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Global Forum on Competition

THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES

Summary of Discussion

8 December 2021

This document is a summary of 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/pcnca.

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Summary of Discussion

By the Secretariat

1. Introduction by the Chair

1. The **Chair** explained that the roundtable would be divided into three parts:

- addressing anti-competitive governmental measures through enforcement
- support by competition authorities to public bodies in the design of regulation and reforms
- tools of competition authorities to address public support measures.

2. The expert panel consisted of:

- **Eleanor Fox**, Walter J. Derenberg Professor of Trade Regulation at the New York University School of Law
- **José Luis Buendía**, a Partner at Garrigues
- **Deborah Jane Healey**, Professor at UNSW Sydney, Faculty of Law and Justice.

3. All three panellists had provided video contributions, available on the Forum website. Prof. Fox had also provided a paper for the roundtable, and the OECD Secretariat had provided a background note. A number of jurisdictions had provided written contributions.

2. Overview of background paper

4. The **Secretariat** gave a summary of their background paper for the session. Ms Flaherty explained that the paper identifies five areas in which state intervention can distort competitive neutrality. First, the scope or enforcement of a jurisdiction's competition law can introduce distortions, for example through the granting of exemptions. Second, regulatory frameworks may discriminate among enterprises based on ownership, nationality or legal form. Third, public procurement regimes may distort competitive neutrality in their legal framework or tender procedures, for example by favouring state-owned enterprises (SOEs) or domestic firms on public policy grounds, or discriminating against new entrants and small and medium-sized enterprises (SMEs) through burdensome requirements. Fourth, public support measures, which are direct or indirect financial advantages provided by the state to enterprises, may selectively favour certain firms. Fifth, rules determining the granting of special and exclusive rights for the provision of public services can create undue advantages in three ways: the selection of beneficiaries, the rights and privileges attached to public services, and the compensation paid.

5. Mr Calvet-Bademunt summarised three sets of tools available to competition authorities to promote competitive neutrality. First, competition authorities may have enforcement powers, either direct (e.g. requiring that a non-competitive procurement process be re-run) or indirect (e.g. challenging anti-competitive measures before courts). Second, they can use advocacy tools such as recommendations, guidelines and capacity-building; several authorities reported that these efforts have had a positive impact despite

being non-binding, and they can be especially useful in improving bid-rigging prevention and detection in public procurement. Third, a few jurisdictions have enforcement powers in the area of public support measures, going as far as obliging the government that granted the aid to recover it from the beneficiary company.

6. In general, competition authorities tend to have limited enforcement powers but can use their advocacy powers to engage with governments and convince them of the benefits of competition. He pointed participants to a table in the background paper summarising possible tools to deal with different competitive neutrality distortions, which competition authorities might wish to refer to in examining their current toolkit.

3. Addressing anti-competitive government measures

7. **Eleanor Fox** began the first topic of the session by questioning whether the issue at stake should be framed in terms of promoting competitive neutrality or removing unreasonably restrictive state and local restraints that harm markets and consumers. "Levelling the playing field" for private enterprises is not the point if the source of harm is public restraints that apply to them equally.

8. She turned first to unreasonable state and local restraints within a jurisdiction. She quoted Prof. Timothy Muris that "protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel". Restraints are often of a hybrid form whereby the vested interests of private parties are served by a public entity. In other cases, good faith regulation extends too far.

9. There are many examples of action by competition authorities to remove or prevent unreasonable regulation through both enforcement and advocacy, which can be considered when formulating international best practice. A number of jurisdictions allow the competition authority to enforce competition law against state and local restraints, Lithuania and Peru being very good examples.

10. Prof. Fox also felt that bolder action is required to challenge unreasonable cross-border and regional restraints, many of which are going unaddressed because trade and competition policy are organised into silos. She considered the EU to be a strong example of law that integrates the treatment of trade, SOEs and competition restraints. The African Continental Free Trade Area (AfCFTA) is attempting to integrate trade in Africa and incorporates a competition dimension, but cross-border restraints of member nations (often hybrid restraints involving leading firms) need to be addressed.

