relatively more targeted and more debate seems to revolve around the issue – a greater number of relevant cases are considered by the FAS and, then, resolved on a compromise basis.

Although, in principle, the policy of creating SOEs may be abandoned partially or completely and existing SOEs may be privatised for eliminating the main cause of the relevant concerns, this is not always a possible or desirable policy option, as some of the above-named rationales for establishing SOEs suggest. Where this is the case, as was discussed in Chapter 4, alternative measures may be considered to negate negative effects of the reliance on the state sector. Generally, the offered measures fall within one of the several main broad categories: measures relating to ownership practices and corporate governance; related to something called competitive neutrality; and measures of the institutional character. Though better be applied all together, many of such measures may be effective in isolation. The category covering

competitive neutrality measures is the most all-encompassing one, as it embraces a wide range of solutions of a very different nature (related to regulatory neutrality, debt neutrality, etc.). It is fair to note that many of the measures within all three categories revolve around the idea that two natures of SOEs – as of a commercial entity and of a public establishment – should be insulated from one another with the commercial functionality of SOEs being equalised with that of private businesses.

It appears that competition law and competition authorities have an important role to play in implementing the above solutions. In particular, competition authorities should proactively apply competition laws in respect of the state sector and the state, proactively engage in relevant competition advocacy, and proactively assist government with the creation and (or) the enhancement of the capacity of institutions dealing with competition matters. The last of these tasks – the creation of a workable institutional framework for competition polices in the context of statism – is likely to be the hardest one, as quite different institutional relations need to be targeted – not only the tripartite relations between the state represented by its agents, the state sector, and competition authorities, but also relationship between different state agents.

The implementation of all the above measures and especially the institutional measures demands for maximum clarity of relevant policies. Hence, the state should identify clearly what purposes the expansion of the state sector and competition policies pursue, which of relevant policies are prioritised, how chosen regulatory instruments correlate with the set purposes and priorities, and what sort of behaviour is expected from entities and persons being subject to relevant regulation. It is notable that some fundamental purposes chosen for developing a policy and relevant institutions may more be constructive then others – hence, for competition policies, the purpose to ensure consumer welfare and to maintain competition as such are likely to be beneficial.

With the above noted, national values and environmental conditions must always be considered when some theoretically ‘correct’ policy objectives are prioritised or some standardised solutions are chosen and implemented. Some necessary adjustments should be made depending on that what problems are most relevant in a given society at a given moment, how such problems correlate with each other, and how such problems and corresponding solutions are perceived by the society. In particular, if statism becomes a pressing issue from the economic development perspective, competition policies may be made more focused on that competition-related considerations are adequately embraced by all state actors.

5.2 Application of the Identified Solutions in the FSU

Now, after we have summarised the main findings of the previous Chapters, having reminded ourselves of the context of the analysed conflict in the FSU and the potential solutions for it elaborated in relevant studies and (or) applied in other jurisdictions, it is possible to turn to the main task of this Chapter which is to analyse how the relevant measures may be adapted and applied in the FSU, considering specific characteristics of the region's social and economic environment. This Section looks at: the strengthening of regulation (5.2.1); institutional measures (5.2.2); state ownership policies, the structuring of SOEs and issues of corporate governance (5.2.3); and the tackling of market distortions with competitive neutrality measures (5.2.4).

It should be mentioned from the onset that where specific solutions are discussed in this Section 5.2, only limited regard is given to the practical willingness of the FSU governments to implement them. This important issue is discussed in details in the following Section 5.3. It is worth noting, however, that though some general reluctance to implement liberal reforms is in place indeed, many of the discussed measures – those mainly of a more moderate, technical nature - are unlikely to be inadmissible for the FSU governments. First, as partially follows from the discussion in Section 2.3, pro-statism measures are often applied unconsciously and habitually with limited understanding that their use opens the door for other problems of an economic nature. So there is, thus, no inherent antagonism to improving and reconciling them with competition policies, but there is a lack of knowledge and due attention to that how this may be done in an effective and systematic way. Secondly, some pro-statism measures (e.g. the establishment of SOEs for resolving momentary problems) may be applied vigorously not by government as a whole, but rather by individual state actors e.g. specific line ministries, making use of the absence of a single regulatory approach in this regard.

5.2.1 Strengthening of the fundamental regulatory focus

It seems reasonable to begin the discussion on the implementation of the identified solutions in the FSU region with the most fundamental matter discussed above – the basic objectives and priorities framing and directing the region's competition and statism-related policies. As appears, the identification of honest and clear purposes has never been a primary task of FSU lawmakers – in the majority of the region's main legal acts, no objective is clearly identified, while in many acts, objectives are formalistic and do not reflect the true objectives of regulation, not to mention national values and priorities. This problem is to some extent a consequence of the change of ideology that occurred in the 90s. As all the laws of the Soviet

Union had the same theoretical foundation, not much thought was generally put into that what overarching purposes were pursued by each individual legal act. When liberal ideas became the agenda, the formulation of new purposes turned to be an obscure and challenging task.

Analysis of policy objectives is even less widespread when law is applied in practice – courts and enforcement agencies rarely resort to substantive interpretation of laws, even where conflicting legal provisions are in place. This is because the extraction of goals is generally quite challenging as well as that courts and relevant agencies do not have enough authority (as well as independence) to contemplate about some deeper meaning of legislation.

The development of the practice that both lawmakers and courts seek to identify objectives of legal acts is definitely a hard task, but it is, nevertheless, required. In the context of competition law in particular, clearer understanding as to what the ultimate objectives of the relevant regulation is needed. Although, generally, the constitutions of the analysed countries refer to the inadmissibility of infringement of competition [474] and the FSU region's competition laws do provide for a number of objectives [475], the naming of the objectives seems a formality rather than a conscious choice and relevant priorities are not unambiguous. In this regard, greater accentuation is still needed.

As noted above, it appears that the focus on consumer welfare with simultaneous appreciation of competition as some valuable process in itself may be chosen as valid priority goals. Both these objectives correlate well with the Soviet dogmas on universal justice and equality (i.e. consumers are protected from a predatory behaviour of greedy businesses and are equal as equal are competitors across all markets) and, thus, may be easily accepted by the people of

[474] See for, example, Article 34 of the Constitution of the Russian Federation.

[475] Russia's Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154) seems to be relatively eloquent and its expressly named objectives, as provided in Article 1, include the ensuring of the unity of the economic space, free movement of goods, freedom of economic activity, protection of competition, and the creation of conditions for the effective functioning of commodity markets. The Law is also aimed to 'determine the organisational and legal foundations for the protection of competition, including for the prevention and combating with monopolistic activities, unfair competition, and restrictions of competition by [state authorities]'. The Ukrainian Laws on competition seem to acknowledge in their different parts (the Preface to the Law of Ukraine on the Protection against Unfair Competition No. 237/96-VR (n 175), the Preface and Articles 4, 6, 13, 15, etc. of the Law of Ukraine on the Protection of Economic Competition No. 2210-III (n 176)) such goals of the competition policy as the development of economic competition, de-monopolisation of the economy, ensuring fairness of competitive behaviour, prevention of abuses of a monopolistic position, protection of interests of consumers and competing business entities. The Uzbek Law of the Republic of Uzbekistan on Competition No. ZRU-319 (n 208) aims to regulate competitive relations in commodity and financial markets (Article 1) and en passant mentions in its different parts about the inadmissibility of restrictions of competition; violations of rights and interests of consumers; violation of rights, interests, economic freedom, and access to markets of competing business entities (Articles 10-13, 27).

the FSU and be more easily promoted and advocated. This, in turn, may allow to invigorate competition institutions, make their role more understandable and, hence, more appreciable. It appears that to fix the significance of these objective, relevant amendments to the main competition laws should be introduced with competition law enforcement guidelines being then refocused to the extent required.

As discussed in sub-Section 4.3.3.2 above, the main competition policy objectives may from time to time be complemented by other goals, which become of significance at certain moments. For now, in the context of statism, the focus on competition as such may be invigorated by adding the goal to enhance competitive neutrality and to complete the transition in this regard. Some public policy goals may occasionally become a priority, e.g. securing innovative and stable development, creating a holistic market, ensuring employment, providing social guarantees, etc. Though they seem secondary from the perspective of the general competition theory, they may still worth consideration (albeit not to the extent that would turn the region's competition authorities into macroeconomic regulators). [476] In contrast to the principal objectives, however, relevant objectives should not be set as the main focus of the foundational laws, being rather a part of guidelines, covering particular competition violations and considering particular cases where priorities should shift.

The above remarks on the importance of articulating clear objectives are equally applicable to the paternalistic legislation propagating the state sector. As was described in detail in Section 3.2, policy decisions on the state sector in the FSU region are unsystematic, do not have a comprehensive purpose-driven regulatory basis, and are often targeted at resolving momentary problems. Suggestions that may, thus, be relevant is first to recognise that the state sector and related state interventions represent an important and usable method of social and economic regulation within the FSU, for which, therefore, a comprehensive and structured legal framework has to be created. Secondly, objectives of the use of the relevant mechanisms should be clearly articulated – hence, among other things, an exhaustive list of purposes for which SOEs may be established and maintained should be set (with no broad expansions e.g. references to 'specific needs, as may be from time to time determined by the Government'). As was inferred in the previous Chapters, it appears that SOEs, being hybrid creations, should not be established or keep functioning where no clear justification for their operation exists. It is also important that relevant purposes for using SOEs are straightforward, achievable, and interplay with some existing policy objectives (in this regard, such ambiguous all-encompassing purposes as, for example, 'the performance of strategic activities in X, Y, and

[476] Jenny (n 78) 7–8

Z industries' or 'the performance of socially significant activities' look unacceptable, in so far as the concepts of 'strategic significance and 'social significance' remain to be undefined).[477]

Although some attempts to limit statism and to make it more focused have already been made in the region – thus, for example, as was noted in Section 3.2, Russia's Laws on State and Municipal Enterprises[478] and on the Protection of Competition[479] try to limit a number of cases when unitary enterprises may be created – the relevant measures appear to be underdeveloped and insufficient. It seems that each of the studied FSU states should have a separate comprehensive law covering all forms of SOEs, which would have described all the purposes for which an SOE may be established and kept in detail and laid out the rules for monitoring the progress in achieving such purposes. To make the relevant legal framework more complete, the FSU governments should also elaborate unified standards and guidelines for state ownership for state property management institutions, which will advise on how each purpose identified in the above law may be achieved by using relevant ownership strategies and will guide on how the performance of SOEs in this regard should be monitored. Furthermore, corporate documents clearly identifying priorities and setting corresponding KPIs should be developed for each SOE or, at least, each category of SOEs (depending on their role or an industry, where they operate).

It also appears that the progress of each SOE in achieving its objectives identified in all the above documents should be summarised regularly (probably, once a year) with the general expediency of the attempt to achieve a particular objective through a particular SOE being checked and possible regulatory alternatives being examined. Such analysis should undoubtedly cover all SOEs, be stringent enough, and be controlled publicly and at the highest state level - desirably, at the parliamentary level.[480] It is noteworthy that some relevant measures of intragovernmental and public control have already been implemented in the studied FSU states (for example, Ukrainian state unitary enterprises have the obligation to public information on their goals on their website and regularly update this information,

[477] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 29–32; Miniane and others (n 56) 56-57, 59-60; Arrobbio and others (n 57) 14, 34–35, 106-109

[478] Article 8 of the Law of the Russian Federation on State and Municipal Unitary Enterprises No. 161-FZ (n 231)

[479] Article 35^1 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154)

[480] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 31–32; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 98–109; Arrobbio and others (n 57) 102-104, 115-130, 220-228

indicating relevant progress[481]; in Russia, privatisation programmes are prepared regularly, being approved by the Government or regional executive bodies and published online[482]), but they do not appear to be well-organised and coherent, being, therefore, often, neglected in practice.[483]

In the context of the statism and state sector – competition policy conflict, the clarification of competition policy objectives with greater emphasis on competition will make the competition authorities more determined to promote their agenda and to act decisively in confrontations with the state sector and state actors – it seems that the risk of state capture is, thus, mitigated to a certain extent. A type of behaviour that is expected from market players, including the state sector, also becomes more understandable and market players are, hence, stimulated to act more cautiously. The clarification of paternalistic state sector expansion polices will, in turn, help to ensure that statism and the expansion of the state sector, which, as was discussed, cause a number of competition concerns, do not become goals in itself or default tools used routinely. The main assumption is that where no clear and justifiable purpose for creating or supporting SOEs exists, that is not done and competition problems do not, therefore, materialise *ab initio*. In cases where such measures are, nevertheless, taken, the clarity of a relevant purpose simplifies the analysis of that which considerations have to be balanced and what countermeasures should be taken to address relevant conflicts. For example, where a universal service obligation is the main functional task of an SOE, but this SOE is a source of competition problems, it may be restructured so that it continues to perform only some indispensable functions, while the rest is privatised (some example here is the case of British Post Office and Royal Mail[484]) or given out as a concession to create more competition.

Undoubtedly, all specific economic policies, including competition and paternalistic ones, are tied to some general state economic policy framework and are, thus, supposed to operate in conjunction. This implies that their purposes should to a large extent be aligned with each other to effectively deliver anticipated results. Based on this, it seems that the creation of robust competitive environment should be an objective of not only competition laws, but also of paternalistic industrial laws. To be specific, where an SOE is created or the efficiency of the

[481] Article 73 of the Commercial Code of Ukraine (n 270)

[482] Articles 7-10.1 of the Law of the Russian Federation on Privatisation of State and Municipal Property No. 178-FZ (n 135)

[483] If to comment on Russia's privatisation programs in particular, it is worth noting that the assessment their preparation implies focuses primarily on that whether there are any SOEs that may be privatised rather than that whether all existing SOEs achieve their goals and there are valid reasons to keep them.

[484] Organisation for Economic Co-operation and Development, 'Privatisation and the Broadening of Ownership of State-Owned Enterprises' (n 230) 80-02

existing SOE's operation is assessed, the impact on the competitive environment should also be measured. If to go even further, where possible, SOEs should be established or maintained in a way that will, among others, allow to strengthen competition. [485]

Currently (since 2004 in Ukraine, since 2010 in Russia, and since 2018 in Uzbekistan), the competition screening is done in the FSU in respect of drafts of new and, to a much more limited extent, existing commercial legal acts. Such screening, among others, covers major legal acts of a targeted nature providing for the establishment of particular SOEs. Moreover, since quite recently, in Russia and Uzbekistan, competition authorities' prior authorisation may be needed where particular SOEs are sought to be established (in Russia, where a state authority is uncertain whether it may establish a unitary enterprise for engaging in a particular activity, it is recommended to send a relevant enquiry to the FAS [486]; in Uzbekistan, the authorisation is mandatory for the creation of any SOE, if the state will be its direct owner i.e. not in cases where e.g. an SOE establishes another SOE [487]). However, the relevant assessment is far from being comprehensive and thorough enough in both cases. Hence, the competition screening of legal acts is generally only a part of a more general assessment procedure, being led by institutions not too concerned in practice about the development of competitive markets (e.g. the Ministry of Economic Development in Russia); has very tight time limits (in the contrast to the approach suggested by the OECD, it does not extend effectively depending on the complexity of a relevant matter [488]); and lacks comprehensive and clear standardised assessment rules. In case of the competition authorities' prior authorisation for the creation of SOEs, besides for that not all categories of SOEs are covered by the relevant procedures, it

[485] Even where the establishment of an SOE is seen as the only option for achieving some important goal i.e. supporting the development of a weak industry, that may be done in a more or less positive, pro-market way. To give an example, Uzvinosanoat-Holding, an incumbent in the Uzbek wine industry, was deprived of many of its sector control functions and restructured in 2017-2018. A new company, SUE Uzagrosevis Operator, was established in 2021 with the assistance of the World Bank, which supports the development of the industry in a much more progressive way – by providing expert advice as well as by creating vineyards and greenhouses and selling them to individuals and legal entities in a transparent manner. See Clauses 1-4, and 12 of the Resolution on the Measures for Radical Improvement of the Wine Industry and Sales of Alcoholic Products No. PP-3573 28 February 2018 (President of the Republic of Uzbekistan); the Resolution on the Establishment of the State Unitary Enterprise 'Agroservis Operator' No. 180 3 April 2021 (Cabinet of Ministers of the Republic of Uzbekistan)

[486] Article 35^2 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154)

[487] The instrument has not yet been fully implemented, but is envisaged by Clause 1 as well as Clause 3.3 of Annex 1 to the Decree on the Measures for Further Improvement of the Competitive Environment and Reduction of the State Participation in the Economy No. UP-6019 6 July 2020 (President of the Republic of Uzbekistan)

[488] Organisation for Economic Co-operation and Development, 'OECD Framework for Regulatory Policy Evaluation' (n 54)

seems problematic that there are likewise no sufficiently complex methodological guidelines for conducting the assessment (e.g. in Uzbekistan, it is not clear to what extent established SOE's activities should affect the competitive environment for its creation or entering into particular markets to be prohibited) as well as no mechanisms for prolonging and deepening the analysis. In this regard, as formalism appears to be in place, a much more coherent regulatory methodology is needed for both kinds of pre-assessment with specific and clear guidelines being developed (preferably, taking into account peculiarities of each particular sector). [489]

5.2.2 Institutional measures

Another set of fundamental measures that may have to be taken within the FSU for addressing the studied conflict are measures related to better structuring of involved state institutions. The relevant institutions include primarily the region's competition authorities, sectorial regulators, and state property management agencies. Although, as the conclusions made in Chapter 4 suggest, the setting of clear purposes for relevant economic policies plays an important role for the institution building, it appears that the considered institutional measures may be of significance even if the suggestions provided in sub-Section 5.2.1 are not followed.

