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State Owners in the Internal Market: Medicine or Poison?*

ABSTRACT

State-owned enterprises (SOEs) rank among the largest market players and their importance has increased in recent decades. In developed countries, this trend is part of the functioning of a normal market economy as SOEs may serve as an instrument to reduce market failures. However, the existence of such companies may also lead to undue competitive advantages, as the case of some Chinese monopolies and certain Central and Eastern European countries in democratic backsliding shows. This study analyses the conflict between the benefits and harms of SOEs in the context of the EU internal market and the global economy, and seeks to highlight the potential risks to European integration that state ownership in competition may pose. The study is based on comparative legal research, complemented by quantitative analysis.

Keywords: state ownership, state-owned enterprises, competition law, neutrality principle, democratic backsliding

INTRODUCTION

After extensive privatisation in the 1990s, governments still own a significant number of national enterprises in certain sectors. The reasons for this are different in developed countries and lower-income economies of the EU. In many countries,¹ SOEs are growing or at least maintaining their crucial position in the national and global² economy. Governments acquire the majority of shares in companies for a variety of reasons. One is to ensure the

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¹ U. Papenfuß, L. Steinhauer, B. Friedlander, *Clearing the fog for an overall view on state-owned enterprises: Quality of aggregate holdings reporting by public administrations in 12 countries*, "International Review of Administrative Sciences" 2019. vol. 85(1) pp. 116–136.

² A. Cuervo-Cazurra (ed), *State-Owned Multinationals: Governments in Global Business*, Cham, Palgrave Macmillan, 2018.

continuity of public services,³ but state ownership may also be motivated by other grounds such as environmental concerns, i.e. finding an effective tool to fight against climate change. However, SOEs may also have other functions, including those that are more likely to serve particular economic interests. As a result, compliance of the operation of SOEs with EU internal market and competition rules is often questioned, and disputes of this kind are increasingly being brought before the competent EU institutions.

Certain provisions of EU law give explicit recognition to the *raison d'être* of state-owned enterprises. The Treaty on the Functioning of the EU (TFEU), which declares⁴ that the European law does not affect the rules in Member States governing the system of property ownership, enables Member States to evade their general obligations under EU internal market and competition rules. This provision allows, in effect, an exemption to many of these obligations and a significant number of Member States make use of this possibility. The legality of public monopolies, which often operate as state-owned companies endowed with exclusive or special rights is underpinned by the freedom of Member States to choose their system of property ownership⁵, guaranteed by Article 345 TFEU.

The COVID-19 pandemic brought an additional focus⁶ on the phenomenon of SOEs, as the maintenance of their functions seemed even more inevitable in the global recession for at least two different reasons. First, these companies can play an important role in fulfilling public functions in general or in supporting distressed societies and economic actors. Second, in most countries there is a government intention to bail out large firms through debt restructuring as is usually done for distressed sectors in times of crisis, on the grounds that they are 'too big to fail'. Thus, since the focus on COVID-19 any government response through SOEs has been highlighted more than before. Nevertheless, SOEs have always been present in market economies.

³ G. Citroni, *Neither state nor market: Municipalities, corporations and municipal corporatization in water services – Germany, France and Italy compared*, [in:] *The Provision of Public Services in Europe: Between State, Local Government and Market*, eds. H. Wollmann, G. Marcou, Northampton Edward Elgar, 2010, 191–216.

⁴ Art. 345 TFEU: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.'

⁵ W. Sauter, *Public Services in EU Law*, Cambridge Cambridge University Press 2014, p. 44.

⁶ OECD, *The COVID-19 Crisis and State Ownership in the Economy: Issues and Policy Considerations*, Paris OECD Publishing 2020.

The question raised by this paper is whether there are systemic risks in the development of the European Single Market, especially on the part of less developed member states that tend to reassess their traditions from the pre-privatisation era. In certain countries, cases of competitive disadvantage may be more serious than expected from a purely liberal approach. Our hypothesis, which also applies to the European Single Market in a global context, is that the greater the involvement of national governments in companies, the greater the risk of a reduction in the intensity of competition. Such a risk is likely to emerge when national regulatory regimes are threatened by institutional pressure behind market players. The risk is particularly pronounced in countries where there are deficiencies in the functioning of democratic institutions.

METHODOLOGY

The study is based on comparative public law and policy research using qualitative and, in part, quantitative methods. The findings are derived from a statistical analysis of the ownership structure of state-owned enterprises based on data from corporate databases and a primary analysis of the relevant case law of the Court of Justice of the European Union. The data are analysed in different dimensions, i.e. in addition to the EU internal market context, national and external market relations (i.e. with non-EU countries) are considered as relevant aspects of the research.

One of the main challenges in the research was to identify the criteria for selecting the sample of companies for the empirical analysis, i. e. to define the scope of SOEs. In the literature and relevant expert reports, there are different definitions of what constitutes an SOE. For instance, while the OECD gives a broad definition which does not include a precise ownership threshold,⁷ the European Commission defines SOEs as firms in which the state holds at least 20% of the shares⁸ and other sources (such as a specific CEE report)⁹ restrict the concept to

⁷ According to the definition given in the latest OECD documents, state ownership in SOEs comprises direct majority ownership and, provided that control exists, includes other types of direct and indirect ownership. Control can be exercised if an ownership entity (or several ownership entities acting in concert): is the ultimate beneficiary owner of the majority of voting rights; or otherwise exercises an equivalent degree of control. [OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, Paris OECD Publishing 2024, DOI: <https://doi.org/10.1787/18a24f43-en> ; OECD, *Ownership and Governance of State-Owned Enterprises*, Paris OECD Publishing 2024, DOI: <https://doi.org/10.1787/395c9956-en>

⁸ European Commission, *State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context*, Luxembourg Publications Office of the European Union 2016.

⁹ Chen Xin (ed.), *The Status Quo of State-owned Enterprises in CEE Countries*, Budapest China-CEE Institute 2021.

wholly or majority state-owned enterprises. For the purposes of the research, we needed to apply a definition which covered all cases where the state is (at least potentially) in a position to control the strategic decisions of the company, and therefore we needed to understand the concept of SOE broadly. Thus, we defined SOEs as companies in which the state is a shareholder (with an ownership percentage of btw. 0.01% and 100%) or the ultimate owner.

CONTEXTS

Contrary to popular assumptions about the economic weight of the private sector, the extent of state ownership in the global corporate sector is substantial. There are differing views in the legal and economic literature as to whether this should be understood in the context of the overwhelming trend towards privatisation or whether the progress has some other significance.¹⁰ Nevertheless, the share of SOEs with at least a minority state share was estimated to be around 0.1 per cent¹¹ of enterprises in 2019. According to a study¹² published in 2015, this group already accounts for around 10 per cent of global GDP. According to the latest OECD data, between 2000 and 2023, the number of SOEs among the largest 500 enterprises by revenue worldwide increased from 34 to 126, and at the end of 2022 the public sector held nearly 11% of the global market capitalisation of listed companies.¹³ In terms of size, of course, this is a changing phenomenon.

In the European Union context, there are various legal-economic explanations for this phenomenon, as follows [i-iv.]

i) Since the amendment¹⁴ of the EU public procurement directives in 2004, the obligation to put public contracts out to competitive tender has been increasingly relaxed,

¹⁰ A. Cuervo-Cazurra (ed.), *State-Owned Multinationals: Governments in Global Business*, Cham Palgrave Macmillan 2018; Chen Xin (ed.), *The Status Quo of State-owned Enterprises in CEE Countries*, Budapest China-CEE Institute 2021.

¹¹ L. Bernier, M. Florio, P. Bance (eds.) *The Routledge Handbook of State-Owned Enterprises*, Abingdon Routledge 2020, p. 7.

¹² G. D. Bruton et al., *State-owned enterprises around the world as hybrid organizations*, "Academy of Management Perspectives" 2015, vol. 29(1), pp. 92–114.

