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COMPETITION COMMITTEE

ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Norway --

16-18 June 2015

This document reproduces a written contribution from Norway submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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NORWAY

1. Introduction

1. Publicly owned firms compete with private in many areas. When they do, we have an intuitive sense that a framework that does not distort or restrict competition between public and private firms is an important principle - the same way that watching a football game where the judge is biased, or where one team has to play barefoot, will result in a bad aftertaste. Or even worse; the team in disadvantage exits the match before it is finished, or will not want even to play at all. Thus, competitive neutrality is important, and about creating a level playing field between the different actors in a specific market.

2. The issue normally arises in relation to competition between private and state owned enterprises.[1] Economic theory depicts several good reasons for state ownership, first and foremost market failure. In addition, it can be a more effective (less distortive) way to obtain public funds than taxes; it can be an important governance tool to achieve eg. sectoral policy goals; and in some markets, one more market player can be crucial for competition.

3. However, in the markets where public firms are present, the terms of the competition can be influenced by local or state governments in several ways. It can occur directly with the public firm acting as a market participant selling goods and services under more favorable terms than their private competitors; when the public authority buys goods or services (setting the terms for public procurement or choice of in-house provision); or indirectly through the exercise of authority; the design of regulations, taxes, subsidies or other forms of influence or exercise of authority.

4. The competition authorities have an important role in this framework, although the tools at hand are somewhat lacking. In Norway, the Competition Authority (NCA hereafter) can basically only point out its concerns. A stronger tool is the prohibition regulations against abuse of dominance. However, in most cases the legal prohibition against abuse of dominance does not apply or the hurdle to use the tool is too high. In addition, fighting eventual abuse of dominance is fighting the consequences, not the cause of the problem. Thus, the tools at hand are weak, not suitable or even lacking; or directed towards symptoms, not causes. This is a problem given the potential loss in value creation, productivity and growth a lack of neutrality may imply.

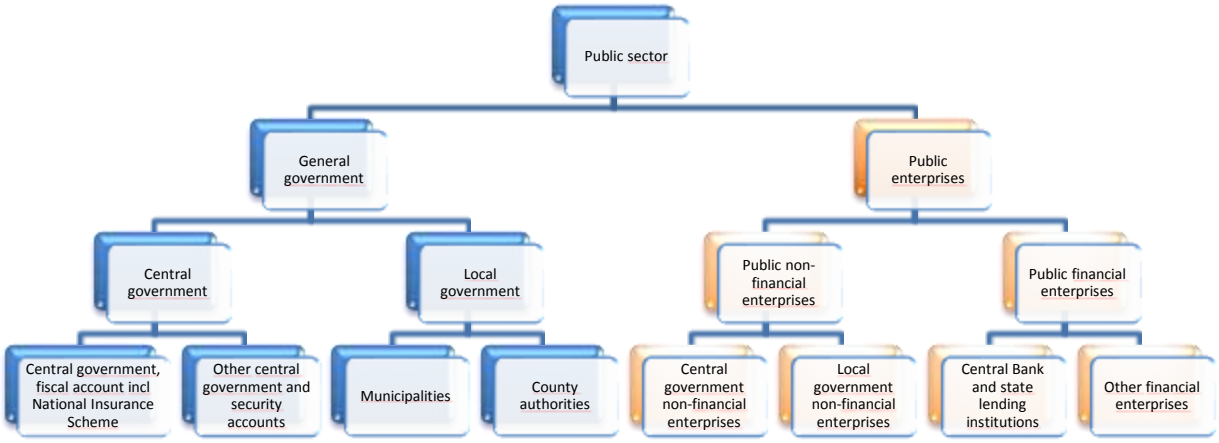
5. This contribution to the Roundtable on "Competitive Neutrality in Competition Enforcement" will first explore the extent to which the Norwegian publicly owned firms operate in the market, causes for distortions and suggested remedies, to assess the potential size of the problem, before discussing the tools the NCA has at hand.

2. Competitive neutrality and the role of the State in the market

6. The state and the municipalities are significant owners in the Norwegian economy. The public sector structure, and the public enterprises, in Norway can be presented as depicted in Figure 1 below.

[1] In the context of the discussion in this submission, state ownership will refer to state ownership or control of an enterprise at any level; national, regional or local (municipal). State and public ownership will be used interchangeably.