5.2.2.1 Competition law institutions

If to begin with the competition authorities, it is first important to ensure their independence. The competition agencies of the FSU should be subordinated directly to relevant countries' supreme authorities – the President and (or) the Parliament (instead of being accountable to the Government (the Cabinet of Ministers), as it is currently organised in the analysed FSU jurisdictions, albeit in Ukraine, the Antimonopoly Committee is already in many ways independent from the Government [490]). Thereby, they will get sufficient authority to advocate effectively and to effectively defend their cause in disputes with sectoral regulators and other

[489] Government of Russia Resolution on the Order of Conducting the Regulatory Impact Assessment of Projects of Legal Acts and Projects of Decisions of the Eurasian Economic Commission No. 1318 17 December 2012 (Government of the Russian Federation); Articles 5, 6, 8, 9, 33, 34 of the Law of Ukraine on the Principles of the State Regulatory Policy in the Sphere of Economic Activity No. 1160-V 11 September 2003 (Verkhovna Rada of Ukraine); Resolution on the Approval of Methods for Analysing the Impact and Monitoring the Effectiveness of Regulatory Acts No. 308 11 March 2004 (Cabinet of Ministers of Ukraine) (Cabinet of Ministers of Ukraine); Resolution on the Measures for Further Improvement of the System for the Regulatory Impact Assessment No. PP-5025 15 March 2021 (President of the Republic of Uzbekistan) (President of the Republic of Uzbekistan); Anna Golodnikova and others, 'Regulatory Policy in Russia: Main Trends and Architecture of the Future' (Higher School of Economics, May 2018) <https://publications.hse.ru/mirror/pubs/share/direct/219490174.pdf>

[490] See Articles 2, 9-11 of the Law of Ukraine on the Antimonopoly Committee No. 3659-XII (n 174)

state actors. The organisational independence is, however, not the only factor that will determine the effectiveness of the competition authorities' institutional independence and other elements noted in sub-Section 4.3.3.1, including, financial independence (ensured through, *inter alia*, increase of currently immaterial fines, as suggested further below) should also be in place.

Another institutional aspect of the functioning of the FSU competition authorities that needs attention in the context of the studied conflict is the fact that they are often overloaded with tasks of secondary importance, which only indirectly relate to the objectives that should be a priority for the competition regulation – those to develop competition and to ensure consumer welfare. Such tasks include enforcing advertisement regulation, curating privatisation, overseeing public procurement procedures, controlling compliance with rules for trade, rules for foreign investments in strategic industries, particular rules for consumer protection (despite the existence of specialised agencies) e.g. for getting access to network infrastructure, etc. It is of particular concern that, as was discussed above, the competition authorities of the FSU region and the Russian FAS in particular appear preoccupied with the tariff regulation and the combatting with excessive pricing. All these functions combined are likely to distract attention of the competition authorities from competition matters, to facilitate prioritisation of ancillary goals (e.g. pushing down prices at all costs), to facilitate state capture, and to downgrade the significance of competition in general. Having such functionality, the competition authorities take up a role of macroeconomic regulators – a role that they are ill-suited to perform, have to distribute their already scarce resources amongst many departments and to overload their few qualified employees. Considering that as well as the fact that the studied FSU states represent populous, resource-rich, and industrially perspective countries, thus, worthy of specialised institutions in each field, it seems that in the context of the analysed problems, the competition law agencies should transform into institutions being more focused on their specific tasks and being able to effectively pursue their specific objectives, free of conflicts of interests. Although the redistribution of functions may to an extent weaken the institutional strength of the competition authorities, it appears that they may be reinvigorated by other means – for example, greater independence, greater advocacy capacity, and the expansion of the legal acts screening functions.[491] Moreover, though the majority of the listed ancillary functions (including checking compliance with rules for

[491] Vladimir Tetushkin, 'Evaluating the Performance of the Antimonopoly Authorities for Improving Economic Security: The Russian and Foreign Experience' (2017) 13(3) National Interests: Priorities and Security 464; Avdasheva and Kryuchkova (n 150); Non-Commercial Partnership 'Assistance in Developing Competition' (n 330)

advertisement, for trade, for foreign investment, etc.) should be transferred to other institutions indeed, this does not presume that the competition regulators should not have a say in relevant areas at all – hence, in the sphere of public procurement, the competition authorities may maintain their role in combatting bid-rigging (but not, as appears, malpractices of public purchasers themselves that should be a prerogative of anti-corruption agencies). [492]

Further regulatory empowerment is the third institutional measure that should be taken in respect of the region's competition policy institutions. Undoubtedly, the competition authorities should have the opportunity to operate proactively and to be heard by the public and other state institutions. It is, thus, appears important that reports and reviews of the competition authorities are regularly published and discussed at Government' and, importantly, Parliament's meetings (probably, at least once year [493]); courts are guided on how to deal with economic cases from the competition policies perspective [494]; representatives of the competition authorities are invited when important economic policy decisions are taken; etc. The main principle is, hence, that the competition policies begin to operate

[492] The competition authorities of the FSU region are often criticised for not only performing functions unrelated to their main tasks, but also for focusing on minor competition cases (see, for example, Ulyanov (n 329)). This criticism seems to be valid indeed – the region's competition authorities spend much time on dealing with minor cases and that is likely to distract their attention from more serious competition law infringements, including large scale statism-informed distortions.

[493] The relevant annual reporting procedure is actually established in the Russian and Ukrainian competition legislation, but it is not comprehensive and the relevant practice is somewhat flawed. Hence, Articles 2 and 9 of the Law of Ukraine on the Antimonopoly Committee No. 3659-XII (n 174) set that the Antimonopoly Committee shall report to the Parliament annually, but, in practice, relevant reports are not heard each year. In this regard, strict requirements for publishing annual reports and presenting them to the Government should probably be added in the Law. In Russia, the procedure is more well-established with relevant annual reports being regularly published and presented to the Government, as required by Article 23 of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154), but, as appears, a wider discussion is needed with the presentation to the Parliament being done and, probably, ministries being obliged to comment on critics contained in the reports.

[494] In Russia, several Resolutions of the Plenum of the Supreme Court are in place, which provide for that how courts should interpret the competition legislation (see, for example, the Resolution on Certain Matters Arising in Connection with the Application of the Antimonopoly Legislation by Courts 4 March 2021 (Plenum of the Supreme Court of the Russian Federation)). Nevertheless, despite providing some help in improving the competition cases adjudication, all of them have been criticised for the lack of comprehensiveness and input of competition law experts from outside the judicial system; they are also not quite bold in going beyond mere clarification of particular provisions of the Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154) (i.e. do not enhance the competition regime substantially). There have been only a few similar acts in Ukraine and none in Uzbekistan; therefore, there seems to be even less synergy between competition agencies and courts in those jurisdictions. It is also noteworthy that none of the relevant acts in the studied jurisdictions target substantially the matter of the state sector's overdominance and consequential problems of that for competition.

comprehensively in the paternalistic environment, not conflicting with statism, but shaping and streamlining its manifestations (i.e. competition ideas permeate the entire economic regime rather than conflict with it).

Speaking of the enforcement practices, as was noted in sub-Section 3.4.1, the ambit of FSU states' competition law is such that it generally equally captures misdoings both of SOEs and state establishment and of private businesses. With that said, based on the relevant discussion in Chapter 4.3.1, it appears that the competition authorities may and should act bolder in enforcing competition legislation, including, in particular, those cases where SOEs are involved. Currently, though the competition authorities of the FSU are becoming increasingly active (especially, the Russian FAS), their activities remain to be restrained that is, among other things, explicable by the lack of some necessary powers and instruments available to, for example, European competition agencies (e.g. the rights to conduct dawn raids and to impose palpable fines [495]) as well as many regulatory and methodological gaps, some of which were noted in sub-Section 3.4.1 (in many cases, existing owing to the passivity in rulemaking of the competition authorities themselves). It seems that functional reinvigoration of the region's competition institutions is needed to address many problems of the relevant enforcement. [496]

In particular, as appears, the competition authorities of the region should find become more active and more equipped to apply structural and behavioural measures of various configurations to remedy infringements. The use of such measures is likely to be quite effective for targeting anticompetitive actions of the state sector, as SOEs tend to be relatively resistant to fines, owing to support of the state and the immunity from bankruptcy (in direct or indirect forms). [497] Though being fixed in the competition legislation of the region and applied from time to time by the national competition authorities, such measures are still an exception and, where imposed, seem to be incomplete and not duly monitored (this is especially accurate for Uzbekistan, where no guidelines of any sort are developed on how relevant measures should be developed and applied).

[495] To give an outstanding example, the current amount of a fine for the evasion of performance of a prescription of the Antimonopoly Committee in Uzbekistan, as applied to managers of a legal entity - infringer under Article 178 of the Code on Administrative Responsibility 22 September 1994 (Oliy Majlis of the Republic of Uzbekistan), is UZS 1,225,000 – 2,450,000 (approx. USD 120 – 240 as of June 2021). There are no fines on legal entities as such (only their responsible managers - usually, the CEO - are fined).

[496] Organisation for Economic Co-operation and Development, 'Competition Law and State-Owned Enterprises' (n 51) 12-13, 24-28; Capobianco and Christiansen (n 64) 21–26

[497] Capobianco and Christiansen (n 64) 21–26

Undoubtedly, since such elaborate ex-post enforcement methods as pro-active application of structural and behavioural measures require a much more thought-trough legal and economic analysis and entail higher monitoring costs, more comprehensive financial and staffing support is required for the competition authorities (probably, in conjunction with their greater budgetary autonomy, as was mentioned above). Moreover, a relevant operational foundation in the form of guidelines, methodologies, and relevant training programmes for their staff should be developed. The issue may also be addressed from another angle and, for example, more substantial fines may be introduced for entities not following prescriptions of the competition authorities. Personal liability of managers of non-compliant entities may likewise be increased. Internal antimonopoly compliance may also have a role to play – it may be a responsibility of an infringing entity itself to report on its non-compliance with competition law and, where applicable, to propose behavioural or structural remedies. [498]

In the environment of the overdominance of the state sector, more thorough merger control may also be needed. Currently, in the FSU, there is no particular difference in merger analysis between situations where only private, private and state-owned, and only state-owned entities participate in a merger. Nevertheless, it is likely that mergers with the participation of SOEs may entail more risks for the competitive environment, as involving consolidation of large volumes of invisible resources and entailing further invigoration of the state as a market player. In this regard, more thorough and more specific analysis may be needed with the assessment of, for example, the involved SOEs' public functionality, which may produce an anticompetitive effect when is extrapolated to a particular market, or of the level of involved SOEs' access to particular state resources, which may undermine the equality of competitive conditions within a given market after the merger. A specific set of behavioural and structural remedies may also have to be included in guidelines for merger cases where SOEs are involved. [499]

The pro-active enforcement of ex-post measures and the use of specific ex-ante measures (primarily, merger control) are not the only tools that may help the FSU competition authorities to become more effective in struggling with statism. It is nowadays often suggested that a relatively new (or at least, underused) tool being tested around the world – the right of competition authorities to intervene and fix failing markets (in particular, digital markets) –

[498] Organisation for Economic Co-operation and Development, 'Competition Law and State-Owned Enterprises' (n 51) throughout 12-28

[499] ibid 17–19; Healey, 'Competition Law and State-Owned Enterprises: Enforcement' (n 62); Capobianco and Christiansen (n 64) 23–26

should also be considered.[500] It seems to be widely accepted that many markets can be reshaped more effectively, if direct regulatory ex-ante measures are taken, rather than measures of a responsive nature. In transitional markets in particular - especially those wherein paternalistic measures are applied widely - there may be no visible anticompetitive practices, as there are no viable competitors as such, owing to primarily inherent structural problems of markets, resulting in high entry barriers and high competing costs.

With the above ex-ante interventions being offered, there is a concern that they may turn competition authorities into macroeconomic regulators and move them away from the original purposes of protecting competition and ensuring consumer welfare, as discussed above. As was noted, this seems to be already the case in the FSU region, particularly, in case of the Russian FAS, and appears to be a worrying development indeed. Considering that, though the instrument of ex-ante pro-competitive interventions looks useful, it appears more reasonable that it is not the region's competition authorities, but sectoral regulators, having more expertise in relevant industries and a direct mandate to develop relevant markets, who should take the lead in applying the instrument. For that to operate effectively, however, there should be a clear disposition fixed by law that sectoral regulators must make regulated markets more competitive and, probably, that they have the right to apply competition law concurrently with competition agencies, as is considered further below (in coordination with the competition authorities, who should also have the right to request the initiation of an inquiry into structural problems of regulated markets). Obviously, there is not a specialised sectoral regulator in each area, but in case of all sectors where the state has notable presence and no specialised regulator is in place, as appears, a specialised competitive neutrality institution may become the main actor, leading the effort to improve relevant markets by elaborating and summarising proposals for enhancing competition and submitting them to the Government and the Parliament (and seeking relevant assistance of other state agencies, where and if required).

It was discussed in Section 3.4 that interventions of state actors in enforcement activities of the competition authorities common in the FSU often neutralise relevant enforcement efforts. Resolving this problem remains to be one of the hardest tasks for improving the competitive environment in the context of statism. A complex approach is needed in this regard that would

[500] Antonio Manganelli and Antonio Nicita, 'The Interplay Between Regulation and Competition Law Enforcement' in Antonio Manganelli and Antonio Nicita (eds), *The Governance of Telecom Markets: Economics, Law and Institutions in Europe* (Palgrave Macmillan 2020); Jay Modrall, 'EU Commission Launches Consultations on Ex Ante Antitrust Tool and Platform Regulation' (Norton Rose Fulbright LLP 8 June 2020) <https://informaconnect.com/eu-commission-launches-consultations-on-ex-ante-antitrust-tool-and-platform-regulation/> accessed 12 April 2021

embrace a number of measures discussed above. Besides for the development of a comprehensive competitive neutrality regime, as discussed in sub-Section 5.2.4 below, and ensuring greater transparency and publicity of relevant investigations, one of the most effective measures here is, as appears, shifting the relations of competition agencies and state actors from confrontation to cooperation through, among other things, persistent pre-emptive competition advocacy, targeted at, primarily, the ingrained administrative governmentality. Generally, there are many instruments of competition advocacy that have been developed around the world, as were listed in sub-Section 4.3.2, and all of them seem to be of relevance for the FSU region. It does not seem necessary to repeat them here, but it should probably be noted that, as appears, activities of the competition authorities in spheres where state actors are protective should not be limited to their own narrow fields of practice and relevant help and guidance should be offered and promoted wherever competition matters are concerned i.e. wherever state actors take decisions that may potentially affect competition (though without the expansion of the scope of intrusive regulatory control of the competition authorities, as was mentioned). [501] For this to happen, however, the problems of financing and staffing should first be addressed to allow the competition authorities to expand their coverage.

Undoubtedly, the discussed competition advocacy is likely to be more effective if state actors that may potentially be interested in nurturing SOEs are also tasked to develop competition i.e. fertile ground has been laid to embrace the idea of the need for competition.

