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## **Public Capital and Private Capital in the internal market. Securing a level playing field for public and private enterprises**

### *I. Introduction*

The main theme of the third topic for FIDE 2010 is that of avoiding distortions of competition which may result from the use of public capital rather than private capital. Such distortions may also be the result from the variations in Member States' definitions of public interests and in the instruments used to achieve public interest goals.

All Member States of the EU define what they consider to be public interests. Such interests identify goods and services that are deemed to be so vital that their provision has to be secured by the government. The provision of such goods and services constitutes a fundamental goal of government policies and legislation. In some Member States such goals are found in the constitution. In other Member States such goals are found in legislation and/or basic policy documents. Governments have created a wide range of instruments to secure the provision of public goods and services as well as the conditions under which this should take place. The intensity, that is to say the degree of intervention in the market mechanism, of these instruments varies. On the one hand, governments may feel that certain activities can be sufficiently controlled by regulation, for example concerning product safety. The example of the pharmaceutical sector comes to mind. On the other hand, governments may take the view that the provision of certain goods and services cannot be left to the market. They will then, in one way or another, participate actively in their provision. Again there is a wide range of instruments that governments have at their disposal to do so. These instruments can be classified according to their degree of control exercised by the government. Some goods and services are not provided by market activities at all. Such activities are provided by the government and not by undertakings. Other goods and services are provided through the market mechanism albeit that the degree of government control may vary considerably. Government involvement can be seen as a continuum of control. At one end of the continuum where control is at its maximum, goods and services are not provided by undertakings at all. Next would come the provision of goods and services by undertakings which are 100% owned by the government, followed by such provision by undertakings in which the government holds a controlling share. A minority government shareholding would move further in the direction of a lower degree of control. Governments may also seek to achieve their policy objectives by defining services of general economic interest and/or

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granting exclusive or special rights. At the other end of the continuum, goods and services are provided by undertakings in which governments are not involved.

For the purpose of our topic, it is important to note first of all that Member States do not necessarily all share the same public interests, even though most of them follow the social market model. Secondly, the differences are even more noticeable as regards instruments used. Public interests are not necessarily effected with the same instruments in each Member State. Thus, for example, in some Member States the production and distribution of electricity is in the hands of publicly owned companies, while in other Member States it is in the hands of private companies. The result of this is that within the Community the conditions of competition may be distorted. The following questionnaire has been designed with the above basic features in mind. Understanding these features will serve as guidance for answering the individual questions. Further, it may be useful to draw the attention of the rapporteurs to the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises.<sup>2</sup> These Guidelines are important for the theme of our topic.

Finally, it may be useful to note that although the present financial and economic crisis may lead to some reshuffling of public and private capital, the topic of financial regulation and supervision is not addressed in this questionnaire. Financial regulation and supervision is designed to foster financial stability and to protect consumers of financial services.<sup>3</sup> Nevertheless, there may well be an effect on the cleavage between public and private capital. Should the rapporteurs be of the opinion that this regulation has an impact please comment under section III.D. Miscellaneous, below.

## *II. The Community instruments designed to secure a level playing field*

This section has a twofold purpose. First, it is addressed to the Community law rapporteur. Second, it is intended to provide guidance to the national rapporteurs.

Community law has two main instruments designed to secure a level playing field between public and private capital.

The first is the rules on the freedoms of the internal market and in particular the free movement of capital. As developed in the case law of the ECJ, the basic prohibitions have led to the elimination of many restrictions including those that favour public over private capital. This is exemplified by the case law on the golden

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<sup>2</sup> ISBN 92-64-00942-6 also available at the OECD website [www.oecd.org/daf/corporate-affairs/soe](http://www.oecd.org/daf/corporate-affairs/soe)

<sup>3</sup> See the report of the High-Level Group on Financial Supervision in the EU, (Chaired by Jacques De Larosiere) Brussels, 25 February 2009

shares.<sup>4</sup> **Q 1.** Has the case law of the ECJ on free movement secured a level playing field for public and private capital?

Art. 295 EC has not had much of an impact notwithstanding the eloquent opinion of Advocate General Ruiz-Jarabo Colomer in the *Golden share* cases.<sup>5</sup> The main reason may be found in the recognition of the mandatory requirements as an exception to the prohibition of restrictions on free movement. This case law of the ECJ seems to have given Member States the leeway to pursue genuine public policy interests without the need to have recourse to Art. 295. **Q 2.** Do you agree? Please comment and provide your views.

The rules on the internal market also include harmonization of legislation. In the area of company law, successive directives on harmonization of national company law rules have an impact on our topic. **Q 3.** Please give an overview of the relevant areas of European Company law. **Q 4.** Have the directives created a level playing field between public and private capital? **Q 5.** To what extent are the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises taken into account?