Figure 1. Public sector in Norway (based on Statistics Norway)



7. The public sector in Norway can be divided into two sub-sectors: general government and public corporations. General government can be divided categorized into central and local authorities. Both central and local authorities encompass different non-commercial units that carry out a range of public tasks, for instance public hospitals, retirement homes and schools.

8. Public corporations are involved in commercial activities. A corporation is designated as *public* when it is controlled by the general government. Control means in this context that the public sector owns more than 50 per cent of the corporation. Examples of public corporations include municipal enterprises such as waterworks and refuse collection as well as companies quoted on the stock exchange, provided the central or local government owns more than half of the shares.

9. Public corporations can again be categorized into commercial and financial corporations. The commercial corporations include large enterprises such as Statoil ASA (oil and gas), Telenor ASA (telecommunications), Statkraft SF (power production) and as well as Vinmonopolet AS (The Norwegian Wine Monopoly). However, the majority of the non-financial corporations are municipal enterprises engaged in transport, property management, waste management and electricity and water supply.

10. Financial corporations include Norges Bank (Norway's central bank), and public lending institutions such as the Norwegian State Housing Bank and the Norwegian State Educational Loan Fund. In addition, central and local government own and control several pension funds, life insurance companies, general insurance companies and other financial companies, e.g. Norwegian Government Pension Fund – Global.

11. State ownership has taken a number of forms, ranging from portfolio investments or capital investments to direct ownership or full or partial ownership. Ownership varies from significant holdings in large OBX-listed corporations to small fully-owned enterprises.

2.1 Affected sectors

12. The Norwegian state and local government is today owners of substantial economic assets. All together the State's direct ownership encompassed 68 companies in 2013.[2] The State's direct ownership in the companies is managed by different ministries, and the Ministry of Trade, Industry and Fisheries has a coordinating and advisory role. When it comes to shareholder structure at Oslo Stock Exchange (OBX), the government and the municipalities own 35.1 per cent the market value in

[2] State Ownership Report 2013.

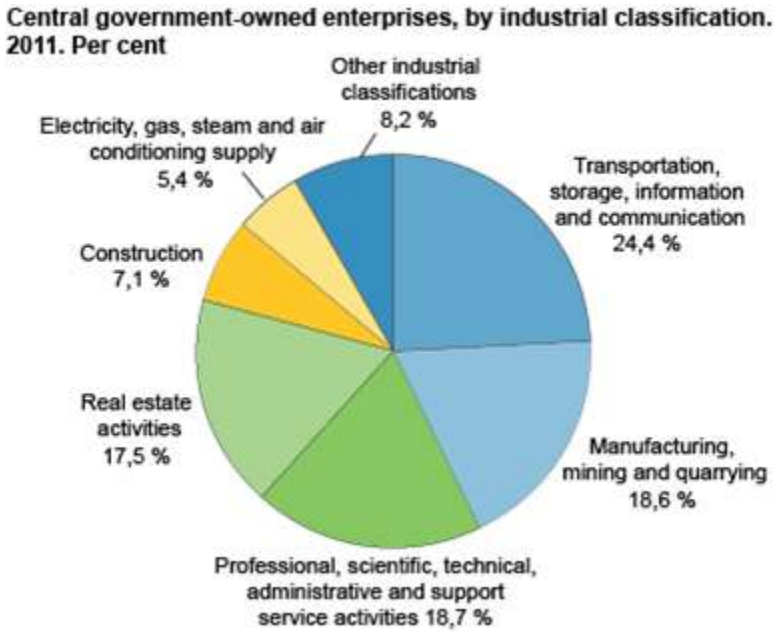
2014. In addition, comes companies owned by the municipalities and companies. Companies owned by local government are typically not registered at the stock exchange.

13. These figures clearly show that the Norwegian public sector is a major owner in Norway. Thus, the publicly owned companies manage large amounts of economic potential on behalf of the population, making these companies important operators in the economy.

14. Regarding the industrial classification structure of public ownership, Statistics Norway in 2012 presented some statistics on public ownership, using the same classification as in Figure 1 above.[3] The statistics comprise publicly-owned non-financial enterprises.[4] The statistics also cover municipal and county authority companies, inter-municipal companies and companies incorporated by the local government Act. One or more local governments wholly own these business entities. Inter municipal companies belong in the municipality where the head office is located

15. According to the statistics, there were approximately 3200 public non-financial firms in Norway by the end of 2011. About 2500, or 78 per cent, were owned by the municipalities, the rest (761) was owned by the state.