5.2.2.2 Sectoral regulators

As follows from the above, institutional changes for sectoral regulators are also important for the FSU region. In this regard, first, in some way like in case of the region's competition policy institutions, the transformation of region's existing monolithic line ministries and state committees, being, as a rule, both policy-makers and markets regulators and controllers (of

[501] The FAS seems to be relatively active in this. Besides for pushing ministries, other regulators, and regional executive bodies to the development of own competition enhancement plans and entering into cooperation agreements with it, the FAS has developed the Single Standard for the Development of Competition, which guides (provides some recommendations to) regional executive bodies and natural monopolies on developing robust competition in regions of Russia (including by suggesting to resort to some of the measures noted in this Chapter e.g. the introduction of comprehensive competition pre-screening of issued decisions and self-assessment on compliance with competition law). Though it may be hard to measure precisely what positive effect such actions of the FAS actually bring, it appears they are a notable step in the right direction. See the Order on the Approval of the Single Standard for the Development of Competition in Regions of the Russia Federation No. 768-R 17 April 2019 (Government of the Russian Federation); Artemev (n 39); Federal Antimonopoly Service of the Russian Federation (n 353)

which the region's Ministries of Energy and Ministries of Transport are generally a good example) in a way that specialised independent regulators overseeing particular markets are created where feasible appears a justifiable step. Such regulators may embrace, technical, assess, and limited price controls functionality [502]. Being accountable to the President and (or) the Parliament with only a limited accountability to the Government being in place or no at all (as well as having other features of an independent institution, as provided in sub-Section 4.3.3.1), such regulators will be less dependent on a changing political agenda of the Government and departmental interests of controlling agencies and more focused on their specific regulatory goals rather than a scattering of mixed public policy objectives. In connection with the latter, they may also be less inclined to promote interests of SOEs for achieving public policy goals and, hence, less inclined to enhance the verticality of relations between the state and the state sector. It appears that being more professional, they may be more capable in taking informed and balanced regulatory decisions, being equally favourable for all categories of market players. [503]

It also seems important in the context of the studied conflict that, as was discussed above, in line with the relevant the pan-EU, British, and German experience noted in sub-Section 4.3.3.1, the objective for the development of competition does not remain a prerogative of the FSU region's competition authorities, but is also set as an objective for region's sectoral regulators (whether existing ones or those being newly established). First, it will make bureaucracies of sectoral regulators understand that their functionality embraces a broader range of tasks than just the implementation of industrial policies - in the context of the FSU economic governmentality, competition-oriented ideas will, thus, be effectively woven into the paternalistic governance philosophy pattern. Secondly, that may facilitate more effective implementation of competition development tasks – as the bureaucracy-centred theory described in sub-Section 4.3.3.1, among others, suggests, officials of sectoral regulators may be more well-suited and well-informed to achieve competition-related objectives in relevant industries. [504] As was noted in sub-Section 4.3.3.1, there is no consensus on whether sectoral regulators should not only pursue competition enhancement objectives, but be also allowed to actually apply competition law concurrently with competition authorities. It appears that

[502] A detailed overview of the FSU states' price controls regime and its possible re-modelling is out of the scope of this research, but, as appears, owing to regulatory capture risks, making independent regulators the only agency responsible for price setting may be a risky step. Probably, such functionality should be reasonably shared with the Ministry of Finance or a separate tariff setting authority.

[503] Elena Glushko, 'Administrative Reform in the Russian Federation: Problems of the Implementation' [2007] Yearbook of the Centre for Public Policy Researches 19; Rosa and Malyshev (n 77)

[504] Bauer (n 76)

given the above reasons, that may be an effective option for the FSU and, thus, worth to be tried out – at least in industries with non-ordinary and technically complex market environment e.g. the power industry or telecommunications. With that said, given the transitional stage of region's competition policies and the overall fragility of the idea of significance of competition in the region, it seems that to ensure that objectives and principles of application of competition law are not subverted when applied by sectoral regulators, the region's competition authorities should still retain the primacy in addressing competition cases – decide on how cases are allocated, have the ability to takeover cases where greater focus on competition is needed as well as be able to provide their guidance on all categories of cases by some analogy with that, for example, how the concurrency is generally implemented in the UK [505].

For now, as suggested above, the creation of independent and competition - oriented sectoral regulators is far from being a wide-spread practice within the FSU. The most visible exception in this regard is the region's central banks, which are able to act in a market-oriented way, being to a large extent separated from other state institutions (albeit not as independent, as prescribed by relevant laws), and seem to be concerned about the creation of robust competitive environment in the financial sector indeed. [506] Only occasional examples may be found in other industries – hence, in Ukraine, being one of the most experienced FSU states in terms of attempts to establish independent regulators, owing to mainly its agreements with the EU, the semi-independent National Commission for the State Regulation in Energy and Public Utilities [507] and National Commission for State Regulation in the Field of Communications and Informatisation operate [508]; in Uzbekistan, it is envisaged by the Concept for the Development of the Power Industry of 2020 [509] that an independent regulator of the power

[505] Competition and Markets Authority, 'Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries' (12 March 2014) CMA10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892735/Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf>; Rosa and Malyshev (n 77)

[506] See, for example, Central Bank of Russia, 'The Bank of Russia's Approaches to the Development of Competition in the Financial Market' (25 November 2019) <https://www.cbr.ru/Content/Document/File/90556/Consultation_Paper_191125.pdf>

[507] Law of Ukraine on the National Commission for the State Regulation in Energy and Public Utilities No. 1540-VII 22 September 2016 (Verkhovna Rada of Ukraine)

[508] Articles 17-23 of the Law of Ukraine on Telecommunications No. 1280-IV 18 November 2003 (Verkhovna Rada of Ukraine)

[509] Clause 6 of the Concept of Providing the Republic of Uzbekistan with Electric Energy for 2020-2030 30 April 2020 (Cabinet of Ministers of the Republic of Uzbekistan)

energy market will be created in the country by 2023.[510] Generally, considering the lack of expertise, entrenched regulatory traditions and fear of reforms, and much concern about regulatory capture, it is unlikely that FSU region's governments will be decisive enough to take bold steps in the relevant direction and specialised independent regulations will start to be created ubiquitously. With that said, it is still possible to find a satisfactory for the FSU's governments regulatory compromise with some limited measures being taken initially i.e. to create fully independent regulators only in a small number of specific sectors (e.g. energy and telecommunications), to provide greater administrative independence to existing regulators in other markets (by, among others, for example, re-establishing ministerial regulatory departments as separate entities under such ministries or the Government), and to make all of them more aware of competition policies and tasks e.g. by articulating competition development objectives in relevant legal acts and guidelines and by enhancing their cooperation with the competition authorities, as provided above. In this regard, it, for example, appears to be significant success that, as was noted above, in 2016-2019 in Russia, the FAS managed to push all industrial regulators towards the development of competition enhancement programmes for relevant industries (though with a varying degree of deepness and completeness).[511]

In the context of the above, it should be added that that the vesting of regulatory powers to SOEs looks like an obvious mistake, which predictably leads to overdominance of the state sector and has a devastating effect on the competitive environment. Where regulatory functions are still with SOEs, they should be transferred to state authorities - regulators. A number of measures directed at the separation of regulatory and operational functions have been taken across the FSU, but the work is still far from being finished. It is a notable development in particular that in Uzbekistan, where the scale of the relevant problem seems to be the largest, several somewhat revolutionary decisions have been taken or are going to

[510] It is to note that the Ukrainian experience shows that decisions on the establishment of independent regulators should not be taken light-mindedly, as much prior adjustment in a relevant legal system may be required. Hence, a number of provisions of the Law of Ukraine on the National Commission for the State Regulation in Energy and Public Utilities No. 1540-VII (n 506) related to the subordination of the National Commission directly to the President were found unconstitutional by Ukraine's Constitutional Court in 2019, as the President had no power to establish and to directly monitor executive bodies, unless that was allowed expressly by the Constitution. See Liga Biznes, 'Constitutional Court Recognised the Creation of the NCREPU as Unconstitutional' (14 June 2019) <https://biz.liga.net/all/tek/novosti/konstitutsionnyy-sud-priznal-sozdanie-nkreku-nekonstitutsionnym> accessed 18 May 2021

[511] Artemev (n 39)

be taken to resolve the problem (e.g. the creation of the Ministry of Energy [512], the Ministry of Transport [513], and the Agency of the Development of the Pharmaceutical Industry [514], taking up regulatory functions of some incumbent SOEs).

In light of those institutional communication and coordination problems of the FSU region that were discussed in sub-Section 3.4.2, it is also worth noting that stronger communication ties have to be established between region's sectoral regulators and competition authorities (that will be especially important in case if concurrent powers to apply competition laws are granted to sectoral regulators). This demands that formalised and well-organised rules for communication between the institutions are set, including clear rules for, among other things, information sharing; regular joint investigations and joint market reviews; mandatory cooperation in decision-making where important economic decisions are taken; transfer and review of competition law cases where the competition law competence is shared, including cases where SOEs are involved (under the umbrella of specialised competitive neutrality institutions or otherwise). As was mentioned above, the Russian FAS in particular has already made a number of independent steps in this direction, entering in cooperation agreements with some industrial ministries, which provide for joint efforts in the competition law sphere. Nevertheless, it seems a stronger regulatory framework has to be created, being more comprehensive and more formal i.e. being set by the supreme governance bodies – the President or Parliament. The cooperation agreements may, in turn, be needed for complementary functions, mainly serving as instruments for facilitating competition advocacy. [515]

5.2.2.3 State property management institutions

A broader and more structured perception of how tasks should be performed should also be embraced by the state property management agencies, which, as suggested by the OECD [516] and was discussed in sub-Section 4.2.3, should better be centralised institutions managing the

[512] Resolution on the Measures for Organising the Activities of the Ministry of Energy of the Republic of Uzbekistan No. PP-4142 1 February 2019 (President of the Republic of Uzbekistan)

[513] Resolution on the Measures for Organising the Activities of the Ministry of Transport of the Republic of Uzbekistan No. PP-4143 1 February 2020 (President of the Republic of Uzbekistan)

[514] Clauses 1, 2, 4-8 of the Resolution on the Measures for Cardinal Improvement of the Management of the Pharmaceutical Industry No. UP-5229 (n 203)

[515] John Hilke, 'Improving Relationships between Competition Policy and Sectoral Regulation' (2006). 4th Annual Meeting of the Latin American Competition Forum <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38819635.pdf>

[516] Among others, Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 34–43

entirety of the state sector based on well-elaborated and partially standardised guidelines. Strong, more autonomous (well-controlled by, probably, the Ministry of Finance and state auditors, but responsible and governed only by the highest state authorities), and pro-active state property management agencies, acting based on thought-through guidelines, will help to construct a holistic and more manageable corporate governance framework (a chance will, thus, appear to address competition concerns properly); to create a buffer between regulators and the state sector (making it less exposed to political changes and departmental exploitation); and to ensure better interaction between the state sector and the competition authorities (since a single channel of communication with the entire state sector is established). Although some steps towards such a system of state property management have already been made in the FSU, as was described in sub-Section 3.3.2, it appears that more efforts are needed to complete the endeavour – the majority of existing SOEs should be transferred from sectoral regulators, other institutions, and, where possible, other SOEs, to the centralised property management agencies (especially those whose production relations with a relevant state institution are not clear-cut) and more comprehensive regulatory infrastructure should be created for such agencies.

It is clear that the current reality of the FSU is such that not all SOEs may be transferred to the centralised property management agencies – hence, for example, there are a number of SOEs coming close to being public establishments and performing functions related to activities of a particular state agency, which owns them e.g. SOEs conducting specific regulatory expertise and issuing relevant licenses or SOEs supporting activities of particular IT systems (e.g. an online system storing state cadastral records). If they are transferred, there may be an unreasonable disruption in internal operation of a relevant state agency. Further, as was noted in sub-Section 3.3.2, there are some SOEs that are of such great significance that they are preferred to be controlled directly by the Government; even if they are transferred to a single state property management agency, control of such an agency over them will be nominal and, hence, unnecessary – examples here are Russian Gazprom and Uzbek Uzbekneftegaz. For such SOEs, it seems to be better that a commission or a department under the Government is created, which openly manages them (and the verticality, as described in sub-Section 3.3.3, is, thus, effectively institutionalised). With all the above said, it appears that even where a number of SOE may not be effectively transferred to a state property management agency, ownership practices in respect of them may be effectively standardised and synchronised with those that are practised by the property management agency over the rest of the state sector.

As was discussed in sub-Section 4.2.3, a concern related to transferring SOEs to a centralised property management agency may also be that such an agency has less expertise in managing

SOEs in particular industries than sectoral ministries and regularities. It nevertheless appears that this concern may be addressed by developing special rules for obtaining advice from sectoral ministries or regulators in cases when complex ownership decisions have to be taken. Some reservations here are, however, that such advising should not become a daily routineroutine as well as that a vicious practice of issuing targeted legal acts for directing the functioning of particular SOEs should be abandoned (prohibited), as this allows sectoral regulators to effectively usurp ownership institutions' functions and negate the ownership separation efforts.

It is worth noting that it is of significance that not only central ownership institutions are empowered, but also regional ones. As was noted in sub-Section 3.3.2, there is some degree of messiness in how regional (municipal) SOEs are owned and controlled and it appears that strong, professional, and autonomous regional ownership institutions may be able to notably improve the quality of owning SOEs in regions. It is particularly important in this regard, however, that there is a clear separation between property owned by central government and property owned by regions, where this is still an issue (as, generally, in Uzbekistan), so that there is no ambiguity as to who owns state property and, consequently, there are no overlaps in functions of ownership institutions of various levels (though the central ownership institution should, as appears, be authorised to monitor regional ownership institutions for, among other things, ensuring proper consistency in applying state property management policies across the country and ensuring some greater autonomy of the regional institutions from regional executives, keen to rely on SOEs). [517]

5.2.2.4 Other institutions

Speaking of solutions for other institutions, such specific institutions as consumer and business associations should be noted. As was mentioned in sub-Section 4.3.2, their capacity to render influence and reasonable pressure on government and markets should not be underestimated. Considering the current underdevelopment of such groups within the FSU, as described in Sections 2.3 and 3.4.2, some liberalisation of their activity and facilitation of it are needed with first and foremost, the possibility to form such groups being promoted and some access to the Government and the Parliament being given to them. Detailed analysis of possible ways of empowerment of associations (both business and consumer ones) probably deserves a separate research paper, but it should be noted that supportive measures should not translate into that associations are effectively captured by the state. If that happens, it is likely that

[517] Centre for Strategic Researches (n 43)

business associations will become one another instrument of statism, facilitating control of the state over particular industries (turning into semi-ministries), while consumer associations will weaken significantly in the context of the state-dominated economy. Such a scenario is already the case in Uzbekistan, where businesses in a number of industries have to become members of state-run associations to operate effectively (owing to, among others, incentives given to members of associations and their power to decide on particular policy matters) [518], giving up their independence to an extent, whereas consumer groups have little market power, being suppressed by bureaucracy (in many ways like in the Soviet Union).

Empowerment of the existing institutions is not the only solution for the statism – competition policies conflict in the FSU, as the establishment of some new institutions may also be an option. Hence, by analogy with Australia, where an intragovernmental institution exists for dealing with competitive neutrality issues, it may be a good idea to have a separate institution for addressing excesses of the state sector expansionism in the FSU. Although the competition authorities of Russia, Ukraine, and Uzbekistan, have already been entrusted with examining state aid and tackling competition distortions caused by state authorities, it does not seem that the approach is comprehensive, always effective (owing to a somewhat secondary role of the competition authorities), and focused enough. A separate state sector-restraining institution may take the form of a commission under the Government or the President with a certain degree of independence, not impairing its communication and advocacy capacity. It may be tasked to deal with competitive neutrality complaints and to refer its relevant opinions to the competition authorities and to infringing state authorities; to act as a mediator in relevant disputes; to compile and to present reports on the state sector and its influence on the competitive environment to the Government, the President, and the Parliament; and to develop measures for enhancing competition and improving the efficiency of state-dominated sectors. It appears that additional support at the governmental level may strengthen the capacity of the region's competition authorities to confront negative manifestations of the reliance on the state sector. As it was noted above, there is a concern that the competition authorities do not really have a mandate to spearhead massive reforms in regulated sectors (to which state-dominated sectors may conditionally be attributed), but generally operate as enforcers of competition regulations, albeit quite diversely. It appears in this regard that a separate competitive neutrality institution may be more authoritative and focused in such context as well as will not have the conflict of interest that may still be in place in case of

[518] See, for example, Clause 9 and 10 of the Decree on the Measures for Accelerated Development of the Textile and Sewing-Knitting Industry No. UP-5285 14 December 2017 (President of the Republic of Uzbekistan)

competition authorities, which may be inclined to promote competition more zealously than a given set of circumstances may require. [519]

Another measure of a similar character that may be considered is the creation of specialised courts or court divisions focusing on competition cases only or cases of an economic nature generally with a joint appeal path for the competition authorities and sectoral regulators being provided (as is the case in, for example, Poland and the UK, as was discussed in sub-Section 4.3.3.2). Such courts may contribute to the capacity building for all relevant institutions and to improve the quality of relevant adjudication; it appears in particular that specialised courts will appreciate values accompanying competition policies to a greater extent and will, thus, be less exposed to the influence of the statism mentality. The creation of the joint appeal path, if opted for, may also help in harmonising regulatory practices of economic regulators, mitigate their conflicts, and induce more active inter-institutional cooperation. [520]

If to speak of FSU region's courts in the context of statism generally, it also seems necessary to take additional measures for ensuring their greater independence from the executive branch of government, which is likely to be a notable issue within the FSU. Moreover, it may be desirable to reinvigorate - in essence, to develop - the right of courts to conduct judicial review of clearly intrusive legal acts (those being illegal and inappropriate, as is, for example, done under English law). As was noted above, the tendency of statism to self-propagate is in many cases caused by the adoption of illegal and inappropriate decisions of state authorities. These and the above judicial reforms, however, seem to require a separate much deeper analysis of the current judicial systems of the region, as all factors able to undermine the practical efficiency of the suggested measures should be carefully considered.