¹³ C. Di Noia, *An increasing role of state-owned enterprises in the global economy calls for better governance*, 17.07.2023, *The OECD Forum Network*, <https://www.oecd-forum.org/posts/an-increasing-role-of-state-owned-enterprises-in-the-global-economy-calls-for-better-governance> (access: 5.9.2024)

¹⁴ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L134/1, 30.4.2004); 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L134/114, 30.4.2004). For recent developments of the EU public procurement markets see the



allowing contracting authorities to conclude in-house contracts with state-owned public service companies without a public procurement procedure. This means that it is precisely the state-owned company that has become a form of intermediation of state influence.¹⁵ This amendment to the public procurement Directives was part of a more general EU regulatory trend to extend the possibilities for derogation from competition rules, which provides the basis for a wider use of previously exceptional solutions (such as in-house contracts), especially where this is necessary for the provision of public services.¹⁶ This has allowed national governments to develop their own path more decisively, which some have tried to use more boldly and others more cautiously. The case law of the Court of Justice has confirmed and extended this trend. Another interpretation¹⁷ later recognised the risk of counter-revolution if exemptions for public services were transformed into general competition rules.

ii) Crises have provided another opportunity to hypothesise greater state influence.¹⁸ Looking back over the last 15 years, this seems justified. After the real estate and banking crisis of 2007-2008, a new situation emerged. Since then, international economic crises have followed one another, such as the eurozone crisis (2008-2010), Brexit on 31 January 2020, and the waves of the COVID epidemic from 2019 onwards. As a result, the scope of state intervention has expanded, and government takeovers of state-owned companies, especially banks, are no longer considered unusual.

The crises were undoubtedly followed by waves of rebalancing. While in the Anglo-Saxon countries state ownership tended to be temporary, i.e. government policy withdrew from direct intervention once the economy had consolidated, in European countries the solutions initially imposed as emergency measures were more easily left in place, i.e. largely unchanged.

analysis of C. Bovis [The Nature and Character of the Public Markets and Their Effects on Public Procurement in the European Union, “Studia Iuridica Lublinensia” 2022, vol. 31(4), pp. 9–27].

¹⁵ I. Bartha, T. M. Horváth, *Does not it matter? Widening of derogation for services of general economic interests*, “Maastricht Journal of Comparative Law” 2020, vol. 27(1), p. 59, DOI: <https://doi.org/10.1177/1023263X19890211>.

¹⁶ For more details see I. Bartha, T. M. Horváth, *An extension of exemptions: systemic shifts in European Union law and policies*, “International Review of Administrative Sciences” 2022, vol. 88(2), pp. 570–586, DOI: <https://doi.org/10.1177/0020852320905359>

¹⁷ P. I. Colomo, *Will Article 106 TFEU Case Law Transform EU Competition Law?* “Journal of European Competition Law & Practice” 2022, vol. 13(6), pp. 385–386, DOI: <https://doi.org/10.1093/jeclap/lpac039>.

¹⁸ J. S. Haas et al., *Economic and fiscal policy coordination after the crisis: Is the European Semester promoting more or less state intervention?* “Journal of European Integration” 2020, vol. 42(3), pp. 327–344, DOI: [10.1080/07036337.2020.1730356](https://doi.org/10.1080/07036337.2020.1730356)

iii) In addition to the crises, a correction of earlier privatisations (i.e. the results of ‘false privatisation’¹⁹), especially in public services sectors, started around 2010. Following re-municipalisation²⁰ and other forms of public ownership, where shares were also returned to public hands, as in the energy, automotive and aviation sectors, a number of countries have responded to privatisation failures or major corporate crises by extending (partial) ownership of state-owned enterprises. Of course, this is not a question of nationalisation, which is a matter of public law, but of ownership through private (corporate) participation without the use of public instruments. The state then becomes a private owner.

iv) The economic literature talks about the possibility of countries choosing different paths²¹ in crisis management and ownership interventions, and of the degree of variation over time. Apart from these developments, it is evident that state ownership of enterprises has consistently played a pivotal role in the modern economy, although its significance has varied in different eras. The management of SOEs has thus become an inalienable, albeit conflictual, part of the modern economy. It thus can be understood as a feature in its own right, not merely as a reflection or counterpoint to privatisation.

In the context of European integration, the beneficiaries of derogations permitted by European Union legislation are the member states, and the use of these derogations may also represent a risk factor that could have a detrimental effect on the values of the single market and political integration. In fact, the self-definition of the business policy of the state enterprise in a market economy often includes references that reinforce the state's economic policy, such as the efficiency of the service provided to the state through better exploitation of synergies, the interests of domestic workers or the retention of profits.²²

RESULTS

¹⁹ A. Shleifer, R. W. Vishny, *Politicians and firms*, „The Quarterly Journal of Economics” 1994, vol. 109(4), pp. 995–1025.

²⁰ M. Pigeon, D. A. McDonald, O. Hoedeman, S. Kishimoto (eds.), *Re-municipalisation: Putting Water Back into Public Hands*, Amsterdam Transnational Institute 2012.

²¹ OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* Paris OECD Publishing 2016.

²² For details see e. g. A. Cuervo-Cazurra et al., *Governments as owners: State-owned multinational companies*, „Journal of International Business Studies” 2014, vol. 45, pp. 919–942, DOI: doi:10.1057/jibs.2014.43

According to the OECD Guidelines on Corporate Governance of State-Owned Enterprises,²³ there are several positive benefits of reforming state-owned enterprises to bring their practices in line with those required of private enterprises. Governments should therefore give preference to these guidelines when establishing the regulatory environment. The logic of the model is that good operation in line with expectations helps enterprises to be more effective in raising capital and minimises the risks of management failure. As most EU Member States are also members of the OECD, the OECD Guidelines are of crucial importance for the European Union.²⁴

1. State-owned enterprises as market actors

Several OECD reports established state-owned enterprises can be adapted to market economy conditions. The OECD Guidelines on Corporate Governance of State-Owned Enterprises,²⁵ developed for the first time in 2005²⁶ and then revised in 2015,²⁷ provides specific and concise advice on how these companies can be managed to be more effective and competitive. Prior to the pandemic, reports identified the expansion of SOEs,²⁸ related challenges,²⁹ national practices,³⁰ good practices,³¹ etc.

Figure 1

Number of SOEs in Europe (EU27 + Norway, Switzerland & UK) per Sector (2020)

²³ OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, Paris OECD Publishing 2024, DOI: <https://doi.org/10.1787/18a24f43-en>.

²⁴ The European Union itself, as an autonomous subject of international law, also participates in the OECD's work pursuant to Supplementary Protocol No. 1 to the OECD Convention.

²⁵ OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, Paris OECD Publishing 2024, DOI: <https://doi.org/10.1787/18a24f43-en>.

²⁶ OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, Paris OECD Publishing 2005.

