

Unclassified

DAF/COMP(2015)8/FINAL

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

13-Apr-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DISCUSSION ON COMPETITIVE NEUTRALITY

- Note by the Secretariat-

27-28 October 2015

This document is the final version of the Note by the Secretariat which was submitted to the Competition Committee under Item 9 "Discussion on Competitive Neutrality" at its meeting on the 27-28 October 2015. More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutralityin-competition-enforcement.htm.

Mr. Antonio Capobianco [tel: +33 1 45 24 98 08, E-mail : antonio.capobianco@oecd.org]

JT03393990

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP(2015)8/FINAL
Unclassified

English - Or. English

TABLE OF CONTENTS

INVENTORY OF COMPETITIVE NEUTRALITY DISTORTIONS AND MEASURES	3
1. The Role of Competition Authorities to ensure the level playing field	3
2. Competitive Neutrality distortions and tools to address them	6
A. State owned/controlled/privileged market player (“SOEs”).....	6
B. Public service obligations (“PSO”)	8
C. Subsidies.....	10
D. Sector regulation.....	11
E. Other distortive state activity.....	12
3. Conclusions	13
MAIN OECD REFERENCES ON COMPETITIVE NEUTRALITY	14

Boxes

Box 1. Examples of good corporate governance initiatives.....	7
Box 2. Examples of compensation schemes	9
Box 3. State aid control in the European Union	10
Box 4. Examples of regulatory competition assessment frameworks.....	11

INVENTORY OF COMPETITIVE NEUTRALITY DISTORTIONS AND MEASURES

Note by the Secretariat

1. On 17 June 2015 the OECD Competition Committee held a Roundtable on Competitive Neutrality¹ in Competition Policy (“Roundtable”) and a Hearing on Competitive Neutrality: Horizontal Challenges (“Hearing”). Following these discussions, the Competition Committee agreed to work on an Inventory on Competitive Neutrality describing from a competition policy perspective (i) the types of distortions of competitive neutrality and (ii) the different ways in which such distortions are treated and addressed across jurisdictions.

2. Recognising that there is no “optimal” solution available to the competitive neutrality problem, this Inventory intends to help jurisdictions identify some of the rules and tools available to address competitive neutrality distortions. The first section of the document outlines general considerations relating to the competition authorities’ role to ensure the level playing. The document then turns to describe five different categories of competitive neutrality distortions and summarises specific rules and tools to address them.

3. The Appendix include a set of Tables (Table 1-3.) listing specific rules and tools by categories of competitive neutrality distortions based on the information provided by delegations in the course of discussions on competitive neutrality at the OECD Competition Committee.

1. The Role of Competition Authorities to ensure the level playing field

4. A first important step consists in drawing a line between distortions that may fall under competition law and that can be addressed through enforcement actions and those that do not. If the distortion amounts as a competition law infringement (“anti-competitive distortion”),² a competition law enforcement action by a competition authority is potentially actionable. Previous OECD work³ in this field emphasised that under the competition law of most OECD jurisdictions⁴ antitrust enforcement is ownership- and nationality-neutral and that the competition rules generally apply broadly. Differences arise

¹ Competitive neutrality is defined as a principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government’s contact, ownership or involvement in the marketplace, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant. OECD, *Competitive Neutrality In Competition Policy* (2015), p 4.

² OECD, *Competitive Neutrality In Competition Policy* (2015), p 11.

³ OECD, *Competitive Neutrality In Competition Policy* (2015), p 12.

⁴ Indonesia reported in its contribution to OECD (2015) that the Constitutional Court through its Decision (Nos. 48 and 62/PUU-XI/2013) has confirmed that in line with Article 33 of the 1945 Constitution, differences between SOEs and the private sector still persist even on newly liberalised markets as SOEs are established by the state and they may not merely be orientated towards profits.

as to how jurisdictions define or interpret the criteria for applying competition law and on the exemptions that the law may include to shield certain sectors,⁵ practices/conducts⁶ or undertakings⁷ from competition law.⁸

5. The most common enforcement actions that competition authorities generally take against an incumbent SOE concern abuses of existing dominant positions.⁹ Here are some examples of enforcement actions discussed at the OECD:

- *Margin squeeze*: in 2012 the German competition authority concluded its abuse proceedings against Deutsche Post AG. The investigation was based on complaints that prices charged to major customers for posting letters did not cover the costs. The German competition authority accused Deutsche Post AG having used a cut-price strategy to squeeze its competitors out of the market or having prevented potential competitors from entering it.¹⁰
- *Refusing to grant access to essential facilities*: in 2012, the Italian competition authority closed an investigation on the abusive conduct by State Railways, which, through its subsidiaries, succeeded in impeding a new entrant from offering its passenger services on the Turin-Milan line, by delaying access to the railway passenger infrastructure.¹¹

⁵ For over a decade, there has been an intense debate between the Central Bank of Brazil and the Brazilian competition authority over the jurisdiction to review mergers in the banking sector. The Central Bank defends that it should have sole jurisdiction in the financial sector, for “prudential” reasons, while the competition authority believes that Brazilian competition law shall apply to all individuals, as well as public and private legal entities in all sectors. See Brazil’s contribution to OECD (2015).