In the end, it is worth mentioning that to be effective all the above institutional measures require that all the named institutions act transparently and there is efficient and comprehensive technical support that facilitates their operation and communication between them. This seems to be especially relevant in case of the centralised ownership agencies, which apparently need developed technical instruments for maintaining accurate and all-encompassing registers of SOEs and other state assets and for conducting close and continuous monitoring of such SOEs and state assets in line with the recommendations given above and further below. Much has already been done in this regard (or, at least, is planned to be done)

[519] Healey, 'Australian Experience with Competition Law' (n 61); Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61)

[520] Organisation for Economic Co-operation and Development, 'The Standard of Review by Courts in Competition Cases' (4 June 2019) DAF/COMP/WP3(2019)1 <https://one.oecd.org/document/DAF/COMP/WP3(2019)1/en/pdf>; Jenny (n 78) 22

in all the three jurisdictions under review, but it is important that the movement towards greater transparency and comprehensive technical coverage remains confident with necessary funds being allocated by government and new solutions being constantly searched for. As was noted above, however, state institutions should not be alone in this quest for enhancing management infrastructure and where possible SOEs and other actors should be made responsible for providing their input (publishing information, updating data, conducting analysis of their own activities, etc.). [521]

5.2.3 State ownership policies, structuring of SOEs and their corporate governance

As was discussed in Chapter 4, there are a variety of other non-institutional instruments that may be used for mitigating the studied conflict. Broadly and somewhat roughly these instruments include ownership and corporate governance instruments, as considered in this sub-Section 5.2.3, and competitive neutrality instruments, as considered in following sub-Section 5.2.4 (though occasionally, a particular instrument may fit into both categories).

5.2.3.1 Privatisation-like solutions

Speaking of the solutions of an ownership and corporate governance nature, it seems reasonable - in line with the logics offered in Chapter 4 - to start with the measures related to the application of privatisation – like instruments first. Procurement, PPP, concession-based, and fiduciary management instruments are generally not new for the FSU region and have been in place for some time already (except for PPPs, probably, which started to be cautiously used only in the 2010s). Nevertheless, their practical application has remained limited and not quite successful that may generally be explained by their underdevelopment, mainly manifesting itself in the lack of proper initiatives for private partners. Though much may be said in this regard, it generally appears that these mechanisms may be reasonably improved and used more often for resolving, among other things, the studied conflict (albeit with some caution – probably, with focus on those sectors where relevant instruments are successfully applied in other jurisdictions, as discussed in sub-Section 4.2.1.1). Hence, where an SOE is considered to be created for achieving one of the objectives named in Section 3.2, reasonable comparative efficiency and competition analysis should be employed as to whether the above alternative mechanisms may be applied (in the same way as the Public Sector Comparator is used before PPP and concession-based projects are initiated in some developed jurisdictions). This may

[521] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 50-51, 54-55, 466-467; Jenny (n 78) 32

become a part of the broader preliminary competition analysis that was suggested in sub-Section 5.2.1 above.

It is worth noting that though, as may be assumed, PPPs, concession agreements, and fiduciary management may be too complicated mechanisms indeed, not always usable in practice, procurement instruments may be resorted to comparatively often – hence, for example, a potentially suitable, but not yet duly explored within the FSU field is competitive tendering of provision of services of general interest. Moreover, the scope of public procurement application may reasonably be broadened to squeeze intra-departmental (intra-group) purchases, as suggested by some best practice guidelines (i.e. e.g. some x% of services must be purchased from outside rather than obtained internally).[522] For achieving the intended efficiency, it should, however, be ensured that the relevant processes are competitive enough – as was noted in sub-Section 3.3.4.3, there is much concern as to how public procurement contracts are awarded in the FSU – in the vast majority of cases a direct contract is concluded with a single bidder (often being an SOE).

5.2.3.2 Commercialisation: corporatisation and restructuring

The commercialisation measures related to corporatisation and restructuring also seem highly relevant for the FSU. If to speak of corporatisation, as was noted in sub-Section 3.3.1, there are many non-corporatized SOEs in the FSU region that operate based on substandard, non-transparent, and rigid corporate models, being a legacy of the Soviet era (mainly, unitary enterprises and state corporations (associations, concerns)). Although the fact that SOEs represent dual-nature creatures with both commercial and public functionalities may partially explain such failings, it seems important to ensure that, as the conclusions made in Chapter 4 suggest, where SOEs operate in competitive markets, they are made equal to private entities. As in case of many other reforms mentioned above, though some steps have already been made in this direction within the FSU – for example, it has been decided in Russia that unitary enterprises operating in competitive markets will be reorganised into limited liability companies or, where applicable, become public establishments till 1 January 2025[523] – it appears that there is still much room for further action. It seems, however, that in order to proceed effectively, more systematisation should be in place in respect of SOEs. Hence, as was noted above, in all the jurisdictions under review, a comprehensive and informative state

[522] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 76–80

[523] Article 3 of the Law of the Russian Federation on the Changes to the Laws on State and Municipal Unitary Enterprises and the Protection of Competition No. 485-FZ 27 December 2019 (Federal Assembly of the Russian Federation)

register should be created that will include all SOEs and public establishments existing in the relevant state. It should be identified in there what activities each SOE and public establishment performs, which assets it owns, and by which institution it is owned and controlled. This will serve as an important preliminary step preceding corporatisation and restructuring. It will be possible to categorise SOEs and public establishments into different groups depending on their functionality and, then, to elaborate most optimal forms for their operation and levels of corresponding state control. Hence, based on the suggestions in sub-Section 4.2.1.2, such groups may include public establishments, public enterprises (entities providing particular state services, military enterprises, etc,), and SOEs (those where the state is a majority shareholder and those where the state is a minority shareholder). It should be ensured that public establishments and public enterprises, which operate based on non-corporatized legal forms, do not enter competitive markets are reorganised when they do or, if that is not possible (owing to some objective reasons e.g. only a small share of their activities takes place in competitive markets), measures are taken of a market-wide nature to outbalance their entrance (e.g. where private hospitals start to compete with public medical establishments in markets for some services, a medical insurance system is redevised in such a way that competition is encouraged). Obviously, the relevant categorisation system should not be too rigid and where market or other conditions change, that should be followed by changes in the register. It should be mentioned that the responsibility to maintain the register may be assigned to a centralised state property management agency with the state sector itself being ordered to regularly provide updated information. The competition authorities and competitive neutrality bodies may be entrusted with the qualification assessment of entities included into the register and may develop and propose relevant reforms based on relevant data[524].[525]

[524] As was noted above, the FSU states have made some modest steps towards the creation of the relevant registers. Hence, for example, see Annexes 1 and 2 to the Resolution on the Measures for Improving the Accounting of State Property No. 273 8 May 2020 (Cabinet of Ministers of the Republic of Uzbekistan), which oblige Uzbek state agencies and SOEs to regularly introduce information on state property into a special online system. Nevertheless, there are still problems with the right categorisation of state-owned property (in the absence of clear definitions), incentives to collect the relevant data, actual implementation of technical solutions (relevant systems do not operate smoothly and the data is patchy). It is where development of internal reporting guidelines for relevant entities and the establishment and (or) strengthening of liability of top managers and specially appointed compliance officers become particularly relevant.

[525] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 48, 330-331; Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 139-141, 206–207; Christiansen (n 64) 9–15

In the context of corporatisation, it should probably be added that non-market legal forms of business organisation are often associated with limitations on property rights relevant entities have. As was noted in Chapter 3, unitary enterprises, public establishments, and occasionally, state corporations of the FSU have restricted rights to assets the state have transferred to them, using them based on the elaborated back in the Soviet Union rights of operational control and economic management. Without going back to describing their essence, it may just be concluded that the application of them in the context of modern SOEs appears unjustified, as SOEs are no longer production units and voiceless performers of tasks of line ministries and state planners. In this regard, as appears, only assets being indispensable for the state in terms of their significance for performing particular public tasks, e.g. essential pieces of infrastructure, should remain to be closely controlled by the state. In this regard, it seems that the regime of operational control, being quite rigid and not adapted to market conditions, should be abandoned, while the regime of economic management should be retained only to apply to discussed essential property with minor adjustment being made for different categories of public entities. As appears, however, in particular cases, the application of even this, more liberal mechanism may be excessive and something like concessions should better be considered when important state property is transferred to SOEs.

It is probably also worth noting that it is a characteristic of every private corporation that it may go bankrupt and, thus, end its natural life cycle. SOEs are different in this regard, as in many cases, the state does not allow these hybrid entities to be liquidated, owing to a variety of different reasons, as a rule, correlating with those for the establishment of relevant SOEs. Relevant limitations may be directly set in law in one or another way (this is the case for Ukraine, where key property of SOEs may not be foreclosed on in the course of enforcement proceedings of any sort [526]) or applied in practice (i.e. the state makes efforts to rescue failing SOEs with or without using special mechanisms envisaged by bankruptcy laws). In certain cases, the state (mainly regional authorities) may use more sophisticated, but somewhat shady mechanisms where an SOE is allowed to go bankrupt, but its property is effectively shielded from public sales by using some legal constructions and is just transferred to a new SOE before the bankruptcy proceeding in respect of the SOE come to an end. It appears in this regard that though the impossibility for many SOEs to become bankrupt has to eventually be accepted as some axiom, legislative measures should be taken so that SOEs face consequences emulating some consequences of bankruptcy for private entities so that competitive pressure would have been more palpable (for managers of SOEs and institutions exercising ownership functions).

[526] Articles 1 and 2 of the Law of Ukraine on the Introduction of the Moratorium on the Mandatory Sale of Property No. 2864-III 29 November 2001 (Verkhovna Rada of Ukraine)

Such consequences may include the obligation to sell all non-essential assets, the firing of current managers with depriving them of the right to be restored to a similar position, assignment of main contracts to other entities, etc. Out of the studied jurisdictions, it seems that it is Russia who has come to the closest semblance of such emulation (e.g. where some state property has been provided to any unitary enterprise, it may not be withdrawn from the bankruptcy estate once bankruptcy proceedings have begun, so it may be lost in the course of the proceedings unless the state purchases it back [527]), but, as appears, there is still much place for improvement.

If to speak of restructuring, it is of concern that many SOEs in the FSU engage in non-core activities, often being ordered to do so to their own detriment and to the detriment of their real or potential private rivals or, vice versa, doing that uncontrollably, without giving ownership institutions a chance to properly assess their ventures. Being large and well-established, many of those SOEs are able to extend their influence and to leverage power across many markets without much effort, making use of privileges they have in one or several of their main markets (not to mention that many SOEs actively support each other with discounts and preferences that facilitates the formation undividable state-owned agglomerations). Besides, as was noted above, in the vast majority of SOEs of the region, public and commercial functions are not properly divided and it is monopoly in the provision of particular public services that allows SOEs to dominate in commercial markets. Considering all this, it seems more efforts should be made to make the structure of SOEs clearer and more controllable. First, relevant measures should be taken to ensure a more thought-through policy in respect of that how SOEs expand – where SOEs expand horizontally or vertically or engage in non-core activities, relevant activities should reasonably correlate with or, at least, reasonably support their main activities and objectives. Where no clear correlation exists, it appears an SOE should be prevented from expansion or be ordered to divest excessive assets. That, as appears, should be clearly reflected in ownership guidelines of relevant state agencies – owners of SOEs and internal documents of SOEs themselves. Secondly, where an SOE occupies a dominant position in several markets, it may be a good idea to divide it into several companies, ensuring that no leveraging happens, especially if the relevant SOE is a natural monopoly in one of several related markets (i.e. holds a bottleneck). [528] The measure includes

[527] Articles 63 and 81 of the Law of the Russian Federation on Insolvency (Bankruptcy) No. 127-FZ 26 October 2002 (Federal Assembly of the Russian Federation)

[528] It may also be useful to take preventive measures and to expressly prohibit SOEs to establish subsidiaries in markets, for which they provide unique services or unique goods (by owning essential facilities or otherwise). This, for example, has recently been done in Uzbekistan by the Presidential Decree on the Measures for Further Improvement of the Competitive Environment and Reduction of the

unbundling of vertical state-owned incumbents in network industries that has still not be done in many industries in all the three jurisdictions being studied. Although competition-related results of unbundling have been mixed in the industries where it has been tried (in the sense that not all set objectives have been achieved) – for example, in the power energy sector in Russia, as described in sub-Section 3.3.4 – it appears some progress has still been made, while the generally unsatisfactory results tend to be a consequence of incomplete liberalisation efforts, in some way similarly to the EU experience analysed in sub-Section 4.2.1.2. Lastly, public and commercial functionality of SOEs should be separated either completely, i.e. through full ownership separation, or legally, i.e. through separation of internal governance mechanisms, financing, reporting, etc. [529]

In connection with the restructuring measures above, it is also worth reiterating that a more holistic approach should be elaborated to defining, among others, such legal concepts as 'strategic significance' and 'social significance' as well as to identifying natural monopolies. As was discussed in sub-Section 3.2.2, currently, the relevant categories unite dissimilar things with sufficiently clear criteria (conceptualisation) being absent. In this regard, as appears, a relevant approach (or rather a theoretic pattern) suggested by the Russian FAS in respect of natural monopolies looks like a viable option – this approach envisages decreasing the ambit of the concept of a 'natural monopoly' (shortening the relevant list) and the transition to the essence (core) - based regulation e.g. to the understanding that it is not industries themselves that represent natural monopolies, but some relevant network infrastructure – so-called 'cores' (railway networks, main gas pipelines and power grids, etc.). Clear identification of such 'cores' will help to streamline restructuring by giving a hint at what should remain at the state's hands indeed. [530]

State Participation in the Economy No. UP-6019 (n 486) (Clause 2) and may be an effective step to harness the state expansionism.

[529] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 29-32, 45-46; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 9-10, 18-19, 30-34; Miniane and others (n 56) 68–74

[530] Evgeniy Titov, 'The Role and Prospects of the Development of Natural Monopolies in the Russian Federation' (18 November 2014). 9th International Scientific Conference at the Tomsk State University <https://core.ac.uk/download/pdf/53082669.pdf>; Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2019' (n 2); Abdullaev (n 47)

5.2.3.3 Commercialisation: ownership rights and corporate governance

The majority of the other commercialisation measures of an ownership and corporate governance nature discussed in sub-Section 4.2.1 are also worth considering.[531] In the ownership policies dimension, these measures should generally be based on the principle that, as was mentioned, the state should not intervene regularly (and on a whim) in operations of SOEs, but should rather set a holistic regulatory framework and a number of the main principles that will determine their operation (albeit behaving responsibly, where a private shareholder would do so). This implies that the Governments and state ownership agencies of the FSU should abandon the practice of giving regular intrusive, highly-detailed directives to representatives and trustees managing state shares as well as SOEs' management (as described in sub-Section 3.3.3) and should focus more on setting performance indicators (or what is called a general steer). This seems to require changing the current system of exercising ownership functions and the adoption of formal ownership and governance guidelines. This suggestion goes hand in hand with the above suggestion that state authorities should abandon the regular practice of issuing targeted legal acts that intrude into the operation of the state sector for resolving momentary political and economic problems (e.g. those obliging SOEs to assist in implementing emerging social projects or to engage in non-core economic activities). It is where the screening of legal acts, discussed above and further in sub-Section 5.2.4, being properly conducted by competition agencies and competitive neutrality institutions (as well as, probably, by independent sectoral regulators with competition enhancement functions, where established, and state property management institutions), may be of use (though if devised properly with, as was noted in sub-Section 4.2.2.2 above).[532]

In the context of the above, it is also of importance to take measures for neutralising the verticality of relations between state officials and SOEs' management, which was described in sub-Section 3.3.3 and which, as suggested, is likely to render a significant negative impact on the competitive environment. For that, as appears, the practice of appointing state officials as state representatives in the boards of SOEs should be reconsidered with the practice of concluding management agreements with professional attorneys (managers), chosen on a

[531] The reservation made in Chapter 4 as to the size of SOEs should probably be repeated here. The offered softer measures may have to be applied in sum in case of medium-sized and large SOEs, but should probably be applied selectively and cautiously in case of smaller SOEs, so that not to become too burdensome.

