

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****The Promotion of Competitive Neutrality by Competition Authorities****- Session III - Call for country contributions**

6-8 December 2021
via Zoom

This document is a call for country contributions for Session III of the Global Forum on Competition to be held virtually from 6 to 8 December 2021 (via Zoom). GFC participants are invited to submit their contributions by 29 October 2021 at the latest.

JT03479956

TO ALL GLOBAL FORUM PARTICIPANTS

RE: Roundtable on the Promotion of Competitive Neutrality by Competition Authorities

20th Global Forum on Competition (6 to 8 December 2021)

Dear GFC Participant,

In December 2021, the [Global Forum on Competition](#) will hold a roundtable on [the Promotion of Competitive Neutrality by Competition Authorities](#). We are writing to provide you with some information on the topic and on the organisation of the session, and to invite you to submit a written contribution.

Competitive neutrality is a principle according to which all enterprises 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.¹ It has been a major theme of OECD work in recent years.

In the context of the Global Forum on Competition, particular aspects of competitive neutrality have been addressed on three occasions: in 2018, in the roundtable on *Competition Law and State-Owned Enterprises*; in 2010, in the roundtable on *Competition, State Aids and Subsidies*; and in 2009, in the roundtable on *Competition Policy, Industrial Policy and National Champions*. Furthermore, the OECD Competition Committee and its Working Party no. 2 have discussed aspects of competitive neutrality on several occasions, including a 2015 roundtable on the subject, as well as a 2020 session on the *Role of Competition Policy in Promoting Economic Recovery*. The Committee's work has culminated in the adoption of the Recommendation of the Council on Competitive Neutrality² in May of this year, which encourages³ Adherents to:

1. Ensure that the legal framework applicable to markets in which enterprises currently or potentially compete is neutral and competition is not unduly prevented, restricted or distorted. This includes having a competitively neutral competition law, maintaining competitive neutrality in the enforcement of competition, bankruptcy law, and the regulatory environment, and establishing open, fair, non-discriminatory, and transparent conditions of competition in public procurement.
2. Preserve competitive neutrality when designing measures that may enhance enterprises market performance and distort competition. This includes, avoiding offering undue advantages that distort competition and selectively benefit some enterprises over others, limiting compensation for any public service obligation placed upon an enterprise so that it is appropriate and proportionate to the value of the services, and adopting structural and governance rules for state-owned enterprises that do not provide them with an undue advantage that distorts competition.

¹ See OECD, Recommendation of the Council on Competitive Neutrality.

² The Recommendation is available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

³ The Recommendation recognises that achieving public policy objectives, in certain circumstances, requires exceptions to competitive neutrality.

In light of the Recommendation, this roundtable will explore how competition authorities can contribute to enhancing competitive neutrality in their jurisdictions. In particular, the discussion will examine the enforcement and advocacy tools competition authorities may use to address competitive neutrality concerns, and the challenges they face in doing so. The roundtable will focus on the specific anti-competitive state actions including:

1. **Enforcement of competition law.** There is broad recognition that the application of competition law plays an important role in ensuring a level playing field. To ensure competitive neutrality, in principle, jurisdictions should ensure ownership-, nationality-, and sector-neutral competition laws (in terms of both formal legislative exemptions and enforcement practice). Yet, some jurisdictions have exemptions, exceptions, immunities or defences in their competition laws for certain activities or sectors. Beyond these legislative measures, authorities may face other challenges and pressures when applying competition law to certain actors (e.g. the so-called national champions).

Please note that the enforcement of competition law against state-owned enterprises was already discussed during the 2018 Global Forum on Competition, and thus we are particularly keen to explore the other ways in which competition authorities can contribute to competitive neutrality.