⁶ In its contribution to the OECD (2015) Australia reported that federal and state governments have explicit power in Australia to legislate that certain conduct is exempt from the restrictive trade practices provisions of the Competition Act. In addition to that, the Crown immunity is still residual where the Crown does not “carry on a business”. Germany pointed in its contribution to the OECD (2015) that the legislator expressly exempted public fees from abuse control in 2013. The Indonesian competition law provides exclusions of the natural monopoly implemented by SOEs. See Indonesia’s contribution to the OECD (2015).

⁷ Acts of state sovereigns that may inhibit competition are exempt from antitrust challenge under the “*state action doctrine*” in the United States which was further elaborated recently by the Supreme Court in the *North Carolina State Board of Dental Examiners v. FTC* case (574 U.S.2015, No. 13-534). See United States’ contribution to OECD (2015).

⁸ Some jurisdictions (e.g. Costa Rica, the European Union, Italy and the Netherlands) also include exemptions relating to those undertakings that perform services of general economic interest or are granted special or exclusive rights. For instance the competitive neutrality provisions of the Dutch competition act do not apply if a service/good of public interest is concerned. See the Netherlands’ contribution to OECD (2015).

⁹ However, some jurisdiction reported that in cases of SOEs possible conflicts with competition law are not limited to abuse of dominance cases. The Polish competition authority established in 2007 that two petroleum companies, the state-owned Grupa Lotos and the state-controlled PKN Orlen concluded an anti-competitive agreement. The authority found that the explicit objective of the agreement was to prevent competition in the U-95 market and therefore, imposed a fine on both companies. See Poland’s contribution to OECD (2009).

¹⁰ See Germany’s contribution to OECD (2015). Deutsche Post AG has appealed the decision to the Düsseldorf Higher Regional Court.

¹¹ See Italy’s contribution to OECD (2015).

- *Refusal to deal*: in 2006 the Romanian competition authority fined CFR Marfa, the national railway freight carrier for (i) applying unequal conditions on similar services towards private operators (e.g. charging discriminatory tariffs) and (ii) refusing to provide certain ancillary services, such as depot services, sheds, and fuel services to its privately owned competitors.¹²
- *Predatory pricing*: examples of predatory pricing were provided by Norway and the United Kingdom. The Norwegian competition authority imposed a fine on Scandinavian Airline Service for abusing its dominant position through predatory pricing on the Oslo-Haugesund domestic air route in May-June 2004. In 2008 the Office of Fair Trading found that Cardiff Bus, a publicly-owned bus company had engaged in predatory behaviour designed to eliminate a competitor.¹³

6. The discussion at OECD showed that competitive neutrality problems may arise at all levels of government control but that they are particularly widespread at local level (e.g. Costa Rica, Germany, Italy, Lithuania, Sweden and the United States),¹⁴ where a large number of municipality-owned undertakings pursue both economic¹⁵ and non-economic activities. Various competition authorities reported difficulties in tackling such distortions using traditional competition law enforcement tools and standards.

7. As enforcement agencies face several challenges in enforcing competition law against state related distortions of competition, they often rely on other non-enforcement tools. Advocacy can be a very powerful tool for competition authorities to address competitive neutrality distortions that cannot be caught by the traditional enforcement of antitrust law and/or where no competitive neutrality framework exists. This is particularly true for distortions arising from unduly restrictive regulation. In these cases advocacy efforts have been used, for example, to target regulatory exemptions (e.g. Australia, Germany) or distortive/discriminating/restrictive regulations (e.g. Finland, Germany, Italy, Latvia and Spain). Discussions showed that advocacy efforts can take various forms including submitting opinions (Norway)¹⁶ and recommendations to government agencies and raise awareness to the distortive effects of the regulation at stake (Chile),¹⁷ or conducting surveys and market studies (Japan),¹⁸ publishing reports

¹² See Romania's contribution to OECD (2009) and Competition Law and Policy in Romania, A Peer Review, OECD (2014).

¹³ See Norway's and the United Kingdom's contribution to OECD (2009).

¹⁴ For instance Germany reported in its contribution to OECD (2015) that the German competition authority faced a number of cases involving municipal companies due to the general trend towards re-municipalisation. The main areas of the authority's activity in this field are merger control in the hospital sector and abuse proceedings in the award of energy network concessions and water supply. Sweden also confirmed in its contribution to OECD (2015) that the number of municipal companies in Sweden is increasing, sales of municipal companies are not declining, and the areas of conflict between public and private companies are set to persist and diversify.

¹⁵ An economic activity is widely defined as the provision of goods or services, regardless of the entity's legal status, ownership or financing structure. OECD, Competitive Neutrality In Competition Policy (2015), p 12.

¹⁶ In line with the Norwegian Competition Act the competition authority must supervise competition in the various markets and, where appropriate, submit proposals aimed at furthering competition and facilitating market access by new competitors. See Norway's contribution to OECD (2015).

¹⁷ As of May 2015 the Chilean Competition Tribunal had issued fifteen different advices to the President, suggesting various modifications to specific laws. To date, several of these advices have been taken into account by the government, two of them related to SOEs. See TDLC's contribution to OECD (2015).

(e.g. Latvia, Sweden and the United Kingdom,¹⁹ and creating dedicated task forces (Chinese Taipei)²⁰ or councils (United States).²¹

2. Competitive Neutrality distortions and tools to address them

8. Many distortions of the level playing field do not fall within the reach of competition law and in many cases are outside the powers of competition authorities. The question then is whether there are other laws or legal mechanism that can be used to restore competitive neutrality.