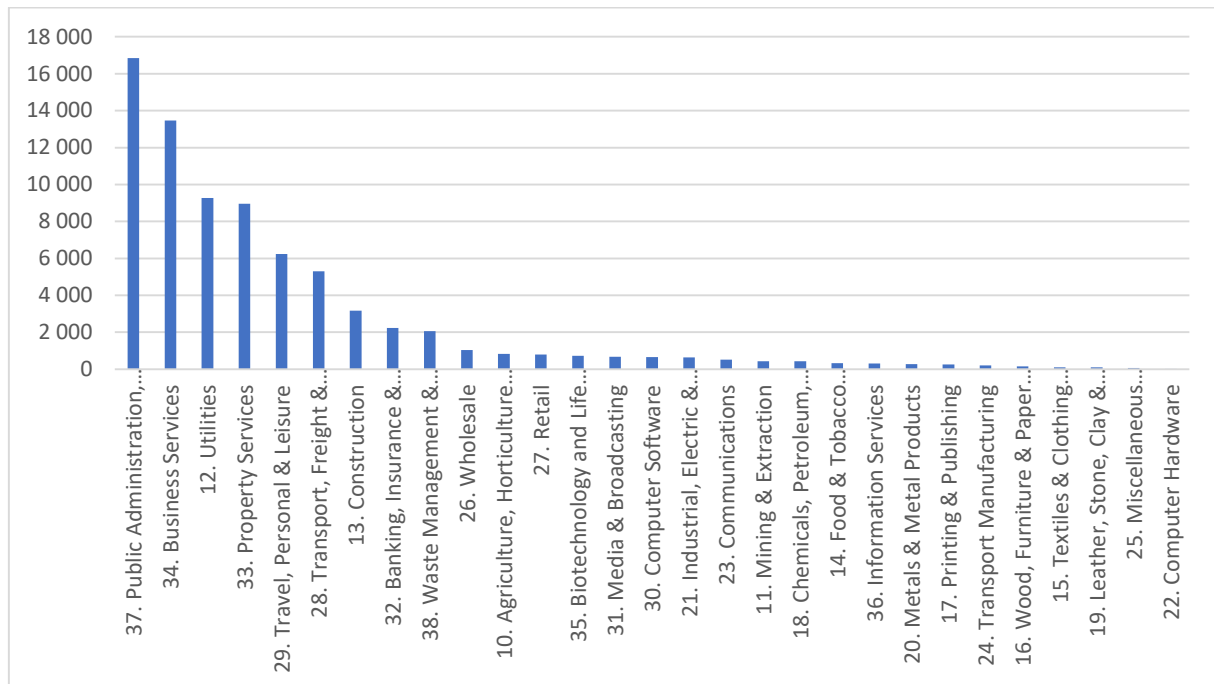
²⁷ OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, Paris OECD Publishing 2015, DOI: <http://dx.doi.org/10.1787/9789264244160-en>.

²⁸ OECD, *The Size and Sectoral Distribution of State-Owned Enterprises*, Paris OECD Publishing 2017.

²⁹ OECD, *State-Owned Enterprises as Global Competitors*, Paris OECD Publishing 2016.

³⁰ OECD, *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices*, Paris OECD Publishing 2018.

³¹ OECD, *Organizing the State Ownership Function: Implementing the OECD Guidelines on State-Owned Enterprises*, Paris OECD Publishing 2020.



Source: The authors' compilation based on the Orbis Europe company database

Note: State-owned enterprises are defined as companies in which the state is a shareholder (with an ownership percentage of btw. 0.01% and 100%) or the ultimate owner.

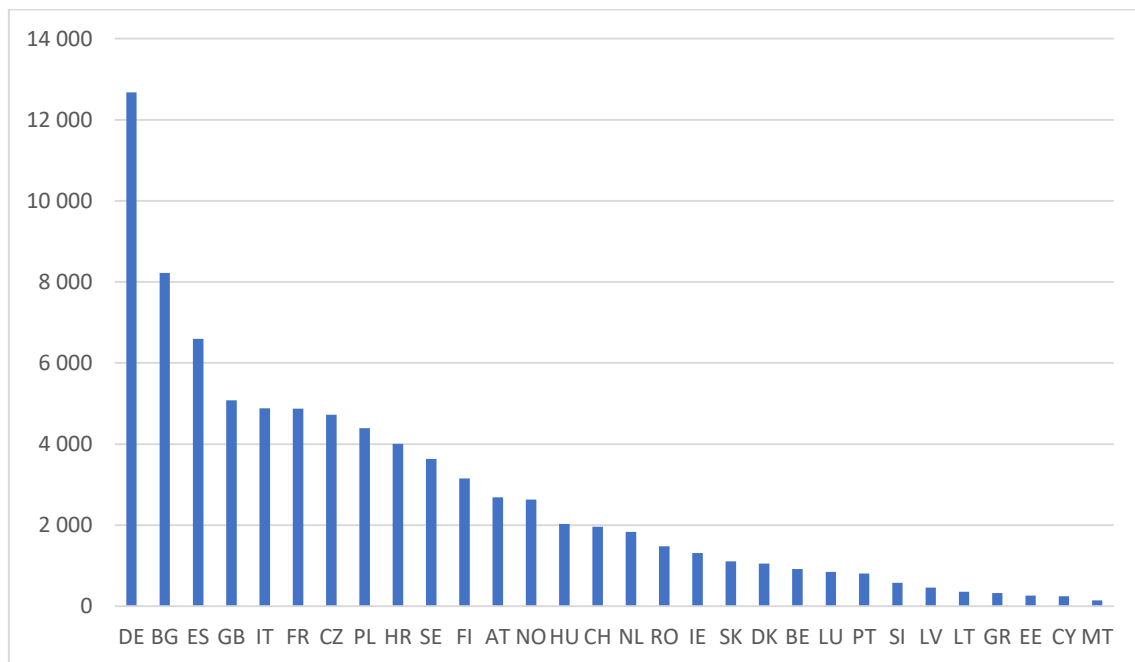
Figure 1 shows that the number of SOEs in certain sectors is significantly higher than others. In public administration, including education, health and public social services, SOEs mainly operate in the form of agencies, depending on the way in which these functions are managed by the state. In addition, some of the economic service sectors are favoured by government owners, such as business and real estate services (also typically in the form of agencies), banking, insurance and financial services. Network services such as utilities, personal travel, public transport (including freight and storage), waste management and treatment are also popular areas of state ownership. Important sectors for SOEs are those where the number of these companies is limited due to natural monopolies, but the turnover is high, such as mining and extraction, media and broadcasting. Sectors producing purely private goods or services are less favoured areas of state involvement.

With regard to the ownership rules in Article 345 TFEU, it can be concluded that these rules mainly target economic sectors with market failures. This conclusion is also confirmed by Figure 1 indicating the preferred sectors for state ownership.

There are also significant differences in the distribution of countries that favour a higher degree of state ownership of companies in the preferred sectors mentioned above. This distribution is shown in Figure 2.

Figure 2

Number of SOEs in Europe (EU27 + Norway, Switzerland & UK) per Country (2020)



Source: The authors' compilation based on the Orbis Europe company database

Note: State-owned enterprises are defined as companies in which the state is a shareholder (with an ownership percentage of btw. 0.01% and 100%) or the ultimate owner.

Economically well-developed countries, especially Germany, have the highest number of SOEs. Central and Eastern European countries such as the Czech Republic, Poland, Croatia and Hungary are in the middle compared to other EU countries. It can be said that the size of the country is only relevant as an independent variable. We can conclude that SOEs are necessary and permanent actors in developed market economies, even in liberalised ones.

What makes a difference between governments in terms of the quality of influence of the SOEs they own?

First, some key elements of a picture of state capitalism may emerge when the political power is autocratic (as is particularly and most persistently the case in Hungary) or, to a lesser

extent, under nationalist unorthodox government conditions. Second, it is closely linked to the transfer of economic influence to friendly private hands (cronies).

This phenomenon is similar to what is described in the literature³² as the difference between Eastern state capitalism and Western statism. According to this view, the current state interventionism in the well-developed countries is intended to reduce market failures, which in recent circumstances have been caused by the pandemic situation, the recession and the Russian intervention against Ukraine. In the case of non-Western economies, however, it is clear that state intervention works against certain free market conditions.³³ Our research results will also show that certain governments of the Central and Eastern European countries could be captured by this state interventionist approach to certain extent. Another phenomenon of this policy is the type of regulation that is more anti-competitive than pro-competitive.³⁴

2. The role of Article 345 TFEU

The initial purpose of the inclusion of Article 345 TFEU was to avoid that the Community would interfere with the Member States' practice of nationalising certain industries.³⁵ Nevertheless, the application of this provision is also supported by the fact that the European legal order is relatively open to conditional orientations due to the expansion of 'post-industrial' priorities in recent decades, such as the protection of the environment and nature, the fight against climate change, consumer protection, and so on.