Figure 2. Central government ownership, by industrial classification



Source: Statistics Norway

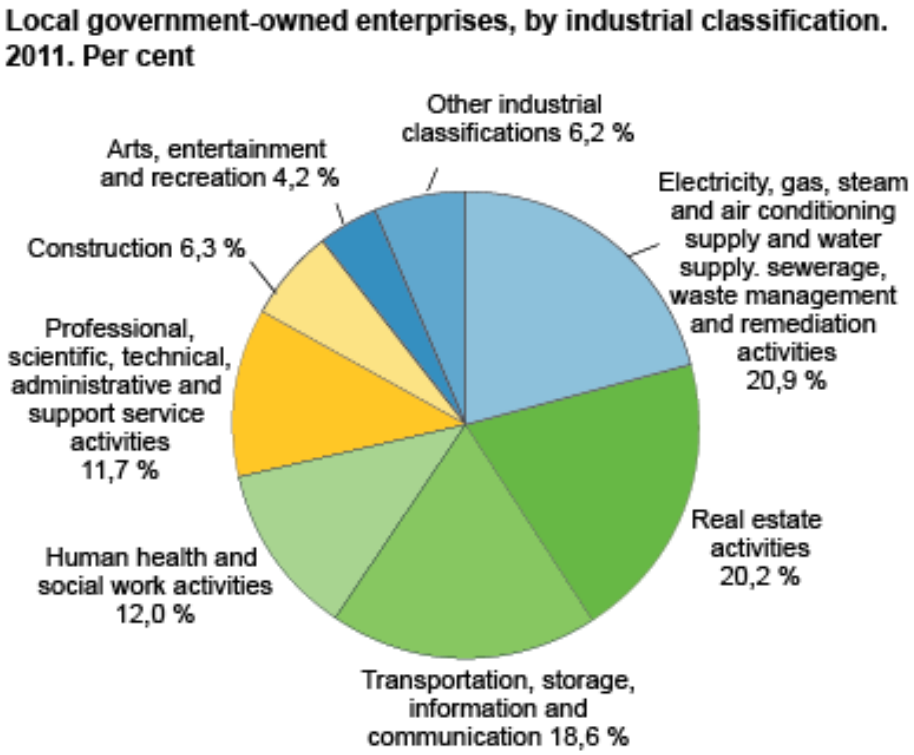
16. The major areas for state ownership through government-owned enterprises were transportation, storage, information and communication (24.4 per cent), professional, scientific and technical activities (18.7 per cent), manufacturing, mining and quarrying (18.6 per cent) and real estates activities (17.5 per cent).

17. The industrial classification areas for the local government-owned enterprises are shown in the figure below:

3 See https://www.ssb.no/en/offentlig-sektor/statistikker/stoff/aar/2012-03-19

4 An enterprise is defined as publicly owned if the majority shareholder in the enterprise directly or indirectly belongs to the central government or the local government. A local government enterprise can be owned by a municipality or by a county authority.

Figure 3. Local government ownership, by industrial classification



Source: Statistics Norway

18. Regarding local government-owned enterprises, we note that this encompass a wide range of activities. However, the major industrial classification areas for the local government-owned enterprises were real estate activities (20.2 per cent), electricity, gas, steam and air conditioning supply (16.4 per cent) and human health and social work activities (12.0 per cent).

2.2 Drivers for public ownership

19. We cannot say that one single strategy has driven the relatively high degree of Norwegian state or municipal ownership involvement. The ownership structure of companies in Norway can be attributed to a variety of factors rather than to one coordinated overall strategy. In some cases, public ownership has evolved as a result of chance events, or of assessments made and decisions taken during particular historical eras.

20. A common feature of public ownership, however, is the desire to safeguard various social and political interests (sectoral policy concerns).

21. Norwegian public ownership, both at the state and municipal level, has for example evolved out of a wish to control the use of natural resources at the national level and the need to develop infrastructure and related services linked to the development of the welfare state in a country with sparse population patterns and a challenging topography.