9. As the tables in the Annex show, different types of distortions may call for different instruments and enforcement powers. The tables summarise the tools which are available to address competitive neutrality distortions along five main distortion categories.

A. State owned/controlled/privileged market player (“SOEs”)²²

10. In many jurisdictions the state is still an important market player and it manifest itself in a variety of ways but mostly through direct ownership and control of companies (SOEs). In recent years, jurisdictions have taken significant steps in adopting the basic recommendations of the OECD SOE Guidelines including: level playing field in the legal and regulatory framework for SOEs, separating state ownership function from other state functions, high standards of transparency and disclosure, high quality of accountability, separate accountancy for SOEs’ economic and non-economic activities, monitoring and assessing of SOE’s performance and their compliance with corporate governance standards.²³

11. The OECD discussions confirmed however that state ownership and control can still lead to competitive neutrality distortions in so far as:

¹⁸ The Japanese competition authority has conducted many surveys and analysis on certain sectors where competitive concerns are occurring and has provided proposals from the view of competition policy. See Japan’s contribution to OECD (2015).

¹⁹ In 2013, the Swedish competition authority issued a report entitled Competition in Sweden in which it identified policy recommendations with the potential to promote effective competition and competitive neutrality. See Sweden’s contribution to OECD (2015). The Office of Fair Trading issued a working paper in 2010 on “*Competition in mixed markets: ensuring competitive neutrality*”. Available at: http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/economic_research/oft1242.pdf

²⁰ The competition authority of Chinese Taipei set up the “461 Special Task Force” shortly after its establishment to review administrative regulations that might be in conflict with the legislative purposes of the competition act and consulted with related agencies over such issues. See Chinese Taipei’s contribution to OECD (2015).

²¹ In March 2015, President Obama issued an Executive Order which establishes a Broadband Opportunity Council to use all available and appropriate authorities to identify and address regulations that may unduly impede either wired broadband deployment or the infrastructure to augment wireless broadband deployment. See United States’ contribution to OECD (2015).

²² SOEs are defined widely as in the OECD SOE Guidelines (2015). Some jurisdictions (e.g. European Union) have established rules specifically for SOEs and for undertakings given special or exclusive rights. Article 106 TFEU provides that the European competition rules (including the rules on State aid) apply both to public undertakings (SOEs) and to private undertakings with special or exclusive rights, reflecting the principle of ownership neutrality on which the EU system is based.

²³ OECD SOE Guidelines (2015), see especially Chapter III. (State-Owned Enterprises in the Marketplace), Chapter VI. (Disclosure and Transparency) and Annotations to Chapter III.

- the state confers unfair privileges to SOEs, such as a favourable tax treatment or a preferential financial treatment; or
- it allows SOEs to behave in a way that may lead to abuses of market power, e.g. by leveraging a legal monopoly into a competitive market or by cross-subsidising between different activities so as to charge predatory pricing.

12. Some of these distortions can be addressed through competition law enforcement but the Roundtable identified several other tools that jurisdictions use in these cases, including good corporate governance principles (see Box 1.), transparency rules,²⁴ tax and debt neutrality²⁵ and initiatives to rationalise the number of SOEs.²⁶

Box 1. Examples of good corporate governance initiatives

- *Chinese Taipei*: The Executive Yuan (Cabinet) announced in 2003 the “Policy Framework and Action Plan for the Strengthening of Corporate Governance” and set up a cross-ministerial task force to strengthen the system of corporate governance. It decided that the competent authorities of public enterprises would follow these six rules for strengthening corporate governance of SOEs and ensuring transparency and accountability: “enhancing internal control and auditing systems,” “enhancing accounting systems,” “strengthening the board of directors’ function and the efficacy of shareholders meeting,” “strengthening the public information disclosure system,” “protecting shareholders’ rights and interests” and “considering stakeholders’ rights and interests.”
- *Latvia*: The Strategic Development Plan of Latvia for 2010-2013, approved by the Cabinet in April 2010, tasked the Government with: “improv[ing] management of state-owned and local government-owned assets.” This reform effort included a critical review of the SOE sector that involved Cabinet adoption of two policy planning documents in June 2012: the Concept for Commercial Activities of Public Persons and the Concept for Management of State Capital Shares. In these policy planning documents, the Government identified specific challenges to the effective corporate governance of the Latvian SOE sector. A new SOE law was prepared to address these shortcomings. The Cabinet approved a draft legislative reform package in 2013 and the Saeima adopted the Public Persons Enterprises and Capital Shares Governance Law on 16 October 2014 during its third and final reading of the law.
- *United States*: The United States identified “notional principles” to guide policymakers, including for instance: the public service responsibilities of SOEs should be clearly delineated by law; the state’s ownership function should be clearly separated from other state functions, especially with regard to regulation or maintenance of markets to avoid unnecessary market distortions that reduce consumer welfare.

²⁴ As the OECD highlighted in the Competitive Neutrality, National Practices (2012) document, many jurisdictions adopted more stringent reporting requirements for SOEs than for similar private sector companies (e.g. Australia, Denmark, Estonia, Finland, Iceland, Israel, Korea, New Zealand, Slovak Republic, Spain, Switzerland, Turkey, United Kingdom and the United States). Other jurisdictions (e.g. Austria, Chile, Finland, Germany, Israel, Italy, Lithuania, New Zealand, Slovak Republic, Slovenia and Sweden) apply similar reporting requirements to private sector.