How (with what mechanism) can this be allowed in the EU legal system?

The legal relevance of Article 345 TFEU is that it allows central and larger local governments to acquire the majority of shares in companies being in charge especially of public utility service provision. While public ownership itself is not a problematic issue, it may often

³² I. Alami, A. D. Dixon, *The strange geographies of the 'new' state capitalism*, "Political Geography" 2020, vol. 82, pp. 1–12, DOI: <https://doi.org/10.1016/j.polgeo.2020.102237>.

³³ J. Kurlantzick, *State capitalism: How the return of statism is transforming the world*, Oxford University Press 2016; D. McDonald, *Don't get too excited: The structural limits of state-owned enterprises in capital economies*, [in:] L. Bernier, M. Florio, P. Bance (eds.) *The Routledge Handbook of State-Owned Enterprises*, Abingdon Routledge 2020, p. 276.

³⁴ J. Drexler, V. Bagnoli (eds.), *State-Initiated Restraints of Competition*, Northampton Edward Elgar 2015, pp. 108–111.; J. Chaisse, J. Górski, D. Sejko (eds.), *Regulation of State-Controlled Enterprises: An International and Comparative Examination*, Singapore Springer 2022.

³⁵ Opinion of Advocate General Niilo Jääskinen (ECJ) of 16 April 2013, joined cases C-105/12 to 107/12, *Essent and Others*, ECLI:EU:C:2013:242; P. Reuter, *La Communauté européenne du charbon et acier. Préface de Robert Schuman*, Paris Librairie Générale de Droit et de Jurisprudence 1953.

lead to undesirable state influence on the market or privileges having distortive effect on competition. In particular, when considered in conjunction with other TFEU provisions allowing for derogations from the application of EU competition rules.

Article 106(1) TFEU generally states that public undertakings and those entrusted with special or exclusive rights are not exempted from EU competition rules. Article 106(2), however, lays down a derogatory regime for services of general economic interest, providing that these undertakings are subject to EU competition law provisions (that is Articles 101, 102 and 107 TFEU) only in so far as the application of such provisions does not obstruct the performance of their particular public service obligation. In line with the latter provision, companies in public ownership are often entrusted with exclusive rights by central or local governments to fulfil certain public service obligations, as was the case for instance with the management of car parks in the municipality of Brixen (Italy)³⁶ or the provision of public passenger transport services in the cities of Lisbon and Oporto (Portugal).³⁷ Granting exclusive or special rights to an undertaking often generates the dominant position itself³⁸ that is the precondition for unlawful conduct under Article 102 TFEU which, as Article 106(2) suggests, may nevertheless be saved by referring to the 'particular tasks assigned to them'.

The most of the forms of state aid are in principle prohibited under Article 107(1), unless they are found to be compatible with the internal market because of their specific policy objectives under paragraphs (2) or (3) of the same provision or since they fall under the scope of a block exemption regulation.³⁹ The acquisition of shares in a company by the state may also raise the question of whether such an acquisition may constitute state aid under Article 107(1) TFEU. The Commission pointed out in a 2008 notice that in accordance with Article 345 TFEU “the mere fact that the ownership of an undertaking is largely in public hands is not sufficient in itself to constitute a State guarantee provided there are no explicit or implicit guarantee

³⁶ Case C-458/03, *Parking Brixen*, ECLI:EU:C:2005:605.

³⁷ Case C-504/07, *Antrop*, ECLI:EU:C:2009:290.

³⁸ See for instance Case C-437/09, *AG2R Prévoyance*, ECLI:EU:C:2011:112.

³⁹ See for all Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014) and its amendment [Commission Regulation (EU) 2017/1084 of 17 June 2014 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs (OJ L 156, 20.6.2017)].

elements.”⁴⁰ Does it also follow from the wording of Article 345 TFEU that if a Member State grants to a SOE aid which is compatible with EU law (or a financial contribution that does not constitute state aid within the meaning of Article 107 TFEU, such as compensation for the provision of public services⁴¹), can such aid be regarded in all cases as not placing the SOE in a more favourable position (in a way that distorts competition) than competing private undertakings?

Article 345 TFEU enshrines the principle of neutrality with regard to ownership, public or private, of the ‘means of production’ and of undertakings.⁴² A fundamental question is to what extent this provision relieves Member States of their obligations under European Union law (in particular internal market law). The prevailing view (based on the previous case law of the CJEU and the related Advocate General opinions) is that this provision does not in principle constitute an exemption from the general rules. It also includes that the actual role of Article 345 can essentially be understood from the point of view of which parts of the property regime are directly linked to the proper functioning of the internal market. In the interpretation of Advocate General Jääskinen, this means, on the one hand, that an intrinsic consequence of the system of property ownership cannot be regarded as an obstacle subject to the prohibitions laid down by the Treaty, provided that the system is not discriminatory or disproportionate. As an example, AG Jääskinen brings the nationalisation of the steel industry in one Member State, which, despite it has the effect of excluding establishments of other Member States and even direct investment by investors from those States, may be an intrinsic consequence of a (not discriminatory and disproportionate) ownership system, and therefore “the Court has upheld the compatibility of nationalisations with European Union law since the *Costa*⁴³ judgment”.⁴⁴

⁴⁰ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008); B. Akkermans, E. Ramaekers, *Article 345 TFEU (ex. 295 EC), Its Meanings and Interpretations*, “European Law Journal” 2010, vol. 16(3), pp. 292–314., 305.

⁴¹ In the case of SGEI, however, public service obligation compensation (that is where the State pays aid to undertakings as compensation for the fulfilment of PSOs), under certain conditions (see judgment of the ECJ of 24 July 2003, case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paras 89–93), does not qualify as state aid. In addition, Article 93 TFEU is a sector-specific provision with regard to state aid for transport which expressly excludes ‘reimbursement for the discharge of certain obligations inherent in the concept of public service’ from the category of illegal aid under Article 107(1) TFEU.

⁴² Opinion of Advocate General Jääskinen (ECJ) of 16 April 2013, joint cases C-105/12 to C-107/12, *Essent and Others*, ECLI:EU:C:2013:242, paras 41–43.

⁴³ Judgment of the ECJ of 15 July 1964, case 6/64, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

⁴⁴ Opinion of Advocate General Jääskinen (ECJ) of 16 April 2013, joint cases C-105/12 to C-107/12, *Essent and Others*, ECLI:EU:C:2013:242, para 43.

Thus, the fact that no private investor may acquire shares or interests in a company reserved for public shareholders cannot be regarded as a restriction prohibited by the Treaty, inasmuch as it is precisely an element of the system of property ownership that the Treaty does not seek to change.⁴⁵

On the other hand, the scope of such “intrinsic consequences” must be interpreted narrowly, which means that restrictions other than those directly and inevitably resulting from the public or private system of property ownership are, on the contrary, subject to the fundamental freedoms of the Treaty.⁴⁶ As the case law on “golden shares shows, the privileged treatment of public interests within an essentially private system of property is not exempted from the Treaty provisions on fundamental freedoms.⁴⁷

The interpretation of Article 345 TFEU by the CJEU case law also reflects the specific objective previously outlined, namely the motives behind state ownership in enterprises. Based on this approach, the provision must be interpreted in a purposive manner, avoiding a distinction between public and private undertakings based solely on the identity of their various shareholders; that distinction depends on the opportunity available to the State to impose certain economic policy criteria other than the mere pursuit of the greatest financial gain, which is inherent in private enterprise.⁴⁸

DISCUSSION: THE PRINCIPLE OF NEUTRALITY UNDER THREAT

There are internal and external conflicts when it comes to the legal regulation of SOEs in the EU. The internal ones arise from the application of Article 345 TFEU and its relationship with EU internal market and competition law in the case of SOEs of EU origin. The external ones arise from the tension between the rules of EU law and international trade law relevant to SOEs of third country origin. The latter conflict is very extensive due to the increasing role of non-EU economies in the globalised world. The Chinese state as the owner of enterprises, is the largest actor in this process of expansion.