11. **Latvia** described recent amendments to its competition law giving the Competition Council of Latvia (CC) enforcement powers to deal with competitive neutrality infringements by public administrative bodies and SOEs. Such infringements include: discriminating between market participants (which the CC may also apply to public procurement, complementing the powers of the Procurement Monitoring Bureau); conferring an advantage on a SOE; and creating barriers to entry or forcing the exit of a private company (for example, as a result of a regulatory decision). SOEs abusing a dominant position are investigated under competition law rather than under the new competitive neutrality provisions. No formal proceedings have been launched yet under the new powers, but some cases have been resolved through negotiation.

12. The **Russian Federation** described the role of the Federal Antimonopoly Service (the FAS Russia) in dealing with competitive neutrality infringements. The FAS Russia undertakes both competition law enforcement and oversees public procurement. Its powers in relation to public bodies relate especially to Article 15 of the Law on Protection of

Competition, which prohibits them from acting in a way that hinders competition. Such action includes, among other examples, restrictions on the creation of economic entities, unreasonable requirements for economic entities, restrictions on the free movement of goods on the territory of the Russian Federation, providing economic entities with privileged access to information, and imposing discriminatory conditions. There are also special rules governing public tenders and control over state privileges.

13. As well as enforcement, the FAS Russia is involved in the development of sectoral regulation and in competition advocacy. It has recently been involved in the introduction of a system of anti-monopoly compliance in regional and local governments under the National Competition Development Plan for 2018-2020. The FAS Russia also organises training seminars for civil servants in this area and has created "white and black books" of best and worst regional competition policy practices.

14. SOEs are also subject to competition law and are being reorganised or abolished in order to remove their negative effects on competition and development as well as potential private/public restraints and competition law violations. Under an amendment to competition law in 2019, the FAS Russia was authorised to issue a warning of liquidation or termination of activity of unitary enterprises established or operating in violation of the requirements of anti-monopoly legislation in competitive markets.

15. **Lithuania** discussed its regime in relation to the specific issue of municipal enterprises. The Law on Local Self-Government requires municipalities to obtain prior approval from the Lithuanian Competition Council in order to engage in a new economic activity either by establishing a new entity or entrusting provision to an existing one under its control. Before applying for such consent, the municipality must hold a competitive tender to select a private provider of the goods or services in question. The Competition Council gives consent if there are no willing providers and two further conditions are met: namely, the activity is necessary to serve the common interest of the local community and will not result in privileges or discrimination for particular undertakings. Under this law, the Competition Council has approved new activities by municipal enterprises in a few cases, for example concerning the operation of swimming pools and the administration of residential property.

16. In response to a question from the **Chair**, the speaker confirmed that this regime concerns only new economic activities. If existing municipal enterprises raise concerns, the Competition Council would be likely to scrutinise them under the general legal framework, which prohibits public authorities from limiting or distorting competition.

17. **Finland** discussed the powers of the Finnish Competition and Consumer Authority (FCCA) to enforce neutral competitive conditions between the public and private sector under the Finnish Competition Act. Chapter 4a) has been in force since 2013 and gives the FCCA the power to intervene in the public sector provision of goods and services if a business practice or organisational structure prevents or distorts competition or is in conflict with the principle of market-based pricing required by the Local Government Act. Such powers are not limited to any particular types of distortions but must respond to a negative impact on competition. This is because the Act does not prohibit public entities from engaging in business per se and the aim is not to protect private sector businesses from public sector competition.

18. The FCCA must first try to remedy the distortion by negotiation. If this fails, it must prohibit the business practice or organisational structure or else impose conditions for continuing the activity so that neutral competitive conditions can be ensured. These measures can be enforced through the imposition of a periodic financial penalty. To date, the FCCA has achieved remedies through negotiation and has not resorted to enforcement.

19. The FCCA has scrutinised various suspected distortions in sectors such as waste management, occupational health services, municipal catering and cleaning services and laboratory services. Adopted remedies have included incorporation of the economic activity or switching from cost-based to market-based pricing.

20. **Gambia** intervened to mention three instances of successful advocacy interventions by the Gambia Competition and Consumer Protection Commission in relation to government restraints. Section 15 of the 2007 Competition Act provides the Comission with a mandate to advise on any action taken or proposed by the State or any public body that may adversely affect competition. The first case concerned a government policy that required pilgrims to Mecca to arrange their journey through the national package operator, which was subsequently relaxed. The second case concerned a government measure permitting only the import of loose cement and prohibiting the import of bag cement after lobbying by domestic cement-bagging companies, which was also reversed. The most recent case concerned a government measure mandating that only the state-owned Gambia Groundnut Corporation be permitted to purchase groundnuts directly from farmers for export.