[532] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 30-35, 40-41; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 192–194; Arrobbio and others (n 57) 59–65

competitive basis being expanded instead.[533] Likewise, the politicised practices of appointing SOEs' managers by the highest governmental officials (the President or the Prime Minister) and the practice of giving SOEs' managers official state ranks (widespread in Uzbekistan) should be abandoned. Supervisory boards and collective decision-making at the executive level should, in turn, be empowered so that a powerful buffer exists between the state and the state sector, absorbing attempts to intrude and hindering direct contacts between individual managers and politicians. An important role here is to be played by strong and autonomous centralised state property management agencies, which should embrace real ownership functions in respect of the state sector, including greater control over the appointment processes (in a way that the corporate structure does matter indeed – e.g. the ownership agency elects the supervisory board, while the supervisory board elects executive managers or, in particular cases - probably, among others, in case of lesser SOEs -a single management board is elected directly by the agency). With that said, however, in the same way it is hard to ensure that centralised ownership institutions in fact control SOEs of significance - national champions, it may be likewise hard to eradicate the verticality in such SOEs. As noted above, therefore, in case of such SOEs, the verticality of relations between politicians and managers should at least be legitimised so that transparency could be ensured and assessment of the relevant relations could be made by competition and competitive neutrality institutions.[534]

A number of the measures in the area of corporate governance considered in sub-Section 4.2.1 may also be useful. These include the mandatory inclusion of independent members into the boards of SOEs (the supervisory board where the two-tier structure of corporate governance is applied and in the board of directors in case of the one-tier structure) - for example, at least, 40% of the board - being able to make decisions based on their professional perception of what is best for a given SOE, rather than any directives of the state (with only some general guidance

[533] Since quite recently, despite some persistent reluctance, some attempts have been made within the FSU to increase the presence of professional attorneys (as well as independent directors) in SOEs. However, there is notable lack of systematism in such attempts. Moreover, there is a problem of that there is no sufficient number of highly qualified candidates for the relevant roles having no conflicts of interest. What seems to be required in this regard after the introduction of stricter requirements for the appointment of professional attorneys and independent directors is (without going into much detail) the development of a comprehensive structured policy for searching for and assessing relevant candidates and the elaboration of better remuneration terms for appointees. See Irina Berezinetz, Yuliya Ilina and Marat Smirnov, 'Boards of Directors in Russian JSCs with State Participation' (2016) 2 Economic Science of Modern Russia; Alexander Jdanov, 'Professional Attorneys or Independent Directors?' (2014) 4 Corporate Strategies; Zaporojhan (n 306)

[534] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) 34–36; Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 138-144, 192-194, 220-224; Arrobbio and others (n 57) 162–189

probably being in place)[535]; open and transparent decision-making processes (that, among others, implies regular publication of decisions and activity reports); and pro-active implementation of competition law compliance policies. It is important again in this regard that clear standardised corporate governance guidelines are available for SOEs, which allow managers to improve their governance techniques. With that said, it appears that guidelines should set requirements that are not too burdensome or only relevant for one narrow category of SOEs, as excessive stringiness may bind SOEs to the state more tightly and, thus, make them less market-oriented and more dependent on state support. A practice, whereby, SOEs are required to follow stricter rules for no clear reason (e.g. follow organisational rules for public companies being not listed) is relatively widespread in the FSU and does not seem to produce positive efficiency and competition-related effects.[536]

Where SOEs do not have private shareholders at all (the state directly or indirectly owns the whole stake) or the state share is overwhelmingly large, the Chinese experience of selling minority stakes to private (preferably foreign) investors with established corporate culture and (or) increasing their share to the maximum possible amount (e.g. 49% of voting shares) may also be followed. Albeit not being able to drastically influence on SOEs' operation, such investors may bring in some necessary inner dynamics and streamline corporate governance that, in turn, may make SOEs operate in a more market-oriented manner and be more resistant to attempts of state actors to take over control. It is an obvious truth, however, that private investors will not be interested in acquiring shares of SOEs, if, at least, basic preconditions favouring their entry are not created i.e. e.g. initial liberalisation has not been conducted and the state keeps to comprehensively control all activities of SOEs. In case of foreign investors, this, among other things, requires that excessive barriers are lifted, which prevent them from making equity investments based on public order, strategic and national security grounds. This, in turn, includes the shortening of lists of cases where foreign entry may be prohibited and the

[535] As was noted in Chapter 3, codes of corporate governance developed in the studied FSU states as well as the Law of Ukraine on Managing State Property No. 185-V (n 299) already recommend or make it mandatory for some categories of SOEs to have independent directors, but this has not be followed in practice. In this regard, it seems that a more comprehensive and stricter requirement is needed. Moreover, systematized measures are needed for finding appropriate candidates, as suggested above.

[536] Organisation for Economic Co-operation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (n 11) generally; Centre for Strategic Researches (n 43) Organisation for Economic Co-operation and Development, 'Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries' (n 52) 88-102, 127-130, etc.; Arrobbio and others (n 57) 166-168, 215-242, etc.

vocalisation of those limitations that though are not expressed in law, are actually in place, where transactions with foreign investors are examined by the state. [537]

In considering all the above measures, three factors should be also probably taken into account and duly addressed. First, often, strict oversight of government over SOEs in the FSU region (including the elaboration of substandard corporate governance solutions) is based on the concern that benevolent government will not be able to effectively ensure the preservation of some valuable assets at the disposal of SOEs. In the context of that, for relaxing the state control and, thus, reverting the merging of the state and markets, it seems important to take additional measures to address this particular concern. For that, as appears, independent members of supervisory boards and supervisory boards as a whole should be empowered (as that was proposed above, albeit in different context) and clearer and more comprehensive rules should be developed for controlling SOEs' deals (particularly, among others, transfers of assets as equity contributions to companies where SOEs are a member and transfers of assets based on concession agreements), though not of a directive, but of transparency-related nature. Undoubtedly, stricter anti-corruption laws may also help, but this matter is likely to require a separate inquiry. With clearer and more comprehensive rules for corporate governance and mangers' behaviour (including anticorruption and anti-money laundering compliance) as well as stronger corporate bodies having been developed, the relevant day-to-day control may be loosened and more independence may be afforded to SOEs.

Secondly, the very system of corporate governance developed in the FSU and framed by the relevant corporate legislation tends to encourage hierarchical, pyramidal management. Companies are usually considered to be completely owned by shareholders i.e. no clear distinction is recognised between the interests of shareholders and the interests of a company and, thus, management of a company is always meant to be fully subservient to its shareholders (that is a consequence of, among other things, weak capital markets). In connection with that, it seems further tuning of corporate laws is needed with more attention to independence of companies as entities having a separate legal identity (e.g. competence of

[537] In this context, it seems that the instrument a 'golden share' and its analogues (veto powers) should be applied more cautiously or, preferably, not at all. It appears that their existence creates uncertainty for potential investors and is unlikely to help in achieving a desired target – private-like efficiency with some state control in place. Probably, majority state shareholding or direct ownership of indispensable facilities, being more straightforward, should replace this instrument where possible. Otherwise, the instrument should become as clear and limited as possible and, for example, envisage the right to veto the disposition of essential assets and the liquidation only. See Centre for Strategic Researches (n 43)

shareholders to overrule decisions of executive bodies should be limited to an extent). This, however, again, requires analysis of matters that are beyond the scope of this analysis.

Lastly and most importantly, it should probably be reiterated that as was discussed in sub-Section 3.3.4 and above in this Chapter, the corporate control is not the only type of control over the FSU state sector. SOEs are also subject to specific targeted (in law and in fact) regulatory rules, affecting production, investment, pricing, and procurement activities of SOEs as well as providing for state aid for SOEs. The relevant control is likely to impair the SOEs' independence and, eventually, to affect the region's competitive environment. It is where competitive neutrality measures seem to be more helpful, as discussed below.

5.2.4 Targeting distortions with competitive neutrality measures

The policy of competitive neutrality, as described in sub-Section 4.2.2, should, in turn, be used for ensuring that a level playing field is created for SOEs and private businesses. As was explained, the policy consists of such sets of measures as measures targeted at ensuring that pricing of SOEs reflects costs and ensures commercial rate of return, tax neutrality measures, debt neutrality measures, and regulatory neutrality measures. As it is hard to analyse the whole range of possible instruments for ensuring competitive neutrality that may be used in the FSU, due to the variability of relevant distortions, only the main solutions of a basic character, as offered in sub-Section 4.2.2 are considered.

5.2.4.1 Pricing policies of SOEs

In case of pricing, it seems important to ensure that SOEs act transparently and regularly provide to ownership institutions or state financial authorities (and also preferably publish) their financial information including detailed information on their pricing policies. Such information should be used to assess whether prices set by SOEs properly reflect all costs related to the production of relevant goods and services, including hidden costs of state subsidies, and that such production is not subsidised by revenues from other markets or from performing public functions (i.e. all costs are correctly allocated). As appears, prices of SOEs should be set in the course of a process modelling a price setting process in private entities, where all prices are real i.e. all relevant expenses are usually considered and cross-subsiding is not that widespread. If that is done, SOEs' invisible predatory pricing practices will be undercut and, hence, healthier competitive environment will be created in state-dominated markets. In this regard, regulations should be developed that will guide the accounting and price setting processes in SOEs (based on those, for example, that have already been elaborated in

developed competition and public sector law jurisdictions e.g. Australia, France, and some countries of Eastern Europe, relying on specifically devised benchmark and market tests and such indicators as e.g. the weighted average cost of capital). It seems to be particularly important for such regulations to provide for, among other things, the requirement to maintain separate accounting for different types of activities of SOEs and especially, for separate accounting for the commercial and public functionally. [538]

It is also of importance when it comes to pricing of SOEs that no sophisticated pricing network should exist within the state sector as a whole. As was noted in Section 3.1, it is a characteristic of the FSU region that SOEs provide discounts to each other, being often directed to do so by state actors, which, in turn, provide compensatory benefits. A system of constant cross-subsidisation is, thus, in place at the inter-SOEs level with, however, no real price being paid to many SOEs. There is no doubt that this approach (fixed in targeted legal acts, corporate decisions, aforementioned material balances and plans) should be abolished all in all. All SOEs should receive direct monetary compensation for goods and services they provide, including those being provided as a part of their public functionality, based on prices being as much close to market ones as possible with no underpayment and overcompensation being in place (as was discussed in sub-Section 4.2.2.2). This would allow to ensure that no disproportionate compensatory benefits are given to SOEs and, hence, balance out markets, making it possible for private competitors to enter and compete, as well as would allow to weaken monolithism of the state sector. [539]

A competitive neutrality task directly related to pricing policies of SOEs is ensuring that SOEs do not only recover their costs, but also have a commercial rate of return (to the extent possible). Though not all SOEs of the FSU region pursue the objective of profit-making, it appears that even in such cases, the commercial component of the nature of SOEs should not be forgotten (which actually differentiates them from public establishments) as well as that even slight reorientation of an SOE towards the relevant goal is able to ensure that it operates in a more market-oriented and competition-friendly manner – particularly, is more attentive

[538] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 11-12, 53-54, 127, etc.; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 36–42; Christiansen (n 64) 15–16, 22, 27-28, 38, etc.; Anh Tuan (n 422)

[539] Organisation for Economic Co-operation and Development, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (n 11) 11-12, 53-54, 127, etc.; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 36–42; Izvorski and others (n 341); Anh Tuan (n 422)

to prices it sets and expenses it makes. In this regard, it seems that profitability KPIs should be set for SOEs' managers and SOEs themselves. Though all the studied FSU states have progressed in setting KPIs for SOEs' managers, there is still much work to do for improving the relevant practice. It is notable for example that even in Russia, the most developed FSU state with regard to introducing KPIs, only 49% of SOEs have KPIs for managers compared to, for example, 90% of Chinese SOEs.[540] In case of KPIs for SOEs themselves, as appears, a clear overarching centralised dividend policy has to be developed for SOEs (probably, by the Ministries of Finance, the competition authorities, and the state property management institutions) by analogy with such countries as Australia, New Zealand, and some of the EU member states, including the majority of the Eastern European members. At least in respect of medium-sized and large SOEs, such a policy should transparently set some fixed dividend rates or formulas for determining dividend levels as well as provide for cases where there may be a deviation (as in Australia, such cases may include cases where there is a substantial change in the debt to equity rate of an SOE – where the size of equity gets too large, more dividends have to be paid).[541] The basic standards of the framework dividend policy should then be reflected down in SOEs' corporate documents, business plans, etc.

Currently, in the FSU, dividend practices in respect of SOEs are generally decentralised and the distribution of dividends mainly depends on current needs of each relevant SOE and, to a larger extent, a relevant state actor managing the state share and the state at large. To be fair, there have been some attempts to centralise and systematise dividend payment practices. Hence, in Ukraine, being relatively progressive in this regard, where enterprises fully or partially owned by the central government and enterprises more than 50% of shares of which are owned by enterprises wholly owned by the central government are concerned, there is a minimum distribution rate of 30% of the net profits, as set by the Law on Managing State Property[542] (though there is a practice that the Cabinet of Ministers annually establishes specific rates,

[540] Zahid Hasnain and others, 'State-Owned Enterprises in the Russian Federation: Employment Practices, Labour Markets, and Firm Performance' (World Bank, 18 June 2019) <http://documents.worldbank.org/curated/en/246661562074950759/State-Owned-Enterprises-in-the-Russian-Federation-Employment-Practices-Labor-Markets-and-Firm-Performance>

[541] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 46–51; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 44–50; Miniane and others (n 56) 59–60; Christiansen (n 64) 15–16, 22, 27-28, 38, etc.

[542] Article 11 of the Law of Ukraine on Managing State Property No. 185-V (n 299)

which may vary significantly, from 30% to 95% for different categories of enterprises[543]). In Russia, for example, in 2002, the Government obliged all federal unitary enterprises to transfer to the state budget at least 50% of their net profits[544]; in 2012, it issued an Order recommending SOEs in the form of joint-stock companies to regularly direct at least 25% of their net profits to paying dividends as well as to plan investment projects based on this norm of profitability[545]; in 2016, it ordered that at least 50% of profits SOEs - joint-stock companies made in 2015 should be paid out as dividends[546]. In Uzbekistan, there was a Presidential Decree in 2018 providing that 50% of profits of state-owned enterprises in the form of limited liability companies and joint-stock companies where the state is a direct owner and 30% of profits of state unitary enterprises shall be regularly paid as dividends.[547] Nevertheless, as follows from the above, all the relevant requirements are somewhat uncomprehensive and lack a well-developed methodological basis.[548] Moreover, they are often perceived as recommendatory only – there are no any clear consequences of (sanctions for) non-compliance.[549]

Going back to the pricing matters, adequate pricing rules should be developed not only for the state sector itself, but also for those institutions that set prices, where price control exists. Generally, it seems, that scope of regulatory price control in the FSU states should be reduced

[543] See, for example, Clause 1 of the Resolution on the Approval of the Basic Rates of Deductions from Profits Directed for Paying Dividends for 2019 for Business Entities with the State Participation No. 328 24 April 2020 (Cabinet of Ministers of Ukraine)

[544] Clause 6 of the Rules for Developing and Approving Programs for Operating and Defining a Part of Profits that Must be Transferred to the State Budget of Federal State Unitary Enterprises No. 228 10 April 2002 (Government of the Russian Federation)

[545] Clause 2 of the Order on Amending Certain Orders of the Government No. 2083-r 12 November 2012 (Government of the Russian Federation)

[546] Clause 1 of the Order on Mobilising Profits of the Federal Budget in 2016 No. 705-r 18 April 2016 (Government of the Russian Federation)

[547] Clause 9 of the Decree on the Concept for Improving the Tax Policy of the Republic of Uzbekistan No. UP-5468 29 June 2018 (President of the Republic of Uzbekistan)

[548] Lidia Levanova, Alla Vavilina and Irina Tkachenko, 'Interrelation between Dividend Policy and Corporate Regulation in Russian Companies' (2019) 4 Strategic Management and Corporate Governance 14; Valentina Verkhoglyad, 'How Do Enterprises with the State Share Pay Dividends?' (Uteka 1 June 2017) <https://uteka.ua/publication/commerce-12-xozyajstvennye-operacii-9-kak-vyplachivayut-dividendy-predpriyatiya-s-gosdolej> accessed 17 May 2021; Antonyan and Belomitseva (n 44); Abdullaev (n 47)

[549] Potentially, as appears, strict sanctions may be applied to SOEs-infringers and their managers; the requirement to provide the Government and (or) the Parliament (or regional authorities in case of municipal SOEs) with reports explaining the non-compliance and measures to fix it may be introduced; etc. Relevant practices are to an extent in place in Ukraine (there are fines for untimely payment of dividends, forced withdrawal of some share of profits in case of non-payment, etc.), but there is still room for improvement. See Article 11 of the Law of Ukraine on Managing State Property No. 185-V (n 299).

significantly (that to some extent goes hand in hand with decreasing the number of 'strategic' enterprises and natural monopolies, as provided above). Only prices for a narrow group of socially significant goods and services should remain controlled in the spheres where that is absolutely indispensable and as flexibly as possible (as appears, direct price fixing should be avoided; also, perhaps, the softest approach where not regular, but crisis price control interventions are allowed is a preferable option [550]). In other cases, it may be desirable that vulnerable consumers and specific categories of businesses are subsidised directly for allowing the purchase of relevant products. Where price control, nevertheless, remains, coherent and clear rules, as noted above, are important. [551] As suggested in sub-Section 4.2.2.2, from the competition policy perspective, such rules should be reasonable enough not to facilitate predatory pricing by SOEs and to allow private entities to enter regulated markets.

Repeating something that was already noted above, it also seems that though the FSU competition authorities may participate in the tariffs setting in regulated industries for creating better competitive environment, it does not seem to constitute their inherent function and a conflict of interest may be in place (along with the risk of regulatory capture). Therefore, as appears, they should better take up the responsibility to control compliance with the above competition enhancing rules for price setting i.e. to ensure that tariffs are calculated reasonably to allow competition in a relevant market (together with competitive neutrality institutions, if and where they have the relevant authority). The ex-post control over such abuse of dominance violations as the setting of 'monopolistically low' and, especially, 'monopolistically high' prices should, in turn, become more nuanced with more specific guidelines being developed for the competition authorities, which would prevent them from being unreasonably intrusive.