⁴⁵ Ibid, para 45.

⁴⁶ Ibid, paras 42 and 43.

⁴⁷ Ibid, para 46.

⁴⁸ Opinion of Advocate General Colomer (ECJ) of 6 November 2008, case C-326/07, *Commission v Italy*, ECLI:EU:C:2008:611, para 36. See also the opinion of Advocate General Colomer of 3 July 2001 in cases C-367/98 *Commission v Portugal*, C-483/99 *Commission v France* and C-503/99 *Commission v Belgium*, ECLI:EU:C:2001:369, para 54.

There is, however, another threat, the importance of which is based less on economic weight and more on a qualitative nature. An internal challenge in this dimension is the willingness of some of the CEE governments in power to gain economic influence through their SOEs. In this case, the opportunity of doing so (i. e. being allowed to gain such economic influence) derives purely from European law, in contrast to the external conflict mentioned above.

Both trends seem to threaten the principle of neutrality in the internal market. These conflicts will be analysed below.

1. Conflicts related to the application of Article 345 TFEU

The introduction of golden shares as a specific form of government control was inspired by privatisation, partly as a result of Member States' obligations arising from the liberalisation of certain sectors at the EU level, and partly as a result of measures taken in the context of the transition to a market economy in Central and Eastern European countries. Several Member States privatised important industries but, unwilling to relinquish all control, introduced restrictive measures in the form of golden shares, which allowed varying degrees of government control over the privatised company. These control rights can take many forms, and often ordinary shares are converted into golden shares by attaching special control rights to them.⁴⁹ In the late 1990s and the first decade of the 2000s, the Commission initiated infringement proceedings against several Member States, claiming that their golden shares were in contravention of the free movement of capital and freedom of establishment.

This does not mean, however, that the state should not retain special rights in the form of shares in corporate decision-making. This is shown, on the one hand, by the fact that the CJEU has not declared golden shares to be illegal in all the infringement cases mentioned above. In *Commission v Belgium*, the CJEU found the (golden share) legislation in question to be compatible with EU law on the grounds that the objective pursued, namely the security of energy supply in the event of a crisis, undoubtedly fell within the scope of a legitimate public interest which could justify a restriction on the free movement of capital.⁵⁰ In another case, *Commission v Germany (Volkswagen II)*, the provision of the Volkswagen Law requiring

⁴⁹ C. O'Grady Putek, *Limited But Not Lost: A Comment on the ECJ's Golden Share Decisions*, "Fordham Law Review" 2004, vol. 72(5), pp. 2219–2285.

⁵⁰ Judgment of the ECJ of 4 June 2004, case C-503/99, *Commission v Belgium*, ECLI:EU:C:2002:328.

certain corporate decisions to be taken by a four-fifths majority – giving rise to a blocking minority of 20 per cent – as opposed to the three-quarters majority required under general company law, was held to be lawful (albeit mainly on procedural grounds) in a situation where the Land of Lower Saxony held 20 per cent of the shares in Volkswagen.⁵¹

On the other hand, there are still examples of companies in which the state holds shares with special rights, but where this privilege has not been declared illegal in any proceedings before the EU institutions. One such example is MOL, Hungary's largest company (in terms of annual turnover), in which the Hungarian government holds a share with preferential voting rights. The Volkswagen II judgment provides some answers as to how this can be done. In that case, one of the Commission's arguments was that full compliance with the Volkswagen I judgment would require an amendment not only to the Volkswagen Act but also to Volkswagen's Articles of Association. However, after privatisation, Volkswagen became a private company, which, according to Germany, means that the German government cannot be held responsible for the acts and omissions of this company, as only the shareholders can amend the Articles of Association at a general meeting. The CJEU judgment, which rejected the Commission's argument in this respect, also confirmed that Volkswagen's Articles of Association cannot be regarded as a national measure capable of restricting the free movement of capital within the meaning of Article 63 TFEU. It follows from the above that the situation of companies currently operating as private companies, such as the Hungarian MOL (whose Articles of Association are the only legal document providing for a share conferring a special right on the State), is different from that of the companies subject to the Golden Shares judgments, which were formerly public companies whose privatisation process was governed by normative rules (laws and government decrees) that were challenged in the infringement proceedings. In the case of the Articles of Association of a private company (even if the State is a shareholder or even a privileged shareholder), it is much more difficult than in the case of a normative act to argue the existence of a "State measure", which is a precondition for an infringement of the freedom of establishment or the free movement of capital, since the relevant prohibitions in the Treaty are addressed to the Member States. The limitation on the acquisition of public ownership (and thus the scope of Article 345 TFEU), which is based on compliance

⁵¹ Judgment of the ECJ of 22 October 2013, case 95/12, *Commission v Germany*, ECLI:EU:C:2013:676.

with internal market rules, cannot therefore apply if the State is granted a share conferring a special right by means of a private measure.

Unbundling, i.e. the separation of energy supply and generation from the operation of transmission networks, is a principle governing the competitive position of gas and energy companies in the EU internal market. Full ownership unbundling was typically considered by the Commission in its practice prior to the liberalisation of the energy sector in the EU as a precondition to avoid abuse of a dominant position under Article 102 TFEU in the case of vertically integrated “national champions”.⁵² The question is whether in such a case Article 345 TFEU could provide a defence against the ownership unbundling obligation. According to the relevant academic literature, there is no conflict between the “principle of neutrality” represented by Article 345 TFEU and ownership unbundling, since under the latter, publicly owned generation and transmission assets do not have to be privatised, as it would be sufficient to apply measures ensuring effective separation of each activity from the other (e.g. through two independent public entities).⁵³ Member States are therefore still free to choose the model for organising the transmission or generation market, either public or private.⁵⁴ The so-called Third Energy Package, which represented a decisive step in the liberalisation of the energy sector, imposed the unbundling obligation on Member States, with three optional models, of which ownership unbundling was only one, although undoubtedly considered the most efficient.

The internal conflict in the application of Article 345 mentioned above is partly due to the question of the extent to which compliance with the liberalisation obligations (such as unbundling) imposed by EU secondary legislation in certain sectors affects the acceptance of the public interest justification and the assessment of the restriction of fundamental freedoms. This issue has been less pronounced in the earlier cases, as in most cases the contested national rule was adopted before the opening of the EU market in the sector concerned or the entry into

⁵² M. D. Diathessopoulos, *Ownership Unbundling in EU & Legal Problems*, 29.12. 2010, <http://dx.doi.org/10.2139/ssrn.1732212>

⁵³ M. Hunt, *Ownership Unbundling: the Main Legal Issues in a Controversial Debate*, [in:] *EU Energy Law and Policy Issues*, eds. B. Delvaux, M. Hunt, K. Talus, Brussels 2008; J. Pielow, E. Ehlers, *Ownership unbundling and constitutional conflict: a typical German debate?*, “European Review of Energy Markets” 2008, vol. 2(3); E. Cabau, *Unbundling of Transmission System Operators*, [in:] *The Internal Energy Market: The Third Liberalisation Package*, eds. E. Cabau et al., Leuven Clays & Casteels 2010, pp. 90–94.