²⁵ According to the Commonwealth Competitive Neutrality Policy Statement (1996) the Australian competitive neutrality framework addresses – among others – tax and debt neutrality. See Australia’s contribution to OECD (2015).

²⁶ Some jurisdictions (e.g. Italy, Russia, Spain and Chinese Taipei) emphasised that initiatives are on the agenda to rationalise the number of SOEs in the economy. For instance Russia took a position aimed at reducing share of state enterprises until their elimination in stages from competitive markets which is one of the main directions of activity of the Government of the Russian Federation until 2018 (see Russia’s contribution to OECD (2015)). In its contribution the Italian competition authority confirmed that it has advocated for a rationalisation of the number of SOEs and for the adoption of bring private sector objectives and associated incentives in the operation of SOEs (see Italy’s contribution to OECD (2015)).

- *Spain*: Sociedad Estatal de Participaciones Industriales (“SEPI”) is a Public Law entity which brings together some of the main companies under the umbrella of the Central Government. SEPI’s main goals are the following: making the shares and the shareholding assigned by the Government profitable, safeguarding the public interest, combining social and economic criteria and adding extra values when applying the Government’s strategies and guidelines.

Source: Chinese Taipei’s, United States’ contribution to OECD (2015), OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia. OECD (2015), Spain’s contribution to the OECD (2009)

B. Public service obligations (“PSO”)

13. The second category of State measures, which under certain circumstances can in fact distort competition relates to the situation where the market player is tasked with a public service. In particular, the rules for selecting the public service operator and the rules on how to determine the level of the compensation for the public service provision can create undue advantages and in turn distort competition. OECD discussions identified the following measures and tools to address these distortions of competitive neutrality:

- The abuse of the selection process can be primarily safeguarded by the application of effective competitively selection rules where interested public service operators are selected through an open, fair and transparent bidding process.
- The two most frequent solutions used by jurisdictions to ensure competitive neutrality when an SOE is entrusted with a public service obligation and at the same time operates on competitive markets are: good governance principles and structural separation²⁷. This latter concerns the structural separation of economic (active on the market) and non-economic (not active on the market) activities of SOEs, as well as the structural separation of PSO (economic activity with non-profit making objective) and commercial activities (economic activity with profit making objective).²⁸
- Most jurisdictions have developed clear and transparent parameters/rules for public service compensation to ensure that the compensation is fair and to guarantee sufficient accountability of the calculation of the PSO compensation. These standards/benchmarks are generally stipulated by law (e.g. European Union, New Zealand, Poland and Turkey), but they can be also articulated by case law (e.g. European Union, Bulgaria and Romania). If the compensation exceeds the parameters of what is considered a fair compensation, the rules on subsidisation/illegal state aid can be actionable.

²⁷ Structural separation was already assessed by the OECD Competitive neutrality, National Practices (2012) document according to which many jurisdictions (e.g. Denmark, Finland, Lithuania, Spain and Ukraine) adopted legislations requiring undertakings to handle economic and non-economic activity separately.

²⁸ According to Chapter III of the OECD SOE Guidelines (2015), there should be a clear separation between the state’s ownership function and other state functions (“economic activities”).

Box 2. Examples of compensation schemes

Compensation rules

- In Spain it is Law 33/2003, of November 4th, of Public Administration Wealth which declares that SOEs must be managed according to the constitutional principles of efficiency and economy. Royal Decree 1373/2009 explicitly states that SOEs must neither jeopardize nor distort market competition, regardless of the idiosyncratic aspects of public sector obligations.

Case law

- In its Decision 542/15.05.2013 the Bulgarian competition authority issued an opinion regarding the provisions of the Ordinance for the transportation of passengers and the conditions for travelling by trolley bus (electric bus that draws power from overhead wires) in the town of Vratsa. The ordinance obliges the trolley bus transportation companies to offer additional discounts on season tickets for certain categories of passengers. In return for this obligation, the companies received compensation from the municipal budget, calculated on the basis of the issued tickets. The authority argued that the granting privilege to a company to compensate it for a legally imposed obligation is not a deviation from the principle of competitive neutrality, provided that there is no overcompensation.
- Within the EEA it is the Altmark ruling²⁹ which draws the line between warranted and distortive compensation schemes. The European Court of Justice (“ECJ”) established four cumulative criteria under which services of general economic interest (“SGEI”) compensation does not amount to (unlawful) state aid: (i) the recipient undertaking must have public service obligations to discharge, and the obligations must be clearly defined; (ii) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations and (iv) where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.
- The competition authority of the Slovak Republic initiated a procedure against News Agency of the Slovak Republic (“TASR”), a state-subsidised organisation, to investigate whether TASR enjoyed an unjustified competitive advantage due to the fact that its economic activity was financed by the state budget. The authority established that as the Ministry of Culture did not define the criteria for the use of the state budget, it made possible for TASR to use public funds for the financing of economic activities. The authority decided that TASR must finance economic activities with its own business income as opposed to relying on the state budget.

Survey

- In line with the Act on Public Transport in Poland, the operator is entitled to compensation if it proves that the revenue resulting from the concessionary fares does not exceed the costs incurred in providing the public transport services. In 2010 the Polish competition authority conducted a survey among entities in charge of land transportation services at central, regional and local levels. The results indicated that the amount of compensation was adequate and that it covered only the cost for providing the services with a reasonable profit.