22. Today, the arguments used for state ownership in Norway can broadly be defined into four categories:

- *Sector policy concerns.* Ownership can be seen as an important means of attaining specific sectoral policy goals. For example, the state monopoly in the sale of wines and spirits is used to restrict and control availability of alcohol. Regulation of the provision of public services through ownership has also been an important argument for state ownership of

infrastructure based companies such as Statnett (the national electricity transport grid). In the municipalities, public ownership in some areas developed due to a lack of private capital, cinemas being one notable example. In others', public ownership in enterprises was a natural development stemming from important statutory municipal tasks in eg. waste management, or public infrastructure and transport at the local level.

- *Norwegian ownership in strategic sectors.* Maintaining Norwegian ownership in strategic sectors such as in the petroleum sector and the energy sector has been considered important for overall business activity.
- *Natural resources.* There is still a broad consensus on the need to maintain political control over the utilization and extraction of natural resources.
- *Head office location.* State ownership ensures that companies establish their head office in Norway, ensuring employment of key personnel and taxable earnings in the country.

2.3 Legal entity

23. Regarding the *legal entity* that undertakes commercial activities on behalf of an owner at the state or municipal level, partially owned public companies are usually organized according to the Private Limited Companies Act (ASA/AS). A few fully owned state companies are designated state enterprises (Statsforetak – SF) and subject to the State Enterprise Act (Lov om statsforetak). In addition, it can be mentioned that there are some "special law companies", i.e. state-owned enterprises established according to special act.

24. SFs are wholly owned by the state, but the state does not hold limited liability in the company. Even though state-owned enterprises are subject to a different law, their management is carried out in accordance with the Private Limited Companies Act, with a clear division of roles between the owners, management, and board of directors, and in accordance with the currently held principles of corporate governance. It is important to note that public companies can be declared bankrupt or enter into composition proceedings.

25. At the municipal level, the corresponding terms are Municipal enterprises (Kommunalt foretak – KF), and County enterprises (Fylkeskommunal foretak – FKF) at the county level. KF- and FKF's does not imply limits in economic responsibility the same ways as private limited companies.

26. At the state level, the government is in general concerned with exercising beneficial corporate governance, including organizing state-ownership such that the State’s different roles are kept clearly separate and that there is transparency with respect to the administration of state-ownership. At the municipal level, the experiences of the NCA indicate a rather mixed picture in this regard.

3. Competitive neutrality

27. We have for many years witnessed a development with blurring of sectors, i.e. indistinct boundaries between the private, public, and non-profit sectors of national economies. This obliteration of boundaries has taken many forms and patterns, where hybrid forms of organizations, such as general or local government owned enterprises, government corporations and heavily regulated business firms can be placed in a continuum where government agencies is at the one extreme and full private ownership enterprises are at the other.

28. In the last thirty years we have also witnessed a shift in the approach to public sector management in many countries, and Norway is no exception. One aspect of this development has been the increasing use of market mechanisms to increase public sector efficiency, from benchmarking to exposing previously sheltered public sector activities to competition by establishing new entities competing in tenders with private companies.

29. In many cases the aim for public ownership has changed over time as well, with companies in several sectors undergoing reorganization and adaptation to market competition. The interests of society at large are increasingly safeguarded through the exercise of governmental authority (licenses, public procurements, taxes, etc.).

30. This allows publicly owned companies to compete on ordinary terms.[5] However, when public firms *do* enter the market to compete, this must be based on the principle of competition neutrality. Competitive neutrality imply that public and private firms compete on equal terms. It works both ways: Public firms should neither have an advantage - nor a disadvange - in the competition with private firms, ie. when discussing competitive neutrality related to general or local government enterprises, we most often are concerned with structural and statutory *advantages* enjoyed by public undertakings. However, it should be mentioned that that the principle is just as important and applicable to any disadvantages suffered by government enterprises.

31. Thus, competitive neutrality involves a commitment to establish a level playing field between public, private and voluntary providers of goods and services in existing markets. A lack of neutrality undermines the whole rationale for efficient competition. Thus, to seek the achievement of this principle is important for utilizing scarce resources efficiently, and create a better foundation for efficient utilization of society's resources, economic growth and increased welfare. A competitive neutral framework will also help to promote the legitimacy of the government as a neutral regulator for commercial publicly owned entities.

32. It is a principle that has broad international support. In practice, however, it is a significant challenge to lay the foundations for competition on equal terms.