[550] The relevant approach is applied in Russia to some extent - the Government is able to temporally, for up to 90 days, introduce price caps for some categories of essential food products, where a price for them rapidly (within 60 days) increases for more than 10% (excluding seasonal factors). The approach seems to be reasonable, though an even more nuanced way of regulation is likely to be required with a set of varying factors being considered before price caps are introduced and more transparency being in place as to that why a particular period of the price control is chosen. See Clause 2 of the Rules for Setting Caps on Retail Prices for Certain Types of Socially Significant Food Products No. 530 15 July 2010 (Government of the Russian Federation)

[551] Currently, for example, there more 150 legal acts of different levels regulate tariff setting practices in Russia with no basic principles being clearly established. See Vozdvizhenskaya (n 331)

5.2.4.2 Tax and debt neutrality

Not much can be said about tax neutrality, as the name of the concept is generally self-revealing. [552] It should only be noted that in-depth analysis has to be regularly conducted in the context of the FSU, as tax benefits are often provided to SOEs indirectly, targeting sectors where SOEs are dominant or legal structures that are mainly used by SOEs. Hence, for example, in Uzbekistan, tax and customs incentives are often given to foreign investors for the implementation of major investment projects. Considering, however, that it is usually required that such foreign investors team up with SOEs in a relevant industry, it is SOEs who are among the main beneficiaries of such incentives (that eventually results in cross-subsidising SOEs' other activities). [553]

Speaking of debt neutrality, as was noted in sub-Section 4.2.2, it generally suggested that financing should be provided to SOEs on terms equal to those, on which financing is extended to private entities. As sub-Section 3.3.4.4, in turn, provided, this is often not the case in the FSU, where generous financing from the state budget and soft loans of state-owned banks and development institutions are available to SOEs (with the state and state actors occasionally also guarantying borrowings of SOEs from private sources). It is generally beyond any doubt that where state institutions (including development banks) extend financing, such financing should be market-based and if not, be caught by rules for state aid. The situation is more complicated where financing is provided by independent or semi-independent financial institutions (e.g. state-owned banks). Some possible solutions here may be derived from those discussed in sub-Section 4.2.2.2 and include the introduction of relevant neutrality rules in good practice guidelines for financial institutions (especially, state-owned ones), the filtration of financial arrangements through an authorised state institution, payment of compensations to the state budget (for alleged support in receiving more favourable treatment) where terms of relevant financing are significantly better than those that would have been obtained by private players. It was noted that in the UK, SOEs get financing only from a specialised state institution, ensuring that funds are given on market terms. Such an approach, however, does

[552] For a detailed discussion, refer to, for example, Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 59–63

[553] See, for example, Clause 12 of the Resolution on the Establishment of the Joint Venture with Foreign Investments 'Uzbekistan Peugeot Citroen Automotive' No. PP-3053 13 June 2017 (President of the Republic of Uzbekistan), according to which tax benefits are granted to a joint venture (car manufacturer) established by 'Peugeot Citroen Automobiles S.A.' and the state-owned incumbent Uzavtosanoat as well as to its suppliers (including Uzavtosanoat itself and many other SOEs).

not seem quite appropriate for the FSU, as it may strengthen statism, making SOEs even more dependent on state agencies. [554]

5.2.4.3 Regulatory neutrality

Regulatory neutrality measures embrace a wide array of measures aimed at neutralising incentives, benefits, exemptions, and concessions given to the state sector (other than those noted above). Generally, under the policy, it should be ensured that all incentives and requirements set by law apply equally to SOEs and private undertakings or are not provided for at all. This includes rules for licensing (currently, for example, state-owned unitary enterprises in Uzbekistan do not have to obtain licenses to engage in licensed activities [555]), the provision of information, employment, getting access to natural resources, etc. As the scope is large, hard work is needed on revisiting and analysing all the existing regulations, some of which have been in place since the Soviet times (it is where broadening the scope of the currently fashionable in the FSU state 'policy of a regulatory guillotine' [556] may be of help), as well as on the pre-screening and regular monitoring of new legislation and regulatory practices.

In respect of all newly adopted regulations, as was already mentioned in, *inter alia*, 5.3.1 in the context of legal acts on establishing SOEs, the procedure for the competition impact screening, both of an ex-ante and ex-post nature, should be improved to make it more focused, more thorough, more comprehensive (embracing, among other things, a closer look at distortions of a paternalistic nature), and more independent from other screening procedures. It, among other things, seems important that where any special tasks or functions are attempted to be given to an existing SOE by a new targeted legal act (if the practice is not completely abandoned all in all, as suggested above) that should automatically trigger review of a legal act by competitive neutrality institutions, if established, the competition authorities, and, possibly,

[554] Organisation for Economic Co-operation and Development, 'Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business' (n 51) 73–74; Organisation for Economic Co-operation and Development, 'Competitive Neutrality: National Practices' (n 51) 77

[555] Article 9 of the Law of the Republic of Uzbekistan on Licensing Particular Kinds of Activity No. 71-II 25 May 2000 (Oliy Majlis of the Republic of Uzbekistan)

[556] Generally, the 'regulatory guillotine' policy implies a systematised (usually, performed based on relevant 'plans-schedules') review of all existing legal acts affecting business and economic relations within a country by a designated state agency (the Ministry of Justice or another one). Sectoral regulators being developers or participants in development of reviewed acts have to provide reasonable explanations for the existence of the acts and all specific economically burdensome requirements in them or they are invalidated. See, among other things, Ministry of Economic Development of the Russian Federation, 'Regulatory Guillotine' (2021) <https://ar.gov.ru/ru-RU/menu/default/view/93> accessed 5 June 2021; Ministry of Justice of the Republic of Uzbekistan, 'The Ministry of Justice Will Hold a 'Regulatory Guillotine' of Legislative Acts' (2021) <https://www.minjust.uz/en/press-center/news/98823/> accessed 5 June 2021

the state property management institutions (as to whether the tasks fit the purpose of the existing of the SOE), even if there no clear-cut benefits for the SOE in question. As was discussed in sub-Sections 3.3.4.4 and 4.2.2.2, the giving of special tasks and functions to SOEs may lead to the emergence of unobvious, hard-to-trace benefits for relevant SOEs. The regular ex-post monitoring also seems greatly important (if, for example, side effects of a seemingly neutral legal act start to manifest themselves) and that is where, as appears, separate competitive neutrality institutions may be particularly useful. [557]

In the context of regulatory neutrality, the widespread in the FSU practices of systematised control of production and supply activities of SOEs at the governmental level, as described in sub-Section 3.3.4.1, should probably be mentioned separately. It seems doubtless that mechanisms allowing SOEs to have guaranteed supplies or guaranteed purchases, including material balances, state orders, or directive planning of any sort, should be reconsidered. As appears, instead of them, the state should design transparent and flexible distribution (supply of goods) and public procurement (purchasing of goods) policies for the implementation in SOEs by the state property management institutions. In that scenario, the state is envisaged to act as an attentive owner, monitoring and directing, where required, activities of SOEs with the use of conventional corporate instruments. That will put the operation of the state sector on commercial footing, depriving it of the benefit in the form of ready-made market relations.

Speaking of supply policies, it seems clear that non-conventional mechanisms of distribution, be it material balances or comprehensive distribution plans, exist for a reason – they, as a rule, represent a part of a single system aimed to ensure that particular products or services reach particular categories of consumers at, where applicable, specific prices (in line with the relevant reasoning for establishing many SOEs, as was discussed in Section 3.2). Though in many cases such an approach may be justified, it seems that along with the switching to more general and transparent corporate control of the activities of SOEs, other mechanisms may be applied to minimise directive control and to create more competition in relevant markets. These may, among others, include the aforementioned competitive tendering of the right to provide relevant goods and services and allowing more consumer choice (direct financial support of vulnerable consumers, vouchers, etc.). [558] It is, however, important to ensure here that fair

[557] Healey, 'Competitive Neutrality and the Role of Competition Authorities' (n 61); Lianos (n 63); Organisation for Economic Co-operation and Development, 'Experiences with Competition Assessment' (n 417)

[558] Office of Fair Trading, 'Government in Markets: Why Competition Matters: Guide for Policy Makers' (1 September 2009). OFT Guidance OFT1113 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284451/OFT1113.pdf>

prices are offered to producers, irrespectively of that whether they are SOEs or private companies, in line with the suggestions on pricing policies above. Where it is feared that particular important, hard-to-access, unique goods (i.e. gold, gas, etc.) will be sold 'under-the-table' without reasonable access of producers down relevant supply chains being ensured, it may be considered to establish that such goods must only be traded through commodity exchanges, as it is already done in Uzbekistan – producers (being mainly large SOEs) must place some share of 'highly liquid' on the national commodity exchange.[559] Besides for that wide access to products is ensured, a positive effect of such an approach is that prices for relevant goods are formed more or less reasonably, in a market way, as a result of public trades (even where starting prices are regulated by the state).[560] This matter of supplies, as appears, is also closely connected to the matter of deregulating and unbundling natural monopolies and strategic sectors, discussed above, as it their products that are usually subject to the stingiest control. A relevant example of the attempt to go down the liberalisation route is once again the Russian electricity sector, where much effort has been put (though not yet completely successfully) to create a wholesale electricity market, covering the whole country, expect for some regions where that has been found completely unfeasible, owing to technical access difficulties (Kamchatka, Sakhalin, and Magadan).[561]

As for purchase policies, it seems that, as was discussed above in this sub-Section 5.2.3 and sub-Sections 4.2.1.2 and 4.2.2.2, clear and transparent procurement policies will be able to increase competition, to encourage innovations, to push prices down, and to open up access to a wider range of supplies for purchasers. At the same time, the state will retain its ability to control relevant markets, including by, among other things, the determination of a market structure through its buyer's power. It is worth noting that, as was discussed in sub-Section 3.3.4.3, the FSU region still has a number of problems with creating a comprehensive and well thought-through procurement system; there is much rigidity and obscurity in the current rules and achieved results of relevant reforms have been rather unsatisfactory. From the competition perspective, more efforts should be made to simplify access to the current systems for private (particularly, smaller) businesses and, thus, to create a level playing field. Currently, as was briefly mentioned in sub-Section 3.3.4.3, being a part of the state sector, SOEs tend to be more well aware of how to participate in and to win in public procurement procedures and are, generally, likely to be preferred by purchasers as more trustworthy (and

[559] Resolution on Further Implementation of Market Mechanisms for the Sale of Highly Liquid Products, Resources, and Materials No. 57 (n 202)

[560] Unless some unreasonable limitations are set e.g. price caps or licenses for accessing the exchange.

[561] Resolution on the Approval of the Rules for the Wholesale Market of Electric Energy and Capacity No. 1172 27 December 2010 (Government of the Russian Federation)

well protected) counterparties. Moreover, having access to state aid and relying on cross-subsidisation, SOEs are able to engage in procurement deals with a lower profit margin and deals where risks of non-payment or delays are high (that is likely to be true for many procurement deals in the FSU). To cure the situation, as appears, a wide array of measures should be applied, starting from greater reliance on qualification and quality rather than cheap prices and formalistic compliance and ending with more well-though trough rules for quotas for private businesses and stricter requirements for purchasers to honour procurement commitments. Detailed analysis of an impact of possible methods for developing public procurement on the competitive environment is beyond the scope of this research, but generally, enhancement of competitiveness and equality in public procurement procedures looks like the right way to address many excesses of pro-active statism. [562]

5.2.4.4 General measures to improve the current regime for controlling state interventions

Speaking of competitive neutrality more generally, one may note that a regulatory regime for it is already in place in the FSU to an extent, as there are norms that regulate distortive state interventions and provision of state aid (state benefits), as described in sub-Section 3.4.2. However, though these regimes tend to be relatively broad in their scope (in all three jurisdictions under review, the relevant rules for state interventions generally prohibit anticompetitive interventions of any sort, whereas the rules for state aid catch broader manifestations of statism, covering cases where not only SOEs, but subservient private champions are cultivated) and provide some solid foundation for dealing with anticompetitive state actions indeed (particularly in Russia) [563], they still do not appear to be comprehensive and targeted enough to cover all problems being a part of the conflict between statism and competition policies. Hence, for example, the existing rules for restricting state aid still contain broad exemptions from the requirement to pre-agree state aid with the competition authorities, allow many purposes for which state aid may be legitimately given where the prior competition analysis is required, and, most importantly, do not seem to cover all variations of state support, which may be much more elaborate than an outright provision of funding or tax exemptions, especially where SOEs are involved (for example, a state agency exercising

[562] Sanchez-Graells (n 67); Organisation for Economic Co-operation and Development, 'Public Procurement in Kazakhstan' (n 391) 369-389, etc.; Organisation for Economic Co-operation and Development, 'Reforming Public Procurement' (n 391) generally; Office of Fair Trading (n 557)

[563] A good example here is Clause 8 of Article 15 of the Russian Law of the Russian Federation on the Protection of Competition No. 135-FZ (n 154). Clause provides that the federal and regional executive authorities, entities providing state or municipal services, the Central Bank, etc., are prohibited from adopting legal acts or acting (or abstaining from acting) in a way that facilitates establishing discriminative conditions.

ownership functions may order a particular SOE to supply its products (services) to another SOE for some benefit of the latter and with no particular commercial benefit for the former or a particular set of government decisions may provide for better employment conditions for SOEs' employees). It also appears that both the current rules for limiting state interventions and the rules for restricting state aid are largely retributory by nature, being directed at explicitly anticompetitive measures either already being in place or being one step away from being introduced.[564] As was noted above in respect of the legal acts competition screening, there is no systematic and focused ongoing monitoring that would have helped to address competition distortions caused by non-obvious effects of the operation of paternalistic legal acts and practices of SOEs (e.g. SOEs may set prices being not below-cost and, thus, predatory or 'monopolistically low', as that called in the FSU, but being low enough to undermine competition in a given market). Likewise, there is no much analysis where a state intervention case has already been reviewed or state aid has already been cleared – the competition authorities rarely revisit considered cases, while target entities (state agencies and SOEs) are rarely obliged to report on their compliance with imposed requirements (including, for example, on the targeted use of state aid). Yet another problem mentioned above (albeit of a smaller scale) is that though the design of the right state aid configurations and admissible state intervention mechanisms in each case requires a certain amount of creativity and in-depth analysis on the part of the competition authorities in theory, they are, as was noted above, rarely exhibited in practice. Evidently, that is an obvious result of the absence of thought-through guidelines, valid experience, and a systematised approach to finding regulatory compromises.[565]

In summary, though some visible foundations of a system for targeting the policy of reliance on the state sector do exist in the FSU region, a more holistic regime is required. As follows from the above, currently, the competition authorities, responsible for implementing relevant measures, act only within a narrow corridor constructed within national legal systems (through many legal acts taken at the highest levels that the competition authorities are not allowed to question). It seems in this regard that legal measures should be taken to ensure the

[564] This is especially true for Uzbekistan, where there are no special, systematised rules for providing state aid and, thus, there is no pre-review of even the granting of state aid (i.e. relevant distortions are also targeted ex-post only).

[565] Federal Antimonopoly Service of the Russian Federation, 'The Report on the State of Competition in the Russian Federation in 2019' (n 2); Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 168-170, 201, etc.; Organisation for Economic Co-operation and Development, 'Competition, State Aids and Subsidies' (n 53) 185–186; Plekhanov (n 339)

comprehensiveness of the current system and to support and invigorate activism of the competition authorities and sectoral regulators enforcing competition polices as well as, desirably, dedicated competitive neutrality institutions. Some relatively specific mechanisms to do that were named above. More general measures that may be of help include the creation of a unified register of granted incentives; the creation of a simple and accessible complaint mechanism for those affected by lack of competitive neutrality (in respect of those practices, in particular, that do not have a clear anticompetitive effect); and the introduction of the requirement for state agencies and (or) SOEs themselves to regularly report on (and justify the existence of) interventionist and state aid measures driving SOEs' performance. It appears that transparency and the maintenance of a regular dialogue between competitive neutrality promoting institutions and state agencies and SOEs are amongst the main principles that should underpin such general measures. [566]

The suggestions provided above do not mention the necessity to enhance expertise of specialists of all involved parties, but that seems to go without saying. For now, there is a striking lack of competence at all levels of FSU state' institutions with respects to the regime of control over statism. Hence, as was mentioned in sub-Section 3.4.2, many of regional officials seem to be completely unaware that the requirement for reporting on state aid exists. Oftentimes, even being aware, state offices do not realise that instruments they devise are prohibited under the regime. Since all that appears to be informed by, as was noted above, the absence of comprehensive guidelines, advocacy, and educational work, more effort is needed in these directions, especially if steps are taken to create a more comprehensive competitive neutrality regime. An additional measure (which, however, requires a separate analysis) is making state officials self-educate through increasing the liability for non-compliance. This measure may be especially valid in the context of that, as was mentioned at the beginning of this Chapter, competition rules are often neglected, being seen as secondary in contrast to real public work.

[566] It is to note that some of the mentioned measures are already to an extent implemented in some of the discussed FSU states or envisaged to be implemented in action plans for improving their competition legislation. Hence, for example, the register of provided state aid is already maintained in Ukraine by its Antimonopoly Committee (though not as accurately and comprehensively, as it should have been) with the relevant requirement being set in Article 16 of the Law of Ukraine on Managing State Property No. 185-V (n 299). The creation of the register in Russia and Uzbekistan is envisaged by Clause 3.4 of the Strategy for the Development of Competition and Antimonopoly Regulation in the Russian Federation for the Period up to 2030 26 September 2019 (Federal Antimonopoly Service of the Russian Federation) and Clause 3.3 of Annex 1 to Decree on the Measures for Further Improvement of the Competitive Environment and Reduction of the State Participation in the Economy No. UP-6019 (n 486).