The other main instrument is competition policy. These rules are found in the competition rules proper, Article 81 and 82 EC, as well as the state aid rules, Article 87 and 88 EC. The key concept for present purposes is the concept of an undertaking. It is a kind of continental divide between the public domain and market activities. By the case law of the ECJ, it is for Member States to define which activities are in the domain of the public sector and which are not. This is very well illustrated by the regulation of health care services in different member states. In the AOK judgment the ECJ held that the health insurance bodies (*Krankenkassen*) in Germany are not undertakings.<sup>6</sup> In the Netherlands, they are undertakings because the law says so.<sup>7</sup> However, the case law also shows that the ECJ does verify whether Member States are genuine about their definition of what constitutes the public sector and the way they implement such policy. Thus in the Hofner judgment it ruled that the official German employment agency was an undertaking.<sup>8</sup>

Even if it is decided that certain activities are to be carried out by undertakings, governments may still want a specific regime for them. Such a regime is provided for in Article 86 EC and by the concept of services of general economic interest. It is generally accepted that the definition of these services is the prerogative of the

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<sup>4</sup> Case C-367/98, *Commission v. Portugal*, [2002] ECR I-4731; case C-483/99, *Commission v. France* [2002] ECR I-4781; case C-503/99, *Commission v. Belgium*, [2002] ECR I-4809; case C-463/00 *Commission v. Spain* [2003] ECR I-4581; case C-98/01 *Commission v. United Kingdom* [2003] ECR I-4641; Joined cases C-282 & 283/04, *Commission v. the Netherlands*, [2006] ECR I-9141.

<sup>5</sup> See Case C-367/98, *Commission v. Portugal*, [2002] ECR I-4731; case C-483/99, *Commission v. France* [2002] ECR I-4781; case C-503/99, *Commission v. Belgium*, [2002] ECR I-4809.

<sup>6</sup> Cases C-264, 306, 354 and 355/01, *AOK Bundesverband and others* [2004] ECR I-2493

<sup>7</sup> Art. 122 of the *Zorgverzekeringswet*, (health insurance law)

<sup>8</sup> C-41/90, *Hofner v. Macrotron* [1991] ECR I-1979

Member States. It is helpful to make a clear distinction between two concepts. Services of general interest are performed by entities that are not undertakings i.e. not active on the market. Services of general economic interest are performed by undertakings. In this context Protocol No. 9 to the Lisbon Treaty on services of general interest is also relevant. **Q 6.** Please comment and provide your views.

Some authors have argued that Article 81 (3) EC should be interpreted so as to allow exceptions for the protection of public interests, most notably the protection of the environment. **Q 7.** Please comment.

Article 21(4) of the merger control regulation 139/2004 allows member states to protect their legitimate interests other than competition policy objectives. **Q 8.** How has this article been applied? **Q 9.** What has the reaction of the member states been to the Commission's practice in applying this provision?

In State aid law the concepts of State resources (*Stardust Marine*<sup>9</sup>) and the market economy investor principle (meip), as well as the concept of services of general economic interest, address the delineation between public and private capital. **Q 10.** Describe the essentials of these concepts and indicate whether in your view these concepts provide a satisfactory solution to possible distortions.

A clear articulation of these principles has been given by the Commission in the recent guidelines for the banking sector in "The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis"<sup>10</sup> ("the Banking Communication"). On 5th December it adopted a fresh communication: "The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition."<sup>11</sup> **Q 11.** Has the application of these guidelines been successful to address the distortions of competition resulting from the massive aid operations and the accompanying measures?

Please take into account that the positive Commission decisions all have to be reviewed after six months in particular to verify whether the conditions attached to these decisions have been observed. **Q 12.** Describe the main elements of the "second generation" of Commission decisions. Do these decisions give rise to comments?

### III. National law

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<sup>9</sup> C-482/99, *French Republic v. Commission of the European Communities*, (*Stardust marine*) [2002] ECR I-4397

<sup>10</sup> OJ 2008, C 270/8

<sup>11</sup> COM(2008) 8259 final. On the 25<sup>th</sup> of February 2009 the Commission published a fresh Communication on the treatment of impaired assets in the Community Banking Sector, see the website of DG Comp

This section is primarily addressed to the national rapporteurs, though the community rapporteur is also invited to provide comments.

### III. A. Constitutional law or other fundamental/framework laws

At Member State level, it is, first of all, interesting to ask the question whether there are rules that require that certain activities to be performed by the State and/or to remain in the public sector. The Constitutions of some Member States contain such rules.

**Q 13.** Please state whether the Constitution of your Member State contains rules that require certain goods or services to be provided by the government. **Q 14.** Are there special laws that lay down similar requirements? The term special laws refers to laws that have a special hierarchical nature in the sense that they have priority over ordinary laws. **Q 15.** Does the Constitution of your Member State contain guarantees that certain activities are reserved for the private sector?

**Q 16.** Are there any rules that prohibit nationalizing undertakings or certain sectors of the economy? **Q 17.** Are there rules that subject nationalizing to procedures or specific rules? **Q 18.** Are there, in the absence of such rules, other procedures or mechanisms that have to be followed for the nationalization of undertakings? **Q 19.** Are there rules for the acquisition or sale of shares of enterprises by the government? **Q 20.** Are these rules different depending on whether the acquisition leads to control or not? And do different rules apply to a sale leading to a loss of control? **Q 21.** Are contracts concluded by state-owned enterprises subject to normal civil law? Please specify. **Q 22.** Is there a rule or practice that one ministry is responsible for enterprises that are controlled by the government or are there different ministries responsible according to their sectoral responsibilities? **Q 23.** Are there rules that restrict the possibilities for other governmental bodies, states, provinces, municipalities etc. to participate in the capital of private enterprises?