Source: Bulgaria’s, European Union’s, Spain’s contribution to OECD (2015), Poland’s and the Slovak Republic’s contribution to OECD (2012)

²⁹ ECJ, *Altmark*, 24 July 2003, C-280/00.

C. Subsidies

14. The state can grant companies with various direct/indirect financial advantages that might distort the level playing field between competitors and amount to subsidisation or to a state aid. The selective advantages can take many forms including direct financing, tax exemptions, loan guarantees, below-market rates, privileged access to inputs, etc.³⁰ To address the possible distortions of subsidies some jurisdictions have adopted both ex ante and ex post monitoring mechanisms.

- In ex ante, preventive screening mechanisms (European Union and EFTA Surveillance Authority)³¹ a state aid can only be implemented after the approval of the relevant authorities.
- Ex post monitoring mechanism include ex post state aid control (European Union)³² and other tools that primarily aim at monitoring the use of public funds (e.g. Spain).³³

Box 3. State aid control in the European Union

According to Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”) state aid is defined as an advantage in any form conferred on a selective basis to undertakings by national public authorities. Undertakings which are engaged in an economic activity are not authorised to receive state aid unless the aid is authorised by the European Commission, as provided for in Article 108 TFEU.

Under a state aid control system, state aid is in principle prohibited because of its distortive effects on trade and competition. Clear rules are defined in which specific circumstances and under which conditions state aid can be provided.

Ex ante mechanism - In line with Article 108 TFEU, Member States are required to inform the European Commission in advance of any plan to grant state aid. Implementing new state aid without notification leads to such state aid being considered “unlawful” and the European Commission may request the Member State to suspend such aid, or to take all measures necessary to recover such aid from the beneficiary.

Ex post mechanism - The European Commission also has the power to review existing state aid, that is aid granted to an undertaking by a Member State prior to such Member State’s accession to the European Union. The European Commission may at any stage find that, due to changing market conditions, such state aid is no longer compatible with the common market and has to be terminated.

Source: the European Union’s contribution to OECD (2015)

³⁰ OECD, Competitive Neutrality In Competition Policy (2015), p 8.

³¹ In their enforcement practice the supranational bodies, the European Union and the EFTA Surveillance Authority (“ESA”) have similar powers and functions. Aid measures can only be implemented after approval, followed by a notification.

³² The World Trade Organisation (“WTO”) is also operating an ex post mechanism. In line with the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) the control is ex post and allows a Member State to challenge the subsidy granted by another Member State before the WTO settlement body.

³³ For instance the Spanish competition authority is elaborating a “Guide on the granting and the evaluation of state aid” which will be released in 2015. See Spain’s contribution to OECD (2015).

D. Sector regulation

15. The fourth main category of possible distortions of competitive neutrality refers to distortive/discriminating/restrictive regulation. The tools used by jurisdictions for such distortions can be differentiated according to the ‘timing’ of the intervention and to the ‘strength’ of the intervention.

- Regulatory impact assessment tools can be put in place before passing the restrictive regulation/legislation (e.g. Australia, Bulgaria, Finland, Japan and Chinese Taipei) or after the adoption of the restrictive regulation/legislation concerned (e.g. Italy, Peru and Spain).
- Some jurisdictions prefer ‘soft’ measures promoting policy co-ordination between agencies (Japan) or regulatory impact assessment frameworks (e.g. Bulgaria, Finland, Japan, Lithuania and Chinese Taipei), whilst other jurisdictions are furnished with the right to apply more powerful measures, such as challenging regulation on court (Italy and Spain) or denouncing regulation (Peru).

Box 4. Examples of regulatory competition assessment frameworks

Soft measures generally include frameworks where authorities assess and review regulations and analyse their impact on competition:

- *Bulgaria*: In order to protect the free markets and to prevent distortion of competition, the Bulgarian competition authority is empowered to assess the compatibility with the provisions of the competition act of draft legislative, regulatory administrative and general administrative acts as well as legislative, regulatory administrative and general administrative acts which are in force. In 2009, in to assist state authorities in the preparation of draft legal acts, the authority elaborated and adopted guidelines on how to assess compliance of legislative and general administrative acts with competition rules.
- *Chinese Taipei*: The Fair Trade Commission set up two special task forces (the “Task Force for Deregulation and Market Competition Promotion” and the “Task Force for Development of the Green Silicon Island Vision and Promotion Strategy Regulations”) to review regulations of different government agencies as well as to advice these agencies on regulations with likely impact on competition.
- *Japan*: Each ministry is obliged to implement an ex-ante evaluation of regulations when it adopts, revises or eliminates a piece of regulation. On this occasion, each ministry must also analyse the impact of the regulation on competition and must describe the results of such analysis in a report.

More powerful measures include the right to challenge distortive regulations directly in court:

- *Italy*: The Italian competition authority can issue an opinion requesting public local entities or administrations to repeal any administrative act that, in its view, is contrary to competition law and principles. In case of non-compliance with its opinion, the Italian competition authority may challenge the act before the Administrative Tribunals.
- *Peru*: In finding an illegal or unreasonable bureaucratic barrier, the Market Access Commission of the Peruvian Indecopi could appeal against the regulation under an “Acción Popular”, a constitutional provision that permits the Judicial Power to repeal sub-statutory unconstitutional or illegal regulations.
- *Spain*: The general advocacy task of the Spanish competition authority includes the ability to challenge acts and decisions of Public Administrations that might raise barriers to competition.