3.1 Potentially distortive measures

33. There are many possible sources of distortion of competition and affecting players' opportunities, incentives or ability to compete, ia.:

- Advantages and disadvantages that arise from their governance and regulatory arrangements. This includes inter alia regulation, taxation and the cost of capital.
- Legal or practical exemption from competition law
- Subsidies from government to fund public service obligations, if used to cross-subsidize commercial activities
- Advantages from lax public procurement rules, where public sector providers are allowed to set prices below full cost
- Power to collect data for public purposes, where the public sector entity can use that data on terms more favorable than those available to the private sector.

34. Cross-subsidization is a problem that can easily occur when a public body on the one hand safeguards the public monopoly tasks through a universal service, and which are funded by other taxes or through separate fees, and another part of the company compete in a market. It is obvious that competition distortions easily occur in such situations. If there is no full separation between monopoly and competition exposed part of the business, it is tempting to facilitate an economic advantage relative to competing private providers.

[5] In some cases the State still uses its ownership to achieve sectoral policy objectives. Examples of this are state control of the National Health Service through the Regional Health Authorities; and the active use of land managed by Statskog SF to achieve social objectives related to conservation or other publicly beneficial purposes.

35. Regarding cost of capital, the opening balance for publicly owned enterprises will affect their fundamental cost structure and the prices they can operate with in the market. If assets are underestimated in the opening balance, or if required return on equity or debt costs are lower than those for the private sector, the publicly owned undertaking will have gained an advantage over its rivals in the private sector. In other words, it is important to determine values in the balance sheet at market prices. In practice, however, it is difficult to assess whether this is actually being done.

36. Other sources of distortion may be that the public entity has a unique position as a supplier to the public sector or in relation to access to public infrastructure.

37. Furthermore, the regulations can be designed in such a way that a public service is favored. Last, but not least comes differences in the risk of bankruptcy, which will give publicly owned firms a competitive advantage. Various forms of state aid can also distort competition; although not necessarily favoring only public firms.

38. Ten years ago, the NCA commissioned a report to discuss these and related issues. The report "*On equal terms? An analysis of competition between public and private enterprises*" (only available in Norwegian), was published in 2005. Some of the main recommendations in the report are that:

- Accounting systems should causally attribute costs to the activities generating the costs.
- Public entities should only be allowed to enter competitive markets as long as there are clear and documented synergies between the competition exposed activity and the core activity, and these benefits accrue to the core activity.
- Revenues from the competition exposed activity must more than cover fully distributed costs. Prices must reflect these costs.
- Competitive branches of public companies should be separated into separate legal entities which are managerially, personnel and physically separated from the core activity.

Even though a blanket prohibition of public firm entry to a specific market is too restrictive, it is argued in the report that public companies should document substantial economies of scale/scope from diversifying as a prerequisite to enter markets. Moreover, if substantial economies are present, synergies should benefit the core undertaking.

4. Rules and tools to address competitive neutrality distortions

39. The current Competition Act entered into force on 1 May 2004. The purpose of the Act is to "further competition and thereby contribute to the efficient utilization of society's resources". When applying the Act, special consideration shall be given to the interests of consumers. The Competition Act is to a large extent harmonized with EU competition rules and includes prohibitions against cartels, abuse of dominance as well as leniency.

40. Under the Competition Act, an undertaking means any private or public entity that carries out commercial activities. Thus, the Norwegian Competition Act applies fully to public corporations and state owned enterprises in the same way as to private corporations to the extent they are involved in commercial activities.

41. Terms of business, agreements and actions that are undertaken, have effect, or are liable to have an effect on competition between undertakings, are covered by the law; be it a private or a public undertaking. Thus, mergers, abuse of dominance or illegal cooperation will not be treated differently if it involves public undertakings.

42. A revision of the Competition Act entered into force from 1 January 2014. The aim of the changes was to simplify the legislation and to further harmonize it with the laws of the EU, and to have more effective enforcement.[6] However, none of the changes have an effect on the substantive enforcement 'tools' vis-à-vis public enterprises.

4.1 Rules and tools and challenges

43. According to Norwegian Competition Act, the Competition Authority shall supervise competition in the various markets (Section 9), among other things by 'calling attention' to restrictive effects on competition of 'public measures' and, where appropriate, submitting proposals aimed at furthering competition and facilitating market access by new competitors. If the Competition Authority so requires, a response from the public body responsible for the measure must be made within the deadline specified by the Competition Authority. The response must include inter alia a discussion of how the competition concerns will be dealt with (Section 9 e).