**Q 24.** Is there any indication that the exceptions provided for under the mandatory requirements have been perceived as insufficient to protect public interests? **Q 25.** Has there been any discussion about the need to have recourse to Art. 295 EC for the protection of national public interests?

### III.B. Company law

The rules of company law of a Member State can be seen as the basic charter for private business, outlining the rules of the game for the market sector. The rules may contain specific features that impact on the distinction between private and public capital. The following questions are designed to draw out such features.

**Q 26.** What was the reaction to the ECJ judgments in the *Golden Share* cases in your Member State? Have there been measures taken to amend legislation?

As is well-known, the rules on the internal market also include harmonization of legislation. In the area of company law, directives on harmonization of national

company law rules have had a major effect. **Q 27.** Have there been any specific characteristics of the company laws of your Member State that were deemed to be imperiled by the EC company law directives? E.g. the German system of co-determination (*Mitbestimmung*).

**Q 28.** Do the national company rules provide guarantees that secure a level playing field when the government pursues its objectives by way of undertakings which it controls wholly or partially? Please note that such guarantees may (also) be found in specific regulation as referred to above in section III.A Q 16-20. **Q 29.** Are there rules that allow or oblige the government to make use of a special form of company if it wants to pursue public interests? **Q 30.** Are there rules blocking unfriendly take-overs? Discuss the attitude of your Member State towards the take-over directive (Directive 2004/25, the "Volkswagen directive").

**Q 31.** To what extent are the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises taken into account?

**Q 32.** Are there any special features in your Member State's legislation that may be relevant for our topic?

### III.C. Competition law

#### Article 81, 82 and 86 EC

As was noted above, it is for the Member States to define which activities are in the domain of the public sector and which are not. **Q 33.** Has there been a debate about whether the provision of certain goods or services should be undertaken by the government or by the private sector? Please specify whether and to what extent such a debate has taken place on a general level or on a specific level, i.e in the context of sector specific regulation? To the extent that there is no general legislative framework for answering such fundamental questions, there may be specific laws or policy documents. **Q 34.** Please identify such laws and/or policy documents.

**Q 35.** For the new member states, it would be interesting to describe how the reform process of the economy whereby large sectors of the economy were privatized has taken place.

Even if it is decided that certain activities are to be carried out by undertakings, governments may still want a specific regime for them. **Q 36.** Has there been any discussion of the question whether certain services should be guaranteed by identifying them as services of general economic interest? What are the questions that were discussed? **Q 37.** Has the implementation of the Services Directive 2006/123 led to a debate about services of general economic interest? **Q 38.** Has the introduction of Article 16 EC with the Treaty of Amsterdam given rise to a debate about the function of services of general economic interest and/or services of general interest?

**Q 39.** Has the equivalent of Article 81 (3) EC in your national competition law been interpreted so as to allow exceptions for the protection of public interest? And has this led to a situation whereby public enterprises have been favoured over private enterprises?<sup>12</sup>

Another area of competition law where member states governments may intervene in a way that may be relevant for our topic is merger control.

**Q 40.** Do the merger control rules in your member state provide for special authorization of mergers when public interests are deemed to be at stake? **Q 41.** Have such powers been used? Give a brief overview of the cases. **Q 42.** Have these decisions been appealed to courts? What was the outcome of these appeals?

#### State aid

**Q 43.** Does your Member State have national rules on the granting of state aid? Are there any procedural rules on the granting of state aid?

**Q 44.** Has the application of the guidelines for state aid to the financial sector mentioned above been successful in addressing the distortions of competition resulting from the massive aid operations and the accompanying measures?

**Q 45.** Discuss the main Commission decisions concerning your member state so far. As these decisions all contain a revision clause that the effects of the aid have to be assessed after six months it is appropriate to describe/analyse the follow up measures. Such analysis should be focused on the main theme of this questionnaire, as set out above.

#### III.D. Miscellaneous

**Q 46.** If you are of the opinion that financial regulation and supervision has an effect on the cleavage between public and private capital in your Member State please provide your views. **Q 47.** Is there a risk that the measures taken to address the financial crisis including the nationalization of some banks, will lead to less stringent financial supervision?

**Q 48** Are there any other areas of the law that are designed to secure a level playing field between public and private capital?

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<sup>12</sup> In Case C-203/96, *Dusseldorp*, [1998] ECR I-4075 and Case C-209/98, *Entreprenorforeningens Affald v. Copenhagen*, [2000] ECR I-3743, the questions were raised under the heading of Art. 90(2) but one could have imagined a discussion under Art. 81 (3) if the government had invited enterprises to conclude agreements with similar purposes.