5.3 Implementation of Reforms

As the scope of the measures that may be applied in the FSU for addressing the statism-related issues was more or less comprehensively described in Section 5.2 above, it seems useful to also think over that what general trajectory may be chosen for the actual implementation of these measures and how the associated reluctance of the FSU region's governments may be overcome. As was discussed in the conclusion to Chapter 2, given that outright benefits of the state ownership are more visible and direct then relatively remote and obscure benefits of robust competitive environment, some balanced implementation approach and a strong reform drive may be needed for the FSU governments to fundamentally reconsider the discussed paternalistic measures and to carry out all the suggested reforms of an institutional, ownership and corporate governance, and competitive neutrality nature.

5.3.1 How to implement the suggested reforms?

If to begin with ideas on the implementation approach, as the above analysis of this Chapter 5 suggests, in order to ensure peaceful and effective coexistence of the policy of the reliance of the state sector and competition policies within the FSU, the above measures of a different nature and significance should better be implemented all together, in a coherent and coordinated manner. Ideally, as appears, the most fundamental steps (i.e. those related to developing or redrafting relevant foundational laws and shaping relevant state institutions) should be taken first with those of lesser significance (individual transparency and management related measures) being then fit into the frame.

With the above said, it is clear that a number of elements of the proposed reform pattern can operate relatively autonomously and, thus, may be implemented individually; this, for example, includes the reforms related to improvement of private-public partnership and public procurement mechanisms as well as the reform of price controls. There are many measures (probably, the majority of those discussed) that should be a part of the general reform process, but may also, in principle, be taken separately - this, as suggested above, may to some extent affect their effectiveness, but some positive shift is still likely to be achieved. To give an example, the engagement of independent directors into the management of SOEs may not be that effective, where such SOEs operate under rigorous control of line ministries and under the pressure of targeted legal acts; however, if such independent oversight is structured properly (there is a sufficient number of independent directors, they are professional enough, they are able to voice their concerns properly and to convey them to interested state bodies and the general public, etc.), it is still able to make relevant SOEs less woven into the system of

government and, hence, less subservient to state agencies as well as making their operation more market-oriented and transparent.

Probably, from the most practical point of view, given the FSU region's current environment with high dependence on SOEs and certain reluctance to conduct reforms, despite the above effectiveness concerns, some reasonable, not too prolonged gradualism will be a valid approach, as was suggested in Chapters 2 and 3. In this regard, it seems that at the beginning, two general strategies for reforming state sector related policies and reforming competition policies in the context of the studied conflict may be developed, perhaps, with the assistance of international organisations, as discussed further below. Such strategies are expected to articulate a clear conceptual framework for the relevant policy changes, i.e. to set clear real objectives which are aimed to be achieved, and to provide for staged plans for the implementation of the reforms – probably, in the order that is reverse to that offered above i.e. with the minor reforms being implemented first and the most fundamental ones being left for the end (with the adoption of new unified all-encompassing fundamental laws crowning the staged process of the transition). That may help to overcome some initial resistance to the reforming and may give some time to adapt to and to access all taken measures (for, among other things, re-directing the course of the reforms if necessary). It seems that based on the general strategy for reforming state sector related policies, individual strategies for reforming particular sectors with a high level of the state presence may gradually be developed at some later stages – probably, if to follow gradualism, starting with relatively isolated sectors, whose reform will not cause serious instabilities in other sectors (the chemical industry, the aviation industry, etc.).

Despite that the exact sequence of actions taken under the above two general strategies and their exact configuration may vary across the studied FSU states, depending on specific contextual factors, there are a number of relatively unburdensome measures (of those listed in this Chapter 5) that should, as appears, be gradually implemented from the very beginning of the reforming in all the studied states, irrespectively of relevant environment. With regard to state sector reliance policies, such measures should include the measures related to raising the understanding of that what the state sector actually represents i.e. the collecting of comprehensive information on all SOEs and other state establishments, as was proposed in 5.2.3.2; the creation of a unified register of SOEs and state establishments and a unified register of incentives granted to SOEs and state establishments (probably, as a single register); the introduction of regular reporting on the state sector and its performance; the establishment of closer monitoring of that how the state sector operates and, most importantly, expands. As for competition policies, such measures should principally include the measures for reinvigorating

the competition authorities, including, to the extent possible, increasing their financing; revoking their ancillary, irrelevant tasks; strengthening their powers to conduct investigations and to impose measurable fines on companies and individuals; strengthening their powers to assess economic and industrial legal acts before they are adopted and on the ongoing basis.

The above initial measures, as was noted, are likely to be universally important within the FSU region. With that said, given the specifics of the competitive and economic environment in each of the studied FSU states, some additional initial steps, particularly important for resolving the tension between statism and competition policies in the context of each studied jurisdiction, should probably be highlighted. Like in case of the above general measures, their implementation does not seem particularly burdensome and, thus, may be initiated relatively easily.

In Russia, where, as was noted above, the competition regime and the competition authorities are comparatively strong, the problem of their isolation from the rest of the state system is likely to be most relevant. Hence, having much expertise and being a strong advocate of competition, the FAS is not often heard by other state actors and is likely to be under their constant pressure, withstand largely thanks to steadfastness of its current liberal leadership. In this regard, as was explained above, it seems that greater understanding of the importance of the competition policies by all state actors is needed for ensuring that the current regime is sustainable enough and for contributing to better application of the competition policies and to greater coherence of the economic regulation in general. In connection with that, such of the named measures as the setting of competition development objectives for sectoral regulators and other state agencies; their regular reporting on achieving these objectives; enhanced cooperation and coordination between the competition agencies and other institutions, including joint investigations and trainings, are of significance and should be introduced as a matter of priority.

In Ukraine, some steps have been taken to develop a strong and stable competition law framework based on the EU model and, in particular, to an extent, to address the studied tension (some examples here are the abovementioned Law on State Aid, the measures to strengthen the competition regulator, and to create independent sectoral regulators). There is, thus, some basis, on which the above reforms may be developed. Nevertheless, it is the following to provisions of the newly adopted regulations that causes concerns, as was noted above and of which the absence of the reporting by the Antimonopoly Committee to the Parliament, as required by law, is an example. Since this is likely to be a result of the country's specific political environment and shocks and the consequential instability of its

institutionalism, the task of creating strong and impartial regulators is important. Therefore, in addition to the above general measures, such initial measures as stabilising and enhancing powers of a variety of the institutions involved in the studied conflict (aside from the competition authorises, which are, as was discussed in sub-Sections 2.3.2.3 and 3.4.1, still remain quite weak, these include the state property management authorities and sectoral regulators), improving cooperation between those institutions for ensuring unity and comprehensiveness of corresponding regulatory coverage, and ensuring the consistency and transparency in the operation of controlled entities, including SOEs, appear relevant. In the context of stabilising the system of regulatory control, it does not seem unreasonable to think about creating super-regulators by, for example, expanding the ambit of the Antimonopoly Committee's control. The inclusion of representatives of the Committee into governance boards of others regulators and authorising it to provide a consent on adopting economic by-laws may be a valid initial step.

In Uzbekistan, due to the very cautious gradualist approach to the transition chosen after the collapse of the Soviet Union and the subsequent suspension of the reforms, as described in sub-Section 2.2.3, the number of problems related to the studied conflict seems to be overwhelming. In this regard, the majority of the measures listed above are likely to give some positive effect and, therefore, it is hard to highlight something in particular. Probably, one of the most important initial steps is giving more freedom to SOEs and reducing their status (to the extent possible) to the status of ordinary companies by, among other things, introducing new improved corporate governance and control mechanisms (engaging independent directors, excluding state officials from management bodies, articulating clear KPIs and performance objectives, tightening reporting and transparency requirements, etc.). For now, the status of many SOEs and the mode of their affiliation with the state are unclear and, hence, the ability to regulate them is often impaired - usually, in practical terms: their specific mandate to do something, as granted by the Government, can hardly be questioned by specific regulators. The above preparatory measures will make SOEs a valid subject for basic economic regulation as more standard market participants and will help to highpoint intrinsic reasons for their competitive advantages, needed to be addressed first.

5.3.2 Willingness to reform

As was discussed in the conclusion to Chapter 2, the current state of things in the FSU (i.e. direct and indirect support for paternalistic advancements having anticompetitive effects) is in many ways caused by the so-called low-reform paradox, wherein all economic actors, including the governments, tend to resist major reforms, worrying of possible consequences, albeit being

driven by a different set of subjective considerations. Even though there is still some demand for reform, as some continuous stagnation is evident, a driver is needed (either a motivated political leader, or a political group, or a strong public demand) to proceed with larger reforms.

In the context of competition polices in particular, this may suggest that motivated competition experts are needed who will be enthusiastic and persistent enough in pushing forward ideas of the importance of competition. It is advocacy, education, and self-organisation efforts that come to the forefront. In this regard, it is notable that, for example, in Russia, the Association of Antimonopoly Experts, a specialised organisation that unifies motivated experts, has been created. [567] This is likely to strengthen the FAS (as long as reasonable communication between it and the Association is maintained) and, simultaneously, to help to render some reasonable pressure on it for ensuring, among other things, that it remains proactive. Undoubtedly, as was noted above, along with professional organisations, some other motivated pressure groups, such as consumer and business associations, may play an important role in causing the needed changes. Here, a reservation should, however, be made that the pace of the emergence and effectiveness of the relevant pressure seems to be, to an extent, interdependent on the progress of the transition (i.e. some period of steady transition shall pass until relevant mentality evolves, knowledge accumulates, and relevant groups embrace that role they may and should play).

It is occasionally offered by out of the region researchers that some soft pressure from developed countries may be rendered on the FSU states to push them towards a more liberal economy. [568] Such a suggestion seems to be driven by the presumption that it is largely politically leaders, managers of SOEs, and oligarchs who oppose the reforming, being driven by corrupt and predatory considerations. As presumed, given the authoritarian and (or) oligarchic setting of the FSU, these groups tend to make use of their privileged position to maintain the status quo at all costs to the detriment of other economic actors and welfare of the society in general. Despite that there is some degree of reasonableness in the approach and the presumption behind it and some effect here may be achieved indeed (hence, for example, Ukraine developed and adopted the Law on State Aid in 2017 [569], having been requested to do so by the EU), a number of concerns have to be voiced. First, compliance with the requirement

[567] Association of Antimonopoly Experts, 'About the Association' (2021) <http://competitionsupport.com/en/about-the-association/> accessed 1 September 2021

[568] See, for example, Lidia Powirska, 'Walking the Precipice: Reforming Ukraine through International Pressure' (Weatherhead Center for International Affairs 2020) <https://epicenter.wcfia.harvard.edu/blog/walking-precipice-reforming-ukraine-through-international-pressure> accessed 16 November 2021

[569] Law of Ukraine on State Aid to Business Entities No. 1555-VI (n 179)

to introduce some legal changes may be formalistic only and be aimed primarily at satisfying international partners, rather than at achieving real objectives of the proposed changes (the mentioned Ukrainian Law on State Aid seems to be a good example of that [570]). It is, in turn, unlikely that any substantial progress may be made without some internal commitment, as the legal system of the FSU region remains to be distinct from foreign ones and if any major changes are made in one sphere, corresponding adjustments should be made throughout the whole system (that may be exemplified by Ukraine's troubled attempts to establish independent regulators, as were mentioned above). Secondly, where any form of foreign pressure is rendered, being however soft, some automatic pushback is likely to be caused, especially in case if a country has a strong sense of self-identity (as in case of Russia). Such a pushback may be given by both political leaders and the society as a whole, since though being true in part, the presumption that it is mainly political leaders and oligarchy who form the governmentality does not seem to be entirely correct (as some observations on the state of minds in the FSU region made throughout Chapter 2 suggest).

In connection with the above, it appears that foreign influence should take gentler forms than 'pressure'. Hence, the lack of internal advocacy may be compensated by some external advocacy. Such advocacy, coming from developed competition law jurisdictions, may take forms of offering educational and training programs, assisting with relevant capacity building, assisting in developing methodologies and guidelines, advising on particular problems and possible ways to resolve them. It is, thus, suggested that tailored advices are sought to be given rather the compliance with some formal requirements is demanded to be achieved.

It is notable that probably, international organisations and development institutions, such as the WTO, the IMF, the ADB, the EBRD, etc., may be more successful in rendering soft pressure than foreign states and political blocks (like the EU). It appears that they generally take a more educative and staged approach; are perceived more favourably by the FSU states, since these states in some way participate in the operation and management of such institutions and such institutions are, in turn, based on the principle of equality of all member states; and offer utilitarian (and, thus, more understandable and easily perceived) solutions, rather than profess political or ideological postulates. Some evidence of comparative effectiveness of the operation of international organisations and institutions have already been observed in a

[570] Oleksandr Aleksyeyenko and Sviatoslav Henyk, 'Two Years of State Aid in Ukraine' (Kluwer Competition Law Blog 2 August 2019) <http://competitionlawblog.kluwercompetitionlaw.com/2019/08/02/two-years-of-state-aid-in-ukraine/> accessed 5 March 2021; Organisation for Economic Co-operation and Development, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 45) 168-170, 201

number of developing countries, including Mexico and some countries of South America.[571] It is noteworthy that a concern has occasionally been raised that international institutions are not well equipped enough to address all manifestations of statism in competitive markets and, thus, their further empowerment is needed. Although such a suggestion looks valid (in particular, for example, the empowerment of the WTO through the creation of a specialised antitrust panel may be considered indeed), it should be kept in mind that, as in case with the pressure of foreign governments, the excessive pressure of international institutions, may face rejection in the FSU states (and, probably, the majority of countries in transition) and lead, contrary to the expectations, to the weakening of the relevant institutions.[572]

It also seems worth mentioning in the context of the above that intra-FSU economic integration and relevant institutions may also help to achieve a positive shift for resolving the studied problem – potentially, the relevant effect may be even greater than that achieved from attracting out-of-the FSU advisers, as suggested above, provided, however, that the relevant integration does not happen inertly (as in case of the CIS), but is driven by the true desire to achieve some common goals. It is clear that integration of not quite democratic and economically paternalistic states is unlikely to cause a substantial shift in the governmentality of their leaders, but it may, nevertheless, create some necessary tension between integrated states' economic policies, pushing them towards ditching favouritism to particular companies and following more cautious paternalistic policies, by some analogy with the EU. To some extent, the relevant foundation already exists in the form of the Eurasian Economic Union (the 'EAEU'), aiming to integrate markets of its members – for now, Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia (with some countries, including Uzbekistan, being observers). Though the organisation is relatively young (it began its full-fledged functioning in 2014, though being preceded by the Eurasian Economic Community, existed in 2001-2014) and relatively weak yet, there is some good basis for, among others, developing region's competition policies - particularly, Section XVIII of the Treaty on the EAEU[573], the Protocol on the Common Principles and Rules of Competition (Annex 19 to the Treaty on the EAEU), the Protocol on the Common Principles and Rules for Regulating Activities of Natural Monopolies (Annex 20), the Protocol on Ensuring Access to Services of Natural Monopolies in the Electric Power Sector (Annex 21), the Protocol on the Access to Services of Natural Monopolies in the Sphere of Gas Transmission through Gas Transmission Systems (Annex 22), and the Protocol on the Procedures for

[571] International Trade Centre, 'Combating Anticompetitive Practices: A Guide for Developing Economy Exporters' (31 October 2012) <https://www.perlego.com/book/3275290/combating-anticompetitive-practices-a-guide-for-developing-economy-exporters-pdf>

[572] Sokol, 'Limiting Anticompetitive Government Interventions that Benefit Special Interests' (n 63)

[573] Treaty on the Eurasian Economic Union 29 May 2014 (version of 28 October 2021)

Managing, Operating, and Developing Common Markets of Oil and Petroleum Products (Annex 23). The relevant provisions of the Treaty and the Protocols establish rules for cooperation between the competition agencies of the member states, basic competition rules that must be reflected in the competition legislation of each member state, and competition rules for the common market with the specialised Department for the Antimonopoly Regulation under the EAEU Commission having been created for monitoring member states' compliance and investigating competition violations in cross-border markets affecting two or more member states. The relevant regulatory framework is underdeveloped yet and does not address effectively the matters of anticompetitive actions of the state and SOEs as well as the matters of state aid. Nevertheless, there are some requirements and restrictions in there that seem to be quite important and useful in the context of the problems of statism (albeit being quite general, subject to broad exemptions, and mainly targeted at the inter-member states trade) – for example, the general requirement to ensure to where services are provided by entities with state participation, they act based on commercial rationales, on par with private entities engaged in relevant commercial relations, and do not get benefits and privileges solely due to the fact that the state in their shareholder [574]; the general requirement for the member states to develop rules for the provision of state and municipal benefits (i.e. state aid) [575]; the prohibition to provide state subsidies where such subsides encourage protectionism in some specific forms [576]; the prohibition of discrimination of business entities of different member states generally and in public procurement procedures specifically [577]; the prohibition of discrimination of business entities of different member states in granting access to some services and facilities of natural monopolies [578]; the prohibition on establishing new natural monopolies non-existing in other member states unless consensus of all the member states has been reached [579]; and the prohibition on introducing price control for new categories of goods, not being products of natural monopolies , without the above consensus (except for in emergencies and where a relevant goal may not be achieved otherwise) [580]. Obviously, there is much concern about the future of the organisation – some of the member states are worried that the Soviet Union will effectively be resurrected with the centre in Moscow and, thus, resist closer integration. This geopolitical matter, however, goes beyond the scope of this research,

[574] ibid, Clauses 16 and 17 of Annex 16

[575] ibid, Article 75

[576] ibid, among others, Clauses 9-18 of Annex 28 and Clauses 3-8 of Annex 29

[577] ibid, among others, Articles 25, 28, 69, 70, and 88

[578] ibid, Clauses 2, 13-17 of Annex 20

[579] ibid, Clause 7 of Article 78

[580] ibid, Clauses 81-89 of Annex 19

while from a narrower competition policy perspective, much benefit may be derived for the FSU states if they enhance their economic cooperation [581]. [582]

To conclude, the lack of political will to conduct the discussed reforms in the FSU thus remains a major obstacle. It seems it may only be tackled over time through continuous internal and, to an extent, external advocacy work. In this context, it, among others, important that the practicality and efficiency of the proposed reforms are explained as much precisely as possible (in much technical detail) when they are advocated so that competition policies are started to be perceived as a real tool of economic policy, rather than as a brain exercise for intellectuals. It is also of significance here that all proposals for relevant reforms do not cease to be context aware and are aimed to address concrete, visible problems, while taking into account all existing concerns and considerations.