Source: Bulgaria's, Chinese Taipei's, Italy's, Japan's, Spain's, Peru's contribution to OECD (2015)

E. Other distortive state activity

16. The last category is of a residual nature and it concerns any other state activity which has the effect of distorting the level playing field (e.g. golden shares, shareholder’s activism, political involvement in strategic deals, industrial initiatives).³⁴ Some jurisdictions have adopted a comprehensive competitive neutrality framework (Australia and the European Union), while others have only adopted specific competitive neutrality provisions (Denmark, Finland, Norway, Spain, Sweden and the United Kingdom), which may address competition distortions. The OECD discussions, however, indicated that competitive neutrality rules and tools are absent in most jurisdictions and that where they exist these frameworks and provisions show significant differences.

17. Discrimination and unfair treatment are addressed in some of the jurisdictions at the highest legislative level by including competitive neutrality provisions into the Constitution (e.g. Brazil, Chile, Mexico, Peru, and Russia)³⁵ or competitive neutrality principles can be also enforced through Constitutional rulings (Costa Rica).³⁶

18. Two remarks apply to these frameworks and provisions:

- The application of competitive neutrality rules is not necessarily entrusted with the competition authority. Only in some cases competition authorities have the powers to enforce competitive neutrality rules (e.g. in Finland, in the Netherlands and in Sweden). Australia is an example where other authority is responsible to restore competitive neutrality: it is the Australian Government Competitive Neutrality Complaints Office (“AGCNCO”) which handles competitive neutrality complaints.
- A distinction can be drawn between more powerful mechanisms to restore competitive neutrality and more ‘soft’ approaches. Australia was a pioneer in establishing the first competitive neutrality framework and still remains a model today of a broad framework, which includes ex ante and ex post response mechanisms to ensure a level playing field. In Sweden the Stockholm District Court may, upon a petition by the Swedish Competition Authority (“SCA”), prohibit certain conduct by the state, a municipality or a county council. Finland and Norway are examples of the ‘soft’ approach. The Finnish Competition and Consumer Agency pursues its competitive neutrality provisions primarily through negotiations, whilst the Norwegian competition authority supervises competition – among other things – by “calling attention” to restrictive effects on competition of public measures.

³⁴ OECD, *Competitive Neutrality In Competition Policy* (2015), p 10.

³⁵ See Peru’s and Chile’s contribution to OECD (2015). Section 60 of the Peruvian Constitution specifies the three conditions which should be met by the State to engage in subsidiary entrepreneurial activity. In Chile the participation of the state in markets, particularly as a supplier of goods or services, is restricted in the Constitution, which establishes the principle of subsidiarity, according to which the State should only develop or subsidize goods or services that private parties are unable to provide.

³⁶ See the ruling of the Constitutional Court of Costa Rica (Res. N° 015763-2011) referred by Costa Rica’s contribution to OECD (2015) in relation to the obstacles imposed by local governments for the development of networks.

3. Conclusions

19. The OECD discussions showed that jurisdictions have put in place many initiatives to ensure a level playing field between SOEs and private competitors (e.g. adoption of good corporate governance principles for SOEs). Despite the positive experiences reported by many jurisdictions on the functioning of competitive neutrality provisions,³⁷ the OECD discussions have also shown that the problem of competitive neutrality is still extensive and that there is no one-size-fit-all approach to addressing it. Some jurisdictions adopted a comprehensive competitive neutrality framework, other jurisdictions apply specific rules and tools to address specific distortions; while others only rely on competition law enforcement and advocacy and competitive neutrality rules are completely absent.

20. Using competition law to address competitive neutrality concerns can be challenging. Although most jurisdictions recognise that competition law should apply widely to any enterprise/economic activity, there are still many exemptions applicable in many countries. But even when these exemptions are narrow, competition authorities face institutional and enforcement challenges³⁸ while applying competition law to SOEs. Beyond competition law enforcement, many agencies have been using advocacy to address competitive neutrality problems. Advocacy proved to be an especially useful tool where no competitive neutrality framework exists. The Annex to this Note identifies various instruments which can be used to tackle distortions that cannot be addressed through competition law enforcement or advocacy.

³⁷ The Netherlands pointed in its contribution to OECD (2015) that “*ACM’s view of the working of this new legislation is cautiously positive.*” Norway emphasised in its contribution to OECD (2015) that “[...] *NCA through its power to ‘point out’ its concerns [...] can initiate change that contribute to create a level playing field between public and private enterprises operating in the same market. However, the power to ‘point out’ is admittedly a weak instrument.*” Sweden underlined in its contribution to OECD (2015) that “*The Competition in Sweden report showed that around two- thirds of public entities had re-assessed their sales activities as a result of the rules coming into force, and a third had made changes to their activities.*”

³⁸ OECD, Competitive Neutrality In Competition Policy (2015) document identified (see particularly p 24-28.) various institutional and enforcement challenges.