⁵⁴ K. Talus, A. Johnston, *Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling*, “Journal of World Energy Law & Business”, 2009, vol. 2(2), pp. 149–154, DOI: <https://doi.org/10.1093/jwelb/jwp004>

force of the relevant EU legal obligation. Therefore, no factor other than the system of fundamental freedoms and exceptions could be taken into account. However, in more recent judgments, the relevance of harmonisation is increasingly coming to the fore. Initially, the CJEU was rather reluctant to take this factor into account when considering the restriction of fundamental freedoms. However, in the *Essent* case concerning Dutch legislation prohibiting the privatisation of electricity and gas distribution system operators,⁵⁵ the CJEU clearly attached importance to the fact that the Netherlands had taken restrictive measures in line with the objectives of the Third Energy Package directives (even though in this particular case only the fulfilment of the Netherlands' obligations under the Second Energy Package was at stake) and examined the scope of Article 345 TFEU in this context. In line with this approach, the CJEU also 'forgave' the Dutch State for not having an explicit obligation to do so under the Directives. As a result, the CJEU established that reasons underlying the rules on property ownership adopted by national legislation may be taken into consideration as those justifying restrictions on the free movement of capital.⁵⁶

Directives 2003/54 and 2003/55 of the second energy package do not require the unbundling of ownership of shares in a transmission or distribution system operator from ownership of shares in other traders and do not make this an explicit means of implementation. The Dutch legislator has thus, on its own initiative, gone further than required by the applicable secondary European Union law by opting to unbundle the ownership structures of distribution system operators on the one hand and energy production and supply undertakings on the other.⁵⁷ However, the Dutch legislation was also in line with the evolution of EU legislation, since Directives 2009/72/EC and 2009/73/EC (not yet applicable in the main proceedings), which form part of the 'third energy package', explicitly mention the unbundling of ownership structures as a requirement for correct transposition.

⁵⁵ The restrictions were provided by Dutch electricity and gas regulations, under which the transfer of shares held in a system operator can not be permitted if the shares became the property of persons other than the State of Netherlands (or Dutch provinces or municipalities) or other 'specified legal persons' owned, directly or indirectly, by Dutch authorities.

⁵⁶ See judgment of the ECJ of 22 October 2013, joined cases C-105/12 to C-107/12, *Essent and others*, ECLI:EU:C:2013:677, para. 55.

⁵⁷ Opinion of AG Jääskinen (ECJ) of 16 April 2013, joint cases C-105/12 to C-107/12, *Essent and Others*, ECLI:EU:C:2013:242, para 69.

It can be seen that while in the *Essent* case the Dutch government invoked Article 345 TFEU to justify an absolute prohibition on privatisation, in the golden share cases the privatisation had already taken place (at least partially), but the obstacles arising from the Member States' prerogatives as shareholders in the privatised companies were the problem under EU law.⁵⁸ Another important difference between the two cases is that in the *Essent* case, the reference to Article 345 TFEU is not primarily presented as an exception to a fundamental freedom of the internal market as a general rule, but the contested Dutch provisions are in line with a liberalisation policy initiated by the European Union, reflected in the adoption of directives requiring the unbundling of transmission and distribution system operators and users.⁵⁹

2. Are SOEs a threat to the internal market?

The entry into the internal market of a company subject to privatisation restrictions in its own country (i.e. outside the EU) has been a challenge for European integration from the outset. In principle, the areas of activity that are subject to privatisation restrictions and those that are not are separated and geographically delimited, but it is not always possible to control that these boundaries are respected. On this basis, however, another problem arises. What is the impact of the entry into the internal market of non-EU state-owned enterprises for which the privatisation restriction is not controlled? We examine this question by taking China as an example.

China alone accounts for the overwhelming majority of SOEs⁶⁰ in the world, and Chinese companies are also active in countries that operate on free market principles. This fact highlights a discrepancy between the anticipated standards of conduct in a free market and the actual practice of state-monopolised economic systems. This type of discrepancy is most evident when examining the proportion of foreign state-owned SOEs in a given region (such as

⁵⁸ Judgment of the ECJ of 22 October 2013, joint cases C-105/12 to C-107/12, *Essent v Others*, ECLI:EU:C:2013:677, para 54.

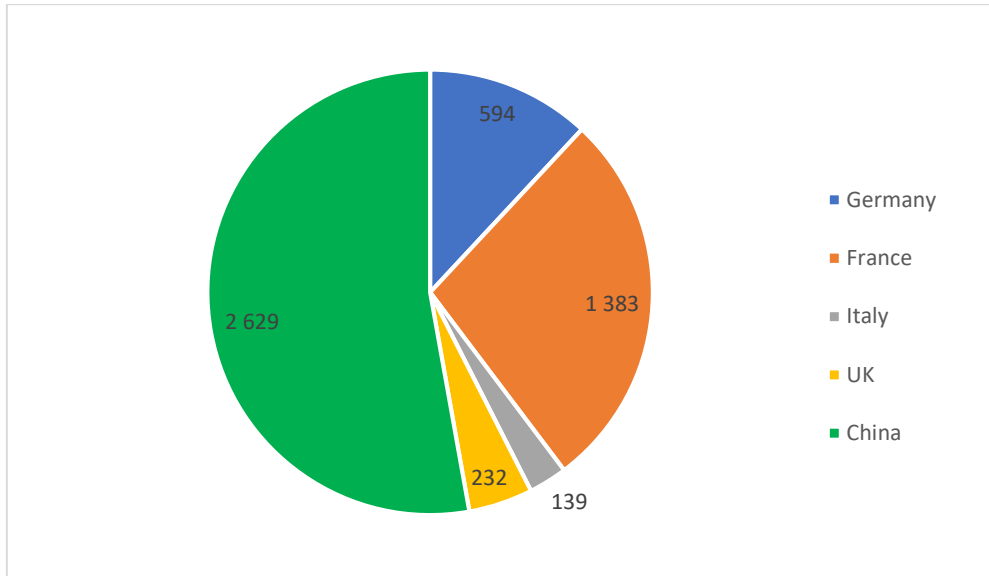
⁵⁹ See also the opinion of AG Jääskinen (ECJ) of 16 April 2013, joint cases, C-105/12 to C-107/12, *Essent v Others*, ECLI:EU:C:2013:242, para 3.

⁶⁰ The central government is a full or majority owner of 51 000 enterprises, valued at USD 29.2 trillion and employing approximately 20.2 million people. [OECD, *The Size and Sectoral Distribution of State-Owned Enterprises*, Paris OECD Publishing 2017, 8].

the European Union), the operation of which is based on free market economy principles (see Figure 3).

Figure 3

Number of companies owned by a foreign state (either as a stakeholder or the ultimate owner) in the territory of the EU



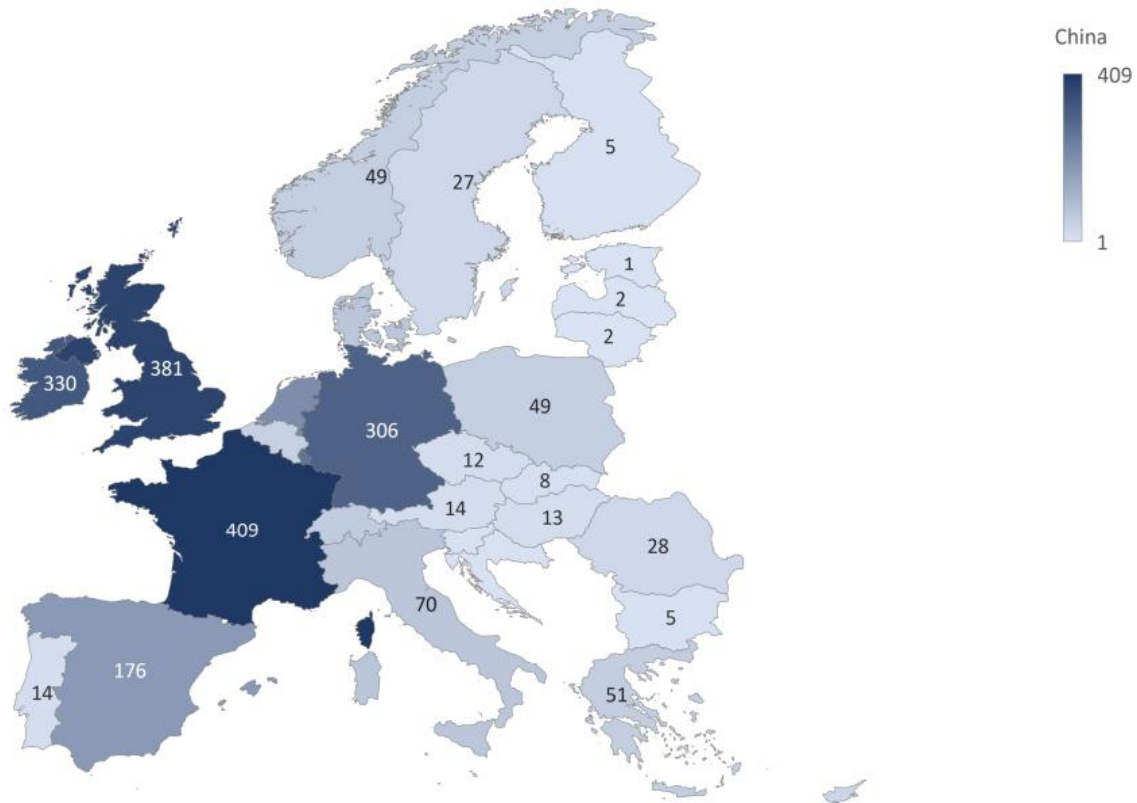
Source: The authors' compilation based on the Orbis Europe company database