5.4 Conclusion

This thesis has made an important contribution to the existing literature on the economic development of the FSU region. It has furthered our knowledge of why the objective to develop competitive markets has been hampered by the persistence of statism and the distorting presence of SOEs, despite three decades passing since the fall of the Soviet economic system. It has further identified and explored measures that may be taken to mitigate the relevant negative impact of the approach on the competitive environment of the studied FSU states (which are Russia, Ukraine, and Uzbekistan).

If to make a chapter-by-chapter recap, the historical analysis conducted in Chapter 2 seems to support the idea that the Soviet era ultra-statism had proved to be ineffective owing to, among other things, its denial of the significance of competition and, thus, it was rightly rejected by the FSU states. A very specific historical path of the studied FSU states, being quite different even from that of the other former socialist countries, has, however, informed the presence of

[581] It should be noted here that there are also the Treaties on the Implementation of the Coordinated Antimonopoly Policy between some FSU states (including Russia, Ukraine, and Uzbekistan) of 12 March 1993 and 25 October 2010, concluded within the framework of the CIS. A relevant cooperation council has been established by the parties to the Treaties and a practice of information sharing on important antimonopoly cases has been agreed. Nevertheless, there seems to be no much intensive work and real harmonisation efforts going on under the Treaties.

[582] Eurasian Economic Commission, 'Competition and Antimonopoly Regulation in the Eurasian Economic Union' (20 January 2021). Electronic Journal 1 <https://eec.eaeunion.org/news/na-sajte-eek-razmeschyon-pervyj-nomer-elektronnogo-zhurnala-o%20konkurentsii-i-antimonopolnom-regulirovanii-v-eaes/>;
Vasiliy Rudomino and German Zakharov, 'Antimonopoly Regulation within the Framework of the Eurasian Economic Union' (Alrud Law Firm 2019) <https://www.alrud.ru> accessed 1 March 2021

a number of barriers of a cultural and practical nature, which have been hindering the subsequent transition from the socialist economy to market liberalism. Hence, in particular, owing to entrenched Soviet dogmas and the chaotic transitional problems of the late 80s – 90s, there has been some tendency among the region's officials and public at large to resist active free market reform and to pursue the stability of the Soviet times. Though there is some understanding that continuation of market reforms is needed, possible social and economic consequences of that are feared i.e. something called a 'low reform paradox' is in place. In this environment, the task of developing competition policies, absent in the Soviet Union, is continued to be disregarded (to an extent consciously), while old Soviet governance techniques, including the reliance on the state sector are vice versa reinvented and re-used ubiquitously to the detriment of the competitive environment.

Following the above observations, proceeding from the view that the completion of the transition should remain a priority, but the current social and political environment of the region has to be considered, it is suggested in Chapter 2 that the existing tension between old-style paternalistic measures and, particularly, the reliance on the state sector, and competitive processes should be addressed by gentle and staged legal reforms in a way that will, probably, help to ensure the coexistence of both policies to the maximum possible extent.

To better understand the current role of the state sector in the FSU and those specific aspects of its functioning that render a negative impact on competition, Chapter 3 looked into that how the region's state sector (primarily, medium-sized and large SOEs) is actually organised and operates today. Generally, as relevant statistical and empirical evidence suggests, the region's state sector is unlikely to be particularly efficient and causes much concern from the competition policy perspective. Despite that, however, there seems to be a wide variety of reasons why SOEs are still created, maintained, or enhanced. These are in many ways similar to the relevant rationales of the Soviet period, including the desire to have stable sources of funds (in the context of existed difficulties in creating an effective tax system), some SOEs' perceived strategic importance, the intention to develop particular sectors, the necessity to satisfy particular public demands, not satisfied by private businesses (e.g. to produce so-called public and merits goods), the necessity to quickly resolve pressing social problems, etc. Many of these reasons may be valid, but others are misplaced and create unnecessary barriers in competitive or potentially competitive markets (a good example here is ubiquitous and unclear exploitation of the concepts 'strategic goods', 'strategic sectors', and 'strategic enterprises", which justify the creation of SOEs-monopolists in particular industries). It was, thus, noted in the Chapter that the scope of the application of the relevant justifications should be reasonably

reduced and the applicability of a seemingly relevant rationale should be thoroughly explored in each particular case.

The problem of the lack of justifiability for cultivating the state sector is particularly acute in the context of how the region's SOEs, being dual-nature creatures, function in a way that harms competition. As Chapter 3 provided, it is of much concern how the structure, ownership and corporate governance processes in SOEs are organised with state officials being closely involved in managing SOEs that allows SOEs to derive competitive advantages; that a special regulatory regime (often, involving the setting of regulated prices, procurement, production, supply, and investment plans at the state level) and special benefits of a direct and indirect nature are designed for SOEs with them coming under close control of the state and being interwoven into the system of state governance; how institutional control over SOEs is structured with various state actors, including sectoral regulators, using SOEs for achieving specific industrial or departmental objectives and directing or indulging their anticompetitive activities. It was further observed in Chapter 3 that the regional competition authorities have limited institutional capacity and legal instruments to effectively target misbehaviour of SOEs caused by the above factors and often concede to them where other state agencies got involved. One of the most notable problems here is the lack of reasonable institutionalised communication between the competition authorities and other state regulators.

In order to find some relevant solutions for the FSU region's above problems, in Chapter 4, the theoretical framework and experience of other countries in respect of the antagonism between statism and competition policies were explored. As was discussed, despite a theoretical dichotomy in that the state either controls the economy directly or liberalises and regulates it, it does not appear that the state may not engage in both activities simultaneously. In other words, it seems that competitive markets and a fundamental state sector may coexist in the same environment without significant losses in effectiveness for any of those instruments. With that said, as in case with any complex social and economic system, this requires that some well-balanced rules are developed that will regulate the coexistence. Both the system of owning, managing, and controlling SOEs (those that justifiably remain in the hands of the state) and competition laws have to be readjusted to ensure holistic and coherent functioning of the relevant economic mechanisms and the general economic regulation framework. As Chapter 4 suggested, the following adjustments are likely to be needed in respect of the state sector for achieving, primarily, that where and to the extent an SOE operates in its commercial capacity in a given sector, it does so on equal footing with private companies, without distorting competition: 1) reforms of ownership practices and corporate governance in SOEs for making them more independent from the state (the radicality of relevant measures may vary in each

case from using privatisation-like instruments, e.g. fiduciary management contracts, to making small commercialisation improvements), 2) the introduction of the competitive neutrality regime, targeting special rules and benefits available for SOEs, and 3) reforms of an institutional nature, ensuring, among other things, that a buffer exists between the state and the state sector. As was further inferred in the Chapter, the competition authorities have an important role to play in implementing such measures and, thus, their functionality and competition regulations enabling it should be enhanced in the following three main spheres: 1) pro-active application of competition laws to the state sector and the state; 2) competition advocacy in its various forms, including competition screening of legal acts and active interaction with sectoral regulators; and 3) the assistance in creating a competition-stimulating instructional framework (by, among other things, providing relevant advice to the Government and the Parliament).

Chapter 5 summarised the findings of all the previous Chapters for achieving the main objective of this research i.e. identifying the solutions (out of those outlined in Chapter 4) that may be applied in the FSU region for resolving the studied tension in light of the region's specific environment and problems. It was generally concluded that many of the solutions of an institutional, ownership and corporate governance, and competitive neutrality nature described in Chapter 4 are likely to be effective, including the creation of independent and more professional competition authorities, sectoral regulators, and state property management agencies; enhancement of corporate governance mechanisms in SOEs through, among other things, empowerment of their supervisory boards and the attraction of independent managers; the establishment of a holistic competitive neutrality regime, among other things, providing for fixing current regulatory disbalances favouring SOEs, introducing more focused competition screening of new economic regulatory acts, devising fair and transparent mechanisms for financing SOEs, ensuring the implementation of more elaborate pricing policies, etc. Competition authorities' operation tools should also be enhanced in line with that was recommended in Chapter 4. Some of the offered instruments, such as, for example, the establishment of competitive neutrality institutions and the merge of public endeavours with private capacities through wider use of PPPs are not quite conventional for the region, but, nevertheless, also seem worth to be tried.

An important idea that was, *inter alia*, highlighted in Chapter 5 is that in adjusting paternalistic and competition policies and creating a new balanced economic system within the region, policy choices that reflect real intentions, concerns, and ideas of government should be made, being then properly legalised and institutionalised i.e. adopted legislation should reflect some existing governmentality rather than be developed to please foreign partners, to demonstrate

a commitment to promoting market economy ideals, etc.. Nowadays, steps towards statism in the FSU are often made right after a commitment is declared to proceed with de-statisation and privatisation and, thus, no clear conceptual framework is in place. It seems doubtless that if there is an aim to make visible transition progress, actual intentions and policy approaches should be fixed in law and, then, adjusted where a conflict arises between relevant policy goals. In the context of the studied conflict in particular, it seems necessary to fill in gaps in the relevant legal basis by fixing or creating laws on SOEs, competition, and regulatory institutions with clear goals and priorities being set. When such a solid foundation is created, much easier adjustment will be possible.

It is understandable that with all the above being offered, given the specificity of the current environment in the FSU region, including the reluctance to conduct the reforms and the high reliance on SOEs, as discussed in Chapters 2 and 3, it may be not quite easy to move to large scale reforms for implementing the above solutions and to amend or to prepare new fundamental laws revolving around new policy objectives. In connection with this, as was suggested throughout the research, some gradualism may probably be the most realistic option. If this approach is taken, as was noted in Chapter 5, it seems that first, specific reform strategies should be elaborated for developing both competition and paternalistic policies in a way that would ease the tension. Such strategies should lay out the current state of things, identify real goals and approaches of the respective polices, and present a step-by-step programme for implementing the suggested reforms. It was proposed that simpler and more straightforward measures are implemented first with more complex and fundamental measures being left for the end. The general scope of the measures seems to be the same for all the studied FSU states, but, as was discussed, the initial focus of the reforming may have to be slightly different. In brief, in Russia, competition policies should start to be applied at a greater scale, being integrated in all economic policies and the operation of all economic regulators – in this context, enhancement of interaction between the competition authorities and state regulators come to the forefront. In Ukraine, more attention should probably be paid to strengthening all regulators (partially, through enhancement of their control powers) and their holistic cooperation with some common competition-friendly agenda being set forth. For Uzbekistan, almost all the offered measures look equally important, but, if to make a choice, as appears, the initial focus should be on SOEs – they should become less connected with the state (to the extent possible) and, thus, become valid subject for economic regulation, including the competition regulation.

The above-noted matter of the lack of sufficient willingness of the FSU governments as well as public in general to engage in serious reforms, as was discussed in Chapter 2 and explored at

the end of Chapter 5, represents the subtlest, but one of the most significant challenges in resolving the studied conflict. In the context of such unwillingness, effective implementation of both fundamental and adjustment reforms is unlikely unless there is sufficient pressure and some internal dynamics in each relevant FSU state and, thus, hard advocacy work is needed. The appearance of the advocacy pressure is, in turn, likely to be a corollary of a staged transition process, wherein constant education of both state officials and the public at large leads to that more market-oriented professionals appear with a new vision, who eventually take positions of decision-makers. Such educational work should be spearheaded by the competition authorities and those who truly believe in competitive markets (for example, associations of competition policy experts and of some categories of private businesses or consumers). As was analysed in Chapter 5, it is where soft external support – primarily, from international development institutions such as the WTO, the ADB, the EBRD, or the IMF – and cooperation within intra-FSU integration institutions - may also render some help, albeit internal dynamics still seems to be of greater significance.

In some conclusion of all the above findings, it should be probably be said that though these findings are unlikely to cause a revolutionary shift in the economic transition theory, they provide a very specific legal perspective on problems of the transition and the absence of competitive markets in the FSU states. As was noted in the Introductory Chapter, there seems to be notable lack of local literature (legal and other) that would have assessed how paternalistic tools and, particularly, the reliance on the state sector, undermine competitive processes within the region, albeit the problem is likely to 'be in the air'. This legal research fills in the existing gap by bringing together the totality of relevant factors of a historical, political, economic, and legal nature to derive and to summarise possible legal solutions. Given a multi-layered structure of the considered problem, the provided solutions are of a different legal nature (with competition law being in the centre and with corporate, administrative, investment, public procurement, price controls, and some other spheres of law being also looked into to varying degrees), which, as hoped will help policy-makers and practitioners to build up a holistic policy approach. To some extent, the described findings and offered solutions are similar to the findings of researchers and research institutions that have been working on matters related to the problem (e.g. competitive neutrality, corporate governance in SOEs, etc.) in the global context, primarily, the OECD. However, they are much more region and subject-specific.

With all the above said, it should probably be noted that, as was mentioned throughout the thesis, there are a number of relatively large areas related to the research subject, where additional research would be necessary to make some of the solutions offered in this thesis

more tailored. Some of the relevant areas include price controls; competitiveness and transparency in public procurement; the creation and empowerment of economic courts and improvement of legal proceeds against state institutions; a reform of region's state governance systems for achieving clearer separation of functions between different state institutions; ways to ensure greater institutional independence of regulators; and the restructuring of natural monopolies. Ideally, sector-by-sector studies are also needed to identify specific flaws of industrial regulation, affecting the competitive environment in particular industries and availing the state sector to derive anticompetitive benefits. In this regard and generally, timely implementation of some of the solutions suggested in this research e.g. the introduction of a comprehensive competitive neutrality regime is likely to be a useful inducive step, since it will inevitably bring to the light those aspects that require focused analysis.

It should probably also be reiterated here that the conflict between the policy of reliance on SOEs and competition policies within the FSU is only a part of a complex tangle of issues related to the transition from the central planning to a market economy. In this regard, there is much more space for other research able to indirectly benefit the resolution of the studied conflict. Relevant studies may, among other things, cover particular matters of corporate law (e.g. the independence of companies from their shareholders, their transparency, the protection of minority shareholders); improvement of the legal regime for protecting foreign investors; land and real estate legislation; the independence of the judiciary and procedures for judicial review; the parliamentary control; ways to resolve acute social problems, including employment crises or emergencies by measures other than the use of SOEs; etc. Studies of a comparative nature may be especially useful in this regard.

An important issue also mentioned throughout the research is the substantial lack of empirical data relevant to the studied conflict (including data on the state sector, privileges and financing available to SOEs, detected competition policy infringements committed by SOEs, etc.); these data may have helped to more precisely assess the scale of the problem and to more precisely prioritise the suggested solutions. In light of this, though, as was suggested above, the primary responsibility to collect the relevant data rests with the state, an input of independent researchers and research institutions would have been very helpful. Some attempts to collect data on the quantity of SOEs and their role in the economies of the FSU states have been made over the recent years, as referred to in Sections 2.3 and 3.3.1, but the noted transparency problems contribute to that much place remains for conducting additional, more comprehensive and in-depth studies. Besides for the named data, it also seems useful if more data is collected from private businesses on how SOEs create obstacles to their activities (for

example, through conducting interviews with CEOs[583]). It is clear that oftentimes, private businesses may not rationally and comprehensively assess the relevant impact, but this information is still likely to provide a much-needed insight on how to structure and prioritise the relevant prevention and response measures.

[583] As that was tried to be done by Adizes Institute in Russia (Feinberg and Kopalkina (n 224)) and PricewaterhouseCoopers in an number of countries around the worlds (PWC (n 230)), as was provided above, but in a much more focused way and much more comprehensively.

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