MAIN OECD REFERENCES ON COMPETITIVE NEUTRALITY

- Competitive Neutrality in Competition Policy, 2015, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En)
- OECD Note on Competition Policy & Competitive Neutrality (2015)
- OECD Guidelines on Corporate Governance of State-owned Enterprises, 2015, <http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>
- State-Owned Enterprises - Trade Effects and Policy Implications, 2013, <http://www.oecd.org/daf/ca/name,230852,en.htm>
- Competitive Neutrality: Maintaining a level playing field between public and private business, 2012, <http://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm>.
- Competitive Neutrality: National practices, 2012, <http://www.oecd.org/daf/ca/50250966.pdf>
- SOEs and Competitive Neutrality, 2012, <http://www.oecd.org/competition/globalforum/2012globalforumoncompetition-programmeanddocuments.htm>.
- A compendium of OECD recommendations, guidance and best practices bearing on competitive neutrality, 2012, <http://www.oecd.org/daf/ca/50250955.pdf>
- Competitive neutrality and state-owned enterprises in Australia, 2011, http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises-in-australia_5kg54cxkxm36-en
- OECD, Government at a Glance, 2011, <http://www.oecd.org/gov/governmentataglance2011.htm>.
- OECD Competition Assessment Toolkit, 2011, <http://www.oecd.org/competition/assessment-toolkit.htm>.
- State Aids and Subsidies, 2011, <http://www.oecd.org/competition/sectors/48070736.pdf>.
- Competitive Neutrality and State-Owned Enterprises, Corporate Governance Working Papers, No. 1, 2011, <http://www.oecd.org/daf/ca/name,222835,en.htm>
- Competitive Neutrality and SOEs: Challenges and Policy Options, 2011, <http://www.oecd-ilibrary.org/docserver/download/5kg9xfjdhg6.pdf?expires=1417531358&id=id&accname=uest&checksum=A7647A965BC1EA33301086D38C3A5DBC>.
- Recommendation of the Council concerning Structural Separation in Regulated Industries, 2011, <http://www.oecd.org/daf/competition/50119298.pdf>.
- Accountability and Transparency: a Guide for State Ownership, 2010, <http://www.oecd.org/daf/ca/accountabilityandtransparencyaguideforstateownership.htm>

Competition, State Aid and Subsidies, 2010, <http://www.oecd.org/daf/competition/sectors/48070736.pdf>.

SOEs and the Principle of Competitive Neutrality: (i) Application of antitrust law to SOEs and (ii) Corporate governance and the principle of competitive neutrality, 2009, <http://www.oecd.org/daf/competition/46734249.pdf>.

Industrial Policy and National Champions, 2009, <http://www.oecd.org/daf/competition/44548025.pdf>.

Regulating Market Activities by the Public Sector, 2004, <http://www.oecd.org/daf/competition/sectors/34305974.pdf>

Table 1. (Distortion A.)

Distortion	Distortion subcategories	Tools	Jurisdiction	Year*	Relevant Authority	Link
State owned/controlled/privileged market player	Unfair privileges to SOEs	Good Corporate Governance	OECD	2015	OECD	SOE Guidelines
			Italy (recommendation)	2015	Competition Authority (ICA)	IT submission
			Chinese Taipei	2015	Executive Yuan (Cabinet)	CT submission
			Latvia (legislation)	2015	n.a.	OECD Review of the Corporate Governance of State-Owned Enterprises in Latvia
			Spain	2009	SEPI	SOEs and the Principle of Competitive Neutrality
		Transparency rules (legislation & guidelines)	OECD	2015	OECD	SOE Guidelines
			European Union (legislation)	2013	n.a.	EU Transparency Directive
			Australia (policy)	2012	n.a.	Competitive Neutrality (national practices)
			Denmark (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Iceland (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Israel (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Korea (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			New Zealand (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Slovakia (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Spain (guidelines)	2012	n.a.	Competitive Neutrality (national practices)
			Switzerland (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Turkey (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			United Kingdom (legislation)	2012	n.a.	UK Transparency Regulation

State owned/controlled/privileged market player (cont.)	SOEs behaviour (Leveraging, Cross-subsidisation, Market abuse)	Transparency rules (cont.)	United States (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Finland (legislation)	2015	n.a.	FI submission
			Spain (legislation)	2015	n.a.	ES submission
		Rationalise the number of SOEs	Italy (proposal)	2015	Competition Authority (ICA)	IT submission
			Chinese Taipei	2015	Task Force for Facilitating Privatization of Public Enterprises	CT submission
			Russia	2015	Russian Federation	RU submission
			Indonesia	2015	Ministry of State-Owned Enterprises	ID submission
		Tax neutrality, ROR policy for public undertakings	OECD	2011	OECD	OECD International VAT Guidelines
			European Union (legislation)	2006	n.a.	Tax neutrality in the EU
			Australia (policy)	2015	Australian Government	AU submission
			Australia (case law)	2015	Australian Government Competitive Neutrality Complaint Office (AGCNCO)	AU submission
			Finland (legislation)	2015	n.a.	FI submission
			United Kingdom (regulation)	2012	n.a.	UK Transparency Regulation
			Hungary	2012	Hungarian State Holding Company (HSHC)	Competitive Neutrality (national practices)
			Hungary (case law)	2012	Competition Authority (GVH)	Competitive Neutrality (national practices)
			Spain	2012	Ministry of Economic and Finance	Competitive Neutrality (national practices)
		Debt neutrality	Australia (policy)	2015	Australian Government	AU submission

* Year 2009 refers to the jurisdiction's submission to OECD SOEs and the Principle of Competitive Neutrality (2009),
Year 2012 refers to the jurisdiction's submission to OECD Competitive Neutrality, National practices (2012),
Year 2015 refers to the jurisdiction's submission to OECD Competitive Neutrality in Competition Policy (2015).

Table 2. (Distortion B.)