Note: State-owned enterprises are defined as companies in which the state is a shareholder (with an ownership percentage of btw. 0.01% and 100%) or the ultimate owner.

The majority of owners in the markets of other EU Member States (hereinafter foreign owners) are governments of the largest European countries. China is an exemption, as it is not a European state but is nevertheless highly represented among those states which are foreign owners of SOEs in the European Union. As Figure 4 shows, the majority of Chinese SOEs are settled in France and Germany, followed by Italy and the United Kingdom.

Figure 4

Number of companies in which China is a shareholder or the ultimate owner, per country (EU-27, Norway, Switzerland & UK, 2020)



Source: The authors' compilation based on the Orbis Europe company database

Note: State-owned enterprises are defined as companies in which the state is a shareholder (with an ownership percentage of btw. 0.01% and 100%) or the ultimate owner.

The issue of subsidies and other forms of support in third countries that adversely affect the EU's internal market has already been raised⁶¹ in the context of competition law, but so far the European Union has not done much to address the problem. This approach seems to have changed with the adoption of the Foreign Subsidies Regulation (FSR), which entered into force on 12 January 2023.⁶² However, such a response does not contribute to a coherent system, as the state aid regime in the internal market is different from that of the FSR, which is aimed at external actors.⁶³ There are also strong initiatives at the global level to control the economic

⁶¹ M. Heim, *How Can European Competition Law Address Market Distortions Caused by State-Owned Enterprises?*, "Policy Contribution" 2019, vol. 15(18), pp. 1–9.

⁶² Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (OJ L 330, 23.12.2022).

⁶³ L. Hornkohl, *Protecting the Internal Market from Subsidisation with the EU State Aid Regime and the Foreign Subsidies Regulation: Two Sides of the Same Coin?*, "Journal of European Competition Law & Practice" 2023, vol. 14(3), pp. 137–151, DOI: <https://doi.org/10.1093/jeclap/lpad005>

activities of state-owned enterprises,⁶⁴ for example under the umbrella⁶⁵ of the World Trade Organisation. This policy orientation focuses on the expected benefits of reducing the market failures caused by state ownership.

In addition to the aforementioned phenomenon, another type of challenge emerged in countries experiencing democratic regression, such as Hungary since 2010 or Poland between 2015 and 2023. Hungary is also subject to protective measures adopted by the Council under the rule of law conditionality regulation.⁶⁶ In both states, economic policies were (are) shaped by economic nationalism which is typically a symptom of democratic backsliding.⁶⁷ In the case of Hungary, the origins of this phenomenon can be traced back to the global financial crisis (2007-2008). In Poland, it has its roots in economic interventionism, which was also accompanied by nationalism in the mid-2010s. In response to these negative developments, the EU has adopted a wide range of responses, spanning from purely political to economic⁶⁸ instruments. However, the foundation of this approach is deeply embedded in the political⁶⁹ and ownership structure of an earlier era and is characterised by a continuous expansion.

An IMF⁷⁰ cross-country analysis of Europe reveals that SOEs in the Central, Eastern and Southeastern European region tend to underperform private companies. However, they wield significant influence, extending beyond the economic sphere. In particular, the illiberal influence of populist governments in Hungary and Poland exert(ed) considerable pressure on

⁶⁴ R. Liu, *How State-owned Enterprises Drag on Economic Growth. Theory and from China*, Berlin Springer 2019.

⁶⁵ Y. Wu, *Reforming WTO Rules on State-Owned Enterprises. In the Context of SOEs Receiving Various Advantages*, Singapore Springer 2019.

⁶⁶ Regulation 2020/2092, of the European Parliament and Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget (OJ L 433I, 22.12.2020). A procedure under the Conditionality Regulation was not initiated in the case of Poland, since the Commission did not find that all the conditions for the application of the Conditionality Regulation were fulfilled. [Communication from the Commission to the European Parliament and the Council on the application of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. COM(2024) 17 final]

⁶⁷ S. Bulmer, O. Parker, I. Bache, S. George, C. Burns, *Politics in the European Union*, Oxford Oxford University Press 2020, pp. 195–196.

⁶⁸ T. Theuns, *Containing Populism at the Cost of Democracy? Political vs. Economic Responses to Democratic Backsliding in the EU*, „Global Justice and Populism” 2020, vol. 12(2), p. 144, <https://doi.org/10.21248/gjn.12.02.220>.

⁶⁹ B. Magyar, B. Mladovics, *A Concise Field Guide to Post-Communist Regimes: Actors, Institutions, and Dynamics*, Budapest CEU Press 2022, pp. 209–221.

⁷⁰ C. Richmond et al., *Reassessing the Role of State-Owned Enterprises in Central, Eastern, and Southeastern Europe*, Washington, DC International Monetary Fund 2019.

the competition law system,⁷¹ which in effect allows SOEs to consolidate their monopolistic positions in the domestic and also extend them in the international market. Consequently, SOEs of sufficient size should also be investigated beyond the context of the internal market, in order to exert an effective control over their activities.

These findings are also supported by data provided by the 2022 BTI (Bertelsmann Stiftung's Transformation Index) country reports and their indicators used for the evaluation of CEE countries (among others) by these reports. In particular, three indicators are relevant for us: i) if free and fair competition is guaranteed by an institutional framework that ensures unrestricted participation in the market and a level playing field for all market participants (7.1. Market organization); whether antitrust or competition laws exist and are enforced against monopolization and cartelistic conduct (7.2. Competition Policy); and to what extent are private companies permitted and protected and whether privatization of state companies proceeds consistently with market principles. Based on these indicators and the overall democracy and market economy ranking of 137 developing and transition countries, Table 1 shows the rating of CEE countries as follows.

Table 1.

CEE countries by selected BTI (Bertelsmann Stiftung's Transformation Index) scores, 2022

Country	Status index (rank)*	Rule of law**	Q7.1 Market organization***	Q7.2 Competition policy****	Q9.2 Private enterprise*****
Estonia	2	10	10	10	10
Czech Republic	3	9	10	9	10
Lithuania	4	9,8	9	10	10
Slovenia	6	8,5	10	9	10
Latvia	7	8,5	8	10	10
Slovakia	8	8,3	9	9	10
Croatia	13	7,3	8	10	7
Poland	14	6,3	9	9	8
Romania	15	7,5	8	7	8

⁷¹ M. Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System*, Cambridge University Press 2022.