4. Support by competition authorities to public bodies in the design of regulation and reforms

21. **Deborah Jane Healey** began the second topic of the session. She cited the May 2021 OECD Council Recommendation on Competitive Neutrality as an important step in helping countries achieve a comprehensive approach to the issue of competitive neutrality, which many lack.

22. She listed five elements required for competitive neutrality, which are reflected in the Recommendation. The first is the application of competition law to government businesses, including its enforcement, which is often lacking because of political pressure on agencies and lack of agency independence. The second is routine competition impact assessment of policies, laws and regulations, both ex ante and ex post. Third, measures such as accounting processes, which can take into account the advantages of government ownership and control and ensure the equal application of laws and policies. Fourth, government procurement must be fair, open and non-discriminatory. Fifth, there should be a clear policy for transparent public service obligations.

23. Prof. Healey next discussed the need for exemptions from competitive neutrality on public policy grounds, which the Recommendation recognises. A key question is whether they should be granted as part of a structured policy or ad hoc by government. The treatment of exemptions may depend on the stage of development of the jurisdiction in question and is often related to other considerations of political economy. Exemptions should however always be circumscribed and carefully considered to ensure the benefits of competition are fully achieved. There is a question of the philosophical balance between the sovereignty of governments to pursue public policy goals and the weighting given to competition in any particular case. Prof. Healey felt that competition experts needed to remind governments of the importance of competition, which they sometimes neglect.

24. She next set out what she considered to be the most important questions in regard to competitive neutrality. The first is where the line should be drawn between the governance and policy role of government on one hand and its role as a market participant on the other. Prof. Healey felt that governments are sometimes prepared to marginalise competition. A second question is whether governments consider the impact of their decisions on market competition sufficiently. Governments may neglect competition, which requires a longer-term focus, in favour of short-term votes. A third question is

whether unfettered competition is always necessary or appropriate to achieve the greatest public good. Prof. Healy felt that in some markets and industries, such as pharmaceuticals and healthcare, it is not. A fourth question is whether governments can be held accountable for failures to consider long-term impacts on competition.

25. Prof. Healey then turned to Australia, whose well-regarded competition policy reforms implemented after 1995 promote competitive neutrality under an overall public benefit criterion. However, she listed several examples where profit maximisation appears to have been pursued at the expense of long-term competitive markets in the privatisation of government assets, which has attracted criticism from the Australian Competition & Consumer Commission (ACCC). Examples include: the sale of a major airport giving the purchaser the right of first refusal on building a second airport and long-term monopoly rights over car parking, resulting in very high prices; long-term leases of critical infrastructure such as ports with restrictive conditions on building additional ports or reducing container throughputs, which has led to high prices of port services; and the sale of the government's 49% share of a toll road to the owner of the majority share where it was already dominant in the city's toll road network.

26. Prof. Healey said there were gaps in Australia's competitive neutrality policy framework. Ministers are not bound by recommendations and there is no compensation for loss suffered as a result of competitively non-neutral conduct by a SOE. The ACCC has routinely advocated to government on these and other cases, but has no formal advocacy role. Prof. Healey suggested that it could be given powers to investigate and advise government prior to implementation.

27. Another possibility is to impose obligations on the Commonwealth and state governments. These could include a public review of privatisation proposals to ensure that appropriate competition is maintained. Alternatively, governments could be required to disclose and justify in a transparent way why competitive outcomes have been compromised in the name of public benefit. To address commercial confidentiality concerns, the report could be laid before parliament for scrutiny. Another possibility is to mandate full disclosure of the relevant analysis in the annual reports of the body selling the infrastructure. Finally, regulation could be imposed on assets with significant levels of market power in order to prevent monopoly conduct.

28. Delegates from the **United States** Federal Trade Commission (FTC) and Department of Justice (DoJ) discussed President Biden's Executive Order on Competition of July 2021, which takes a "whole-of-government" approach to promoting competitive markets through a combination of pro-competitive regulation and law enforcement. An executive order is not legislation but is essentially an instruction from the President to executive agencies regarding their operations in carrying out and enforcing laws, which is non-binding in the case of an independent agency such as the FTC.