44. A 'public measure' can be many things. It can eg. relate to various forms of public support to private and public entities, it can be how public authorities have organized their commercial entities and/or exercise their ownership, how public authority is practiced, or it can be various laws and regulations at the state or local level.

45. It is, however, clear from the preparatory works for the current competition legislation, that even though the term 'public measure' is to be understood in the broadest sense, the typical target for the tool 'calling attention to', is exercise of public authority through various forms of laws and regulation, ie. an indirect form of market impact and cause of lack of neutrality.

46. In this context, 'calling attention' seems as a sensible and balanced approach to address lack of neutrality, where the responsible authority, at least ideally, can weigh the competition concerns raised by the NCA against the other considerations underlying the regulation. Moreover, often the political objectives behind a given regulation can be achieved in a less restrictive manner, and the competent authority may consider constructive proposals from the NCA in this respect.

47. The NCA has, for instance, used this tool in some cases where concern related to lack of competition neutrality arising from blurring lines between monopoly activities and those exposed to competition in waste management.

48. A rather typical case is the following: In the wake the report *On Equal Terms* mentioned above, published in 2005, the Authority was contacted by Veolia Miljø AS ('Miljø'=Environment), which incited the Authority to consider the organization of the waste management company of the municipality of Trondheim, ie. Trondheim Renholdsverk AS (TRV) and its implementation of tender processes in the waste sector. TRV has a monopoly handling household waste in the city. TRV was created by TRV to serve customers in the business and rent containers market segments. In other words, Retura competed with private firms in the industrial waste market.Veolia Miljø AS claimed that the competition between Retura TRV and the private companied not occurred on equal terms.

49. Following the input from Veolia Miljø AS, the NCA approached the municipality of Trondheim to obtain more information. This was followed up with a formal letter according to Section 9 e in the Competition Act, where the NCA pointed out its concerns, and the municipality as

6 One of the main changes is the increase in the turnover thresholds for notification of concentrations. Under the revised law, a concentration should be notified if the merging firms have a combined annual turnover in Norway over one billion Norwegian kroner, and each of at least two of the firms has a turnover in Norway over 100 million Norwegian kroner. Moreover, a pre-merger notification system was introduced. The revision also introduced a settlement procedure in antitrust cases, an improved regulation on leniency and stronger safeguards for companies during investigations. The result is a national legislation in closer harmonization with the EU rules.

owner of TRV was asked to make necessary changes in the organization of TRV as well as the organization of tendering processes in the waste sector to ensure healthy and genuine competition on equal terms in the waste market in the Trondheim area. Through decisions in 2009 and 2010, the Trondheim City Council asked the general meeting of TRV to implement changes that would imply a sharper distinction between the various subsidiaries of the TRV Group in terms of management and board composition. In addition, it should be stipulated in the statutes of the household waste subsidiary, that its activities should be financed based on full cost.

50. In the NCA's view, the changes implemented resulted in a clearer distinction between competitive activities and the statutory activities, contributed to more orderly competition and to reduce the risk - and suspicion - of illegal anti-competitive behavior in the competitive markets.

51. The example illustrates that the NCA through its power to 'point out' its concerns according to Section 9 e in the Competition Act in fact can initiate change that contribute to create a level playing field between public and private enterprises operating in the same market.

52. However, the power to 'point out' is admittedly a weak instrument. Balancing the competitive considerations and other political considerations, it is up to the competent agency to undertake and conclude whether or not to implement changes. And the competition considerations may easily not weigh as much as they should - from society's point of view - in that balancing exercise.

53. Public enterprises can get, or keep a special position in the market not only because of laws and regulations, or governmental ownership that is not conscious of the importance of creating clear distinction between politician role and the role of owner, or having an ownership structure that creates a distinction between protected and competition exposed part of the business.

54. Public enterprises will in many cases obtain and uphold a dominant position in a local market which is backed by a core statutory or non-statutory monopoly activity. Thus, distortions can also arise due to the *behavior* of public firms in the market.

55. Initially, it was pointed out that publicly owned enterprises are subject to competition law on a par with private enterprises. Thus, the prohibition provisions of the Competition Act apply in the same way as for private enterprises.

56. Consequently, the prohibition of abuse of dominant position on Section 11 of the Competition Act can be actualized, if this dominant position is abused through price or non-price means.