Bulgaria	17	6,8	8	8	9
Hungary	29	5,3	6	6	7
<p>* The Status Index ranks 137 countries (developing countries and countries in transition from different geographical regions) according to the state of their democracy and market economy, the second column shows the rank of CEE countries on this list. ** Evaluated in a scale 1 – 10. This factor refers to the basic configuration and operation of the separation of powers (institutional differentiation, division of labor according to functions and, most significantly, checks and balances). *** Evaluated in a scale 1 – 10. The main focus is to assess if free and fair competition is guaranteed by an institutional framework that ensures unrestricted participation in the market and a level playing field for all market participants. **** Evaluated in a scale 1 – 10. This factor aims to assess whether antitrust or competition laws exist and are enforced against monopolization (e.g. mergers, dominant market positions, concentration) and cartelistic conduct. ***** Evaluated in a scale 1 – 10. This factor aims to assess to what extent private companies are permitted and protected, and if privatization processes are conducted in a manner consistent with market principles.</p>					

Source: Bertelsmann Stiftung's Transformation Index (BTI), country reports

3. Fuel crisis and introduction of price cap in Hungary: the market position of MOL Plc.

The following case study illustrates how the presence of state-owned enterprises can have a detrimental impact on the competitive position of other market participants, if the democratic control of the economic decisions by the central government proves ineffective. The issue that the case study highlights is not the existence of state ownership per se, but rather the potential risk of inadequate control of dominant market players and an inability to guarantee fair competition when the state is both the owner and regulator, and democratic control mechanisms are not functioning effectively within that state.

The 2022 fuel crisis, triggered by the Russian invasion of Ukraine, prompted the Hungarian government to impose a price cap on certain types of fuel (petrol and diesel) sold by petrol stations to consumers, with the price ceiling set at 480 HUF per litre, equivalent to about €1.20. The first price cap was imposed by the Hungarian government on the retail price, but not on the wholesale price. This resulted in petrol stations purchasing fuel at a higher price than they were able to sell it for. In response to this, the Hungarian government imposed a second price cap, which then also capped the wholesale price of fuel at HUF 480. The introduction of the second price cap resulted in only a slight improvement for petrol stations, as they paid the same amount for fuel as they could sell it for. This indicates that the market environment remained far from ideal. However, the subsequent impact of the second price cap was that it was no longer profitable for wholesalers to import more fuel than was strictly necessary. As a result, petrol stations were restricted to purchase from MOL, the sole wholesaler with a domestic refinery.

In December 2022, MOL issued a communication, which indicated that MOL was obliged to optimise its supply strategy “in the interest of the country's operational and energy

security”. Consequently, the company was unable to supply fuel to all petrol stations.⁷² In practice, MOL preferred to supply mainly those belonging to its own retail network and did not supply petrol to a number of independent stations (i.e. those not belonging to any supply chain). As a result, several independent petrol stations were forced to introduce quantitative restrictions, such as a maximum of two litres per individual consumer. In 2024, the Association of Independent Petrol Stations submitted a formal complaint against MOL to the Hungarian Competition Authority (HCA), alleging that MOL abused its dominant position in the relevant market.⁷³

The impact of the introduction of price caps from the perspective of market actors can be outlined as follows.

1. Petrol stations’ perspective. During the period of fuel price restrictions, a number of independent petrol stations were forced to cease trading. With the removal of the price cap, former suppliers returned to the market, but customers who had previously patronised the independent petrol stations that had been closed in 2022 did not fully return, leading to the closure of several stations. It is also a question whether the procedure of the HCA can grant them an effective remedy. In recent years, several European Semester Reports of the Commission⁷⁴ have highlighted the fact that competition law instruments are not sufficiently used by the HCA.⁷⁵

2. Consumers’ perspective. The first price cap brought a temporary advantage to consumers, but this was offset by a lack of available fuel due to quantity restrictions. Furthermore, after the price cap period, prices have significantly increased.

3. MOL’s (wholesaler) perspective. The second price cap shifted part of the burden of the first price cap, which had previously been covered entirely by the petrol stations, onto the

⁷² 480-as üzemanyag: élt majdnem 13 hónapot – az olcsó tankolással önmagunkat csaptuk be, telex.hu, 6.12.2022, <https://telex.hu/belfold/2022/12/06/egy-literenkent-480-forintos-ev-ezek-az-uzemanyagar-korlatozas-tortenetenek-allomasai> (access: 10.9.2024)

⁷³ Panaszt tettek a Mol ellen a versenyhivatalnál a független benzinkutak. hvg.hu, 27.02.2024, https://hvg.hu/gazdasag/20240227_Mol_GVH_panasz_FBSZ (access: 15.9.2024)

⁷⁴ 2024 Country Report – Hungary, Brussels, 19.6.2024 SWD(2024) 617 final, 2023 Country Report – Hungary, Brussels, 24.5.2023 SWD(2023) 617 final, 2022 Country Report – Hungary Brussels, 23.5.2022 SWD(2022) 614 final, 2020 Country Report – Hungary Brussels, 26.2.2020 SWD(2020) 516 final.

⁷⁵ Cseres K., *Defending the rule of law through EU competition law: the case of Hungary*, University of Amsterdam, 2024, <https://www.sipotra.it/wp-content/uploads/2024/07/Defending-the-rule-of-law-through-EU-competition-law-the-case-of-Hungary.pdf> (access: 20.9.2024)

wholesalers, primarily MOL. However, the government took over part of the company's losses (e.g. by abolishing the stockholding charge and reducing the excise duty). As a result, the overall impact of price caps and subsequent 'corrective' government measures in the retail sector (i. e. in the secondary market) that only one MOL petrol station and approximately 80 other stations (including several independent stations) were closed between 2022 and 2023. It is also important to consider the impact of other measures introduced by the Hungarian government such as the granting of a concession to MOL for waste management operations. These measures have contributed to strengthening MOL's competitive position in other (non-fuel) markets, thereby also counterbalancing the economic disadvantages caused by the second price cap.

CONCLUSIONS

SOEs are initially designated as a medicine within the internal market, as Article 345 TFEU enshrines the decisive freedom of Member States. This perspective has been confirmed by the case law of the CJEU, which originated from the *Essent* case. In accordance with this rationale, SOEs assume a significant function in ensuring stability in domains where it is imperative for governments to assume responsibility for the security of pivotal industries and services. Concurrently, these entities are also susceptible to political influence. Consequently, they operate at the nexus of economic and administrative power.

Recently, however, there have been additional trends following the circumstances of many global crises over the past decade and a half. In the meantime, government equities can become toxic to a certain extent. The biggest risks come from China as a third country. Chinese state-owned enterprises are generally gaining a relevant position in the domestic market. There is also a threat, albeit to a much lesser extent, from within the internal market, from the member states of Central and Eastern Europe. From that countries which with democratic backsliding represent a relatively large additional risk factor against the normal functioning of the market. From this point of view SOEs may become poison on the free market.

However, recent developments have emerged in response to the circumstances of numerous global crises that have occurred over the past 15 years. Concurrently, government equities may become subject to a certain degree of criticism. A significant threat emanates from within the internal market, namely from the member states of Central and Eastern Europe. It

can be argued that countries which have undergone a process of democratic backsliding represent a relatively significant additional risk factor with regard to the normal functioning of the market. From this perspective, state-owned enterprises (SOEs) may act as a detrimental force within a free market economy.

Our hypothesis is confirmed from both directions. In any case, the greater the involvement of national governments in companies, the greater the risk of reduction in the intensity of competition. In response, EU legislation has become active to limit Chinese distortions. As far as some of the Central and Eastern European member states are concerned, however, the legality of the operations on these companies is also not so easily questioned, reflecting the existing legal environment.

It can be reasonably deduced that an increase in the level of government involvement in business enterprises will inevitably result in a corresponding reduction in the level of competition. In response, the European Union has enacted legislation with the objective of limiting the distortions introduced by SOEs from non-EU countries. In the case of some Central and Eastern European member states, however, the legality of such operations is not so readily open to question, due to the existing legal environment.

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