Distortion	Distortion subcategories	Tools	Jurisdiction	Year*	Relevant Authority	Link	
Providing public services	Selection	Open, fair and transparent bidding process	Australia	2015	Australian Government	AU submission	
			European Union (legislation)	2004	n.a.	EU Public procurement rules	
	Privileges & exclusive rights	Structural separation (economic and non-economic activity)	Corporate governance	Chinese Taipei (policy)	2015	461 Special Task Force	CT submission
				OECD	2001	OECD	Separation policies of public utilities
				Italy (legislation)	2015	n.a.	IT submission
				Sweden	2015	Competition Authority (SCA)	SE submission
				Ukraine	2015	Bodies of the Antimonopoly Committee of Ukraine	UA submission
				Denmark (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				Finland (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				Ireland (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				Lithuania (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				Spain (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				Switzerland (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				Turkey (legislation)	2012	n.a.	Competitive Neutrality (national practices)
				United Kingdom (legislation)	2012	n.a.	Competitive Neutrality (national practices)
	Inequality of access to information	Access equality	Netherlands (legislation)	2015	Competition Authority (ACM)	NL submission	
			European Union (case law)	2003	Court of Justice	Altmark judgement	
			Sweden	2015	Competition Authority (SCA)	SE submission	

Providing public services (cont.)	Over/under compensation	Benchmark for compensation, accounting for public service obligation	Bulgaria (case law)	2015	Competition Authority (CPC)	BG submission
			Latvia	2015	Ministry of Finance and the Ministry of Agriculture	LV submission
			Italy	2015	Competition Authority (ICA)	IT submission
			European Union (legislation)	2012	n.a.	EU SGEI package
			Netherlands	2015	Competition Authority (ACM)	NL submission
			Hungary	2012	State Aid Monitoring Office	Competitive Neutrality (national practices)
			New Zealand (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Poland (legislation)	2012	n.a.	Competitive Neutrality (national practices)
			Slovakia (case law)	2012	Competition Authority (Antimonopoly Office of the Slovak Republic)	Competitive Neutrality (national practices)
			Romania (case law)	2009	Romanian Competition Authority (RCC)	SOEs and the Principle of Competitive Neutrality
			Turkey (legislation)	2012	n.a.	Competitive Neutrality (national practices)

- * Year 2009 refers to the jurisdiction's submission to OECD SOEs and the Principle of Competitive Neutrality (2009),
Year 2012 refers to the jurisdiction's submission to OECD Competitive Neutrality, National practices (2012),
Year 2015 refers to the jurisdiction's submission to OECD Competitive Neutrality in Competition Policy (2015).

Table 3. (Distortions C-E.)

Distortion	Distortion subcategories	Tools	Jurisdiction	Year*	Relevant Authority	Link
Subsidies	Illegal state aid, cross-subsidisation	Ex ante state aid control	European Union	2015	European Commission (DG COMP)	EU state aid control
			Norway	2015	EFTA Surveillance Authority (ESA)	NO submission
		Ex post state aid control	European Union	2015	European Commission (DG COMP)	EU state aid control
		Mechanism to supervise the use of public funds	Spain	2015	General State Controller, Regional Controllers	ES submission
		Guide on the granting and the evaluating of state aid	Spain	2015	Competition Authority (CNMC)	ES submission
Sectoral regulation	Distortive/discriminating/restrictive regulation	Regulatory Impact assessment	OECD	2011	OECD	Competition Assessment Toolkit
			Australia	2015	Australian Government	AU submission
			Bulgaria	2015	Competition Authority (CPC)	BG submission
			Japan	2015	Each ministry of Japan	JP submission
			Chinese Taipei	2015	Task Force for Deregulation and Market Competition Promotion	CT submission
			Finland	2015	Competition Authority (FCCA)	FI submission
		Ex ante policy co-ordination	Japan	2015	Competition Authority (JFTC)	JP submission
		Disapply the regulation	Peru	2015	Market Access Commission (Indecopi)	PE submission
		Denouncing the regulation	Peru	2015	Market Access Commission (Indecopi)	PE submission
		Judicial review	Italy	2015	Competition Authority (ICA)	IT submission
			Spain	2015	Competition Authority	ES submission

Other distortive state activity	CN distortion	Competitive neutrality framework	Australia	2015	Australian Government	AU submission
		Competitive neutrality rules	Denmark	2012	Competition Authority	Competitive Neutrality (national practices)
			Finland	2015	Competition Authority (FCCA)	FI submission
			Netherlands	2015	Competition Authority (ACM)	NL submission
			Sweden	2015	Swedish Competition Authority (SCA)	SE submission
			Norway	2015	Competition Authority (NCA)	NO submission
			Spain	2015	Competition Authority	ES submission
			United Kingdom	2012	Competition Authority (CMA)	Competitive Neutrality (national practices)
		Constitutional framework	Chile	2015	Chilean Competition Tribunal (TDLC)	CL submission
			Peru	2015	Unfair Competition Commission (Indecopi)	PE submission
Costa Rica (case law)	2015		Constitutional Court	CR submission		

- * Year 2009 refers to the jurisdiction's submission to OECD SOEs and the Principle of Competitive Neutrality (2009),
Year 2012 refers to the jurisdiction's submission to OECD Competitive Neutrality, National practices (2012),
Year 2015 refers to the jurisdiction's submission to OECD Competitive Neutrality in Competition Policy (2015).