57. However, an assessment of an abuse of dominant position case triggers a number of difficult questions. Firstly, there must be a *dominant* position. Secondly, it must be demonstrated *an abuse* of the dominant position. Both assessments tends to be quite challenging in general, and even more so in some of the markets where publicly owned firms compete with private. Moreover, an abuse of dominance case will typically also be quite demanding in terms of access to information on costs and cost structure. This information can be particularly challenging when public enterprises are involved.

58. A final point is that in many municipalities, it's just impossible for private firms to enter at all, due to the dominant position and the terms the public firm operates under, or with. Thus, there is no one to file a complaint about abuse.

59. Consequently, the concepts of dominant position and abuse, as these are defined in competition law, are often neither able nor sufficient to capture a public entity's ability to harm actual or potential competition.

60. Yet another tool is Section 14 of the Act, according to which the competition authorities may, if it is considered necessary to promote competition in the markets, intervene by *regulation* against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act. This is primarily a tool that can be used against practices that are not caught by the prohibition restrictions in Section 10 and 11. However, it will rarely be applicable in cases where lack of neutrality is the issue.

61. The final point relates to state aid. State aid is assistance provided by public bodies to entities engaged in economic activities. The most obvious form of state aid is, for example, governments giving grants to businesses to facilitate capital investment, or providing aid to rescue and restructure ailing companies.[7] The default position under the EEA Agreement is that state aid is incompatible with the functioning of the internal market and therefore not allowed.

62. The general prohibition on state aid that applies in Norway and the other Efta countries Iceland, Liechtenstein is enforced by the Efta Surveillance Authority (ESA). In its enforcement of the rules, the ESA has equivalent powers and similar functions to those of the EU Commission. The Efta Surveillance Authority is, like the Commission, independent from the states over which it has jurisdiction, and the framework reflects that of the EU. Plans to grant state aid must be notified to ESA prior to implementation. The Surveillance Authority must then assess whether such a plan constitutes state aid and, if it does, examine whether it is eligible for exemption.

63. State aid can consist of public support measures in numerous forms. Typical examples are regional or industry specific tax exemptions or state guarantees and investments in share capital made by public authorities on terms that would not be acceptable to a private investor.

64. However, ESA's focus will be on 'state aid' being incompatible with the functioning of the *internal market*. Moreover, many forms of 'public aid' may go under the radar of the Surveillance Authority, either because they come in the *de minimis* category or the *General Block Exemption Regulations* (GBER), or simply because the aid is *not notified* or no one *files a complaint*. Yet, the aid might nevertheless have a distortionary impact on local or regional competition.

65. However, there are no formal mechanisms to refer cases which the Surveillance Authority becomes aware of, but which falls under its 'radar' and thus can't be prioritized, to a state aid surveillance authority at the national level. Neither are there any 'surveillance' powers at the national level regarding state aid.

66. The NCA, on its hand, can only point out its concerns - if it ever becomes aware of the specific public aid which potentially distorts competition. It can be noted that some authorities have the powers to assess and address distortions arising from assistance provided by public bodies to private or public entities engaged in economic activities at the more local level.

67. Moreover, the discussion on the state aid issue seems to indicate that a 'division of labor' between national authorities and the supra national level corresponding to what applies to decentralized enforcement of 101 and 102 TFEU within the framework of Council regulation 1/2003 could be discussed - to ensure that aid at all levels of government underpins economic growth - not the opposite.

5. Concluding remarks

68. To conclude, there can be many reasons for a lack of neutrality in the competition between public and private enterprises. It is important to realize, though, that competition neutrality is not normative issue in terms of whether or not the state or the municipalities should own firms operating in a market. Nor is a principle stating that public enterprises are not allowed to compete as hard as

[7] The information here is based on http://www.eftasurv.int/state-aid/state-aid-in-the-eea/

private enterprises or that public undertakings should not be allowed to exploit economies of scale or scope to gain competitive advantage. However, *given* that they do, it is a matter relating to providing a framework for a fair and tough battle in which private firms can decide to enter - to the benefit of the citizens in terms of more jobs, growth and innovation.

69. The overview over the extent of firms owned by municipal firms in particular, in a wide range of areas, can indicate that the problem is substantial. However, the NCA can basically only 'point out' their concerns. Thus, the 'toolbox' of the Norwegian Competition Act lacks the precise and adequate tools to deal with many of the causes for lack of neutrality when public firms compete with private.