29. The order on competition recognises the importance of competitive markets and describes industry consolidation and weakened competition as contributing to ill effects on consumers, workers, farmers and small businesses. It is supportive of the competition agencies, but also notes that the US Congress has enacted industry-specific laws that often provide additional protections, for example in agricultural markets, banking and telecommunications.

30. The order establishes a White House competition council, whose purpose is to coordinate government efforts to address over-concentration, monopolisation and unfair competition in, or directly affecting, the American economy. The tasks of the council include developing procedures and best practices for inter-agency co-operation and co-

ordination on matters of overlapping jurisdiction, and addressing potential legislative changes.

31. Specific requests to the DoJ and FTC include reviewing and potentially updating guidance on areas such as merger review, intellectual property issues and conduct in labour markets. The order also seeks to improve the dialogue between executive branch agencies on one hand and the competition experts and antitrust enforcement agencies on the other. For example, the Department of Labour is ordered to study competition in labour markets and the Department of Agriculture is ordered to study retail food markets, with assistance from the DoJ and the FTC.

32. In response to the order, the Associate Attorney General issued a memorandum to the DoJ Antitrust Division setting out actions for its implementation. These include (among other things): developing new interagency relationships and technical assistance programs to support regulators; promoting rule-making efforts by other agencies; encouraging agencies that apply a public interest standard to consider competition more effectively; filing comments on mergers or other joint ventures under the purview of other federal agencies; working with the Department of Labour to implement antitrust whistle-blower protections; and continuing to work with other federal partners on identifying collusion in public procurement.

33. The FTC has rule-making authority, which it has traditionally used on consumer protection issues, usually upon being directed by Congress. The 2021 executive order encourages the FTC to consider using its competition rule-making authority to address a variety of harmful conducts that can inhibit competition, as well as to address contract terms that might make it harder for workers to move from one job to another, such as non-compete clauses.

34. The delegates explained that the DoJ and FTC, both in response to the order and more generally, have three tools at their disposal: advocacy for pro-competitive laws, rules and regulations; collaboration, for example in the form of memoranda of understanding with regulators and cross-agency working groups; and education, for example via secondments and training programmes.

35. **India** described advocacy activity by the Competition Commission of India (CCI) to increase competitive neutrality in public procurement. The CCI has in the past engaged in case-based advocacy with states and SOEs drawing on the OECD public procurement toolbox, for example to address collusive bidding in the railways sector. More recently, it introduced the State Resource Person Scheme (SRPS), which aims to sensitise state governments to competition issues, especially in public procurement. Resource Persons are appointed by state governments and trained by the CCI, using a tender evaluation toolkit based on OECD materials. They are responsible for identifying competition issues and engaging with public procurement officials, including at the district or municipal level.

36. The CCI also undertakes advocacy with state governments regarding the issuing of general regulations and specific issues to be considered in the design of procurement processes. More than ten of India's 28 states now have specific laws on public procurement, and some have issued guidelines for procurement officials.

37. **Brazil** described co-operation between its competition authority and economics ministry in successfully advocating for the opening-up of the taxi market. The Administrative Council for Economic Defence (CADE) and the Ministry of Economy's Secretariat for Economic Monitoring (SEAE) successfully persuaded legislators to adopt pro-competitive legislation and regulation in the sector that allowed Uber to operate in the Brazilian market. Uber's entry had provoked lobbying from taxi drivers for restrictive legislative measures, as well as instances of unrest. CADE's department of economic

studies also produced three working papers, both before and after Uber's entry, which found for example that prices fell and quality of service increased as a result. This work persuaded legislators at federal and state level to abandon proposed legislation that would have introduced barriers to entry or regulated prices.

5. Tools for competition authorities to address public support measures

38. **José Luis Buendía** discussed state aid with a focus on the EU. He agreed with Prof. Fox that public restraints on competition need to be tackled in addition to private restraints, but stressed the difficulty of the task and noted that genuine enforcement (as opposed to merely advocacy) is realistic only in a supra-national setting such as the EU, since it requires primacy over parliaments and governments.

