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

Global Forum on Competition

THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES

- Executive Summary -

8 December 2021

This executive summary by the OECD Secretariat contains the key findings from the discussion held during Session III of the 20th meeting of the Global Forum on Competition on 6-8 December 2021.

More documents related to this discussion can be found at oe.cd/pcna.

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Executive Summary

By the Secretariat¹

On 8 December 2021, the OECD held a roundtable to discuss the promotion of competitive neutrality by competition authorities as part of the Global Forum on Competition. Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and the expert panellists, the following key points emerged:

1. *State intervention can distort the level playing field by treating some market players (including public, private, domestic, and foreign enterprises) differently to others. This may involve the state (whether at the central, regional, federal, provincial, county or municipal level) granting advantages to certain entities selectively. The principles of competitive neutrality should apply to all firms, irrespective of their ownership, nationality or legal form. State intervention can distort competition in five main ways:*
 - The competition law framework: competitive neutrality issues may arise in relation to both the scope of a jurisdiction's competition law (exemptions) and how the authority enforces it. Exemptions to competition law for specific firms or sectors may significantly undermine competitive neutrality. To ensure competitive neutrality, competition law should apply and be enforced in a non-discriminatory manner to all enterprises, unless overriding public policy objectives require otherwise. In addition, existing exemptions should be regularly re-assessed to see whether they are still justified and proportionate.
 - Regulatory frameworks: the regulatory framework may discriminate based on ownership, nationality or legal form. This could mean that sectoral or horizontal regulatory regimes are not applicable to all competitors or that they provide for selective exclusions from certain requirements. Competitive neutrality requires that all enterprises competing in a market are subject to the same regulatory requirements, irrespective of their ownership, nationality or legal form.
 - Public procurement regimes: public procurement may distort competitive neutrality at both the level of the legal framework and at the level of tender procedures. Measures may be adopted to support certain companies on public-policy grounds. This may mean that some players may be favoured over others or that certain participants face discrimination through the imposition of excessively burdensome requirements. Such measures should be carefully considered in terms of their effectiveness and their likely impact on competition.
 - Public support measures: direct or indirect financial advantages provided by the state to enterprises may selectively favour certain firms, giving them a competitive advantage in the market. To preserve competitive neutrality, competition impacts should be considered in the design and granting of public support measures.

¹ This executive summary does not necessarily represent the consensus view of the Global Forum participants. It does however identify key points that emerged from the Roundtable discussion, including the views of the expert panellists and the participants' oral and written contributions.

- Special and exclusive rights: the rules determining the grant of special and exclusive rights, specifically for the provision of public services, may create undue advantages in three ways. Firstly, in the selection of beneficiaries, secondly, through the rights and privileges that are attached to the public service and third, through the compensation paid. Competitive neutrality can be protected by selecting public service operators through an open, fair and transparent bidding process; clearly defining any exclusive right and limiting it to the fulfilment of the public service obligation and adopting fair and transparent public service compensation standards.

2. *It is crucial for competition authorities to address public restraints as well as private restraints, through both advocacy and enforcement initiatives. Public and private restraints may be linked. An inclusive approach can help foster regional integration.*

Competition authorities often focus on the actions of companies, but the state may also adopt measures that significantly distort the competitive landscape. Public and private restraints may also be intertwined. It is therefore essential that competition authorities play a role in promoting competitive neutrality through enforcement and advocacy initiatives. The involvement of competition authorities may be part of a “whole of government” approach to competitive neutrality, with several jurisdictions providing evidence of wider policy initiatives.

The 2021 OECD Recommendation on Competitive Neutrality defines competitive neutrality as a ‘principle according to which all [e]nterprises are provided a level playing field with respect to a state’s (including central, regional, federal, provincial, county, or municipal levels of the state) ownership, regulation or activity in the market’. A level playing field will allow the most efficient firms with the best products to enter the market and expand, while pushing inefficient firms to exit. Competition is encouraged, meaning that resources are optimised, productivity increases and consumers enjoy the benefits of lower prices, more choice, better quality products and services, and more innovation. Competitive neutrality at the regional level has benefits for regional integration.

3. *Competition authorities may undertake enforcement actions to address or remove anti-competitive regulatory and administrative acts. This involves direct or indirect enforcement.*

Competition authorities may have enforcement powers to address regulatory and administrative measures. The extent of these powers varies greatly across jurisdictions. In some, competition authorities can directly remove anti-competitive provisions and even fine public bodies (generally SOEs) and public officials. However, in other jurisdictions, competition authorities can only challenge acts that harm competitive neutrality before a court. Binding decisions (of an authority or a court) can be particularly effective in promoting competitive neutrality.

4. *Competition authorities may support public bodies in the design of regulations and reform initiatives. Authorities may have powers to review legislation and to provide advice to government authorities.*

Competition authorities may have powers to review legislation and policy measures (including public procurement) and to provide advice to government bodies on their potential competition implications. Advocacy is often the most common tool used to promote competitive neutrality.

Competition authorities are well placed to conduct competition assessments, given their technical capacities. They can undertake such assessments pursuant to specific powers or obligations or as a part of their general advocacy functions. Interventions could involve the

use of mandatory regulatory impact assessments, ad hoc assessments and market studies or sector inquiries. They may also involve significant co-operation with other government bodies. Although competition authorities' opinions or recommendations are often non-binding, various authorities have reported a positive impact of their advocacy efforts.

5. *Competition authorities may use both enforcement and advocacy tools to control public support measures. Enforcement powers are limited to a few jurisdictions.*

Some competition authorities may have enforcement and/or advocacy powers aimed at controlling public support measures. Enforcement powers are limited in most jurisdictions but a key example is the EU State Aid regime, which involves an ex ante screening procedure and an ex-post assessment mechanism. Other authorities may not have a specific regime but can rely on more general enforcement powers that allow them to intervene against anti-competitive state interventions. Such regimes usually target actions by local and provincial governments. Absent specific provisions, several jurisdictions provided evidence of their roles in providing advice, issuing guidelines and in monitoring activities in relation to public support measures.