39. In addition to Articles 101 and 102 concerning antitrust and merger control, competition-related provisions of the Treaty on the Functioning of the European Union (TFEU) with a focus on public restraints are Articles 107 and 108 on control of state aid and Article 106 on competitive neutrality. There are also EU directives on public procurement.

40. Mr Buendía described the provisions on state aid control under Articles 107 and 108 TFEU, which empower the European Commission to impose recovery of state aid granted in contravention of the rules, as among its most powerful instruments and a powerful threat to beneficiaries. Enforcement and authorisation were traditionally centralised with the Commission. Recently there has been increasing decentralisation in the case of negative enforcement, but the Commission retains sole power to give positive approvals of state aid. Complainants against state aid, such as competitors of beneficiaries, can seek a preliminary reference before the Court of Justice of the European Union (CJEU) if pursuing action in national courts, or else can oblige the Commission to take a decision on their complaint. He felt that state aid control would be less effective without this recourse. He also noted that during the Covid-19 pandemic the Commission had taken a more lenient approach to state aid, which he hoped would be merely temporary.

41. By contrast, Article 106, which lays down rules of competitive neutrality in respect of non-financial support, was heavily enforced in the past but is now overlooked. It prohibits state measures such as granting exclusive rights that distort competition (106(1)), except under certain public service justifications (106(2)), and also gives the Commission quasi-legislative powers to adopt directives and decisions (106(3)). Although the wide scope of Article 106(1) has been confirmed most recently by the CJEU in the Greek Lignite case, it is not actively enforced by the Commission, which Mr Buendía attributed to the fact that complainants cannot force the Commission to act, unlike in the case of state aid.

42. Mr Buendía concluded by suggesting that advocacy combined with the above provisions could be a powerful tool. He gave an example from his own experience as a member of the Competition Tribunal of Aragon in Spain, which issued a recommendation inviting a local authority to take action under Article 106 TFEU in connection with a distortion of competition in the market for ski schools caused by a public concession.

43. In response to a question from the **Chair** about the standards by which state aid is judged legal or illegal, the **European Commission** explained that state aid is defined by cumulative criteria including that the intervention is likely to affect trade between member states. State aid is prohibited as a rule but may be permitted in some circumstances such as where necessary for the provision of services of general economic interest (SGEI). Member states generally notify the Commission of their intention to grant aid and enter discussions

with DG Competition about compatibility. A very high proportion of aid is not notified as it is considered de minimis or covered by the General Block Exemption Regulation.

44. The **Chair** also asked why, as described by Mr Buendía, Article 106 TFEU on non-financial support was less actively enforced than the state aid rules. Mr Buendía believed that part of the reason is that there is an overlap between the two sets of provisions and that the Commission tends to use its most powerful instrument, namely the state aid rules. He nevertheless hoped that enforcement of Article 106 in other areas would be increased. The European Commission noted that Article 106(2) was frequently invoked, for example in order to prevent over-compensation of SGEI.

45. **Spain** described the activity of the Spanish National Markets and Competition Commission (CNMC) in promoting competitive neutrality with specific respect to state aid. Under its powers within the competition law framework, the CNMC makes recommendations concerning the removal of barriers to competition that are not justified under grounds of necessity and proportionality, mainly by means of reports on individual schemes and an annual review. It also determines whether cases of state aid should be referred to the European Commission for scrutiny under Article 107 TFEU.

46. In 2021 the CNMC published recommendations to policy makers for boosting growth and economic recovery without undue competitive distortions, focusing on state aid as well as public procurement and better regulation. These include, for example, a recommendation that granting agencies should not give undue preference to operators from the same geographic region.

47. The CNMC publishes an annual report on public aid awarded in Spain including a statistical analysis of aid granted based on data from the European Commission, and the latest laws and regulations on the subject.

48. An example of a case-specific CNMC report is an assessment of a regional tax on nitrogen oxide emissions from commercial aviation at El Prat Airport. The CNMC found that the design of the tax favoured certain airlines and therefore potentially distorted competition, and should be scrutinised by the European Commission.

49. In response to question from the **Chair**, the speaker confirmed that the CNMC has advocacy powers to recommend that anti-competitive local government regulations should be modified, and can bring legal action if necessary.

50. The **Chair** thanked the participants and closed the session.