2. **Regulation.** Some regulatory interventions may have distortionary effects and raise competitive neutrality concerns, such as: uneven liberalisation and sector (de)regulation, or licensing regimes un-levelling the playing field. Competitive neutrality concerns arise where these regulatory mechanisms have an uneven impact on the market, for example when they are designed to the advantage of certain incumbents or domestic firms. In some jurisdictions, competition authorities can assess the impact on competition of draft regulations and assist the public authority adopting them – an assessment that could consider competitive neutrality. Other jurisdictions have more powerful measures allowing the competition authority to challenge distortive regulation in court.
3. **Public procurement.** Public-procurement regulatory frameworks can have distortionary effects where they favour some entities over others, for instance, national enterprises over foreign enterprises. Similarly, tender design can harm competitive neutrality by, for example, giving preferential treatment to incumbents through unnecessary experience requirements. Competition authorities may advocate for pro-competitive legislative changes and co-operate with public purchasers to increase competition in specific tenders.
4. **Public support.** Distortive public support often takes the form of selective advantages using state resources (such as subsidies), but may also be delivered through other mechanisms such as favourable tax treatment. Some jurisdictions may introduce ex ante or ex post screening mechanisms to review the grant of public support, or engage in advocacy with governments in this area.
5. **Public service obligations.** When governments impose duties on firms to provide a given product or service, competitive neutrality challenges may arise at three levels: (i) the selection of the public service provider, (ii) the privileges and powers attached to the public service, and (iii) how the provider is compensated. Compensation that is either insufficient or excessive can distort the domestic competitive landscapes.

The quality and utility of this roundtable will greatly depend on the written contributions submitted by delegations. In order to assist you with the preparation of your contribution, we refer you to the Secretariat background paper on this topic, which will be circulated on O.N.E. in the coming months, the suggested bibliography at the end of this letter, and the questions in the Annex. The list in the Annex is not exhaustive and you are encouraged to raise and address other issues in your submission and during the discussion.

The dedicated webpage for this roundtable (oe.cd/compneutrality) will be the primary vehicle for conveying documentation and related links on this subject (see the GFC website: oe.cd/gfc and our main roundtables page at www.oecd.org/competition/roundtable). Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.

We would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. We invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively, the Secretariat will produce one, but given the time constraints, you might not be in a position to check it before distribution on O.N.E.

Please notify the Secretariat by **24 September 2021** if you will be making a written contribution. Written submissions are due by **29 October 2021**. Failure to meet that deadline can result in a contribution not being distributed on O.N.E. in a timely fashion, and considered in the structure of the roundtable discussion.

All communications regarding documentation and logistics for this roundtable should be sent to Ms Angélique Servin (angelique.servin@oecd.org). All substantive queries regarding this session should be sent to Mr Jordi Calvet-Bademunt (jordi.calvetbademunt@oecd.org) and Ms Sophie Flaherty (sophie.flaherty@oecd.org).

Annex. Suggested questions for consideration in written contributions

This Annex includes a list of suggested questions for consideration in preparing your submission. A submission does not need to cover every listed question. Based on your experience, you may wish to address other issues that are not listed here. You are encouraged to discuss relevant cases where appropriate to illustrate your answers.

1. Does your jurisdiction address competitive neutrality through the competition law? How do you pursue this objective? What are the types of distortions you are mostly concerned with? Please identify the specific tools that the competition law provides you with to address anti-competitive state-actions within your jurisdiction (e.g. subsidy control, supervision of companies entrusted with public service obligations, issuance of opinions) and in other jurisdictions (e.g. merger control).
2. Does your jurisdiction address competitive neutrality through other policies or laws? Who are the responsible institutions? What is the role of the competition authority (if any)? Please identify the specific tools used to address anti-competitive state actions within your jurisdiction (e.g. challenge anti-competitive regulations in court) and beyond your jurisdiction (e.g. through investment screening mechanisms).
3. Is competition law applied to all enterprises in your jurisdiction in an equal manner (e.g. to foreign and national enterprises, all economic sectors)? Among others, consider whether there are any exemptions, exceptions, immunities or defences or any practical difficulties that may limit the scope of your intervention (for example with respect to merger control or cartel enforcement).
4. Have you analysed (including as part of a market study or sector inquiry) specific industries (e.g. those that have been liberalised) from a competitive neutrality perspective? How do you select which industry to analyse?
5. Do you assess whether regulatory frameworks undermine competitive neutrality, including whether there are any enterprises with special rights or that are otherwise favoured? Please provide specific examples of how you do this.
6. Have you analysed the public procurement framework in your jurisdiction to assess whether it may distort competition (e.g. by favouring national enterprises or incumbents)? Do you have any tools to promote competitive neutrality in this context (e.g. issuing opinions)?
7. Have you analysed whether public-procurement procedures in your jurisdiction have distorted competition in practice (e.g. favouring incumbents over new entrants in the tender terms)? Do you co-operate with public purchasers to promote competition in procurement procedures?
8. Is your competition authority involved in the design or implementation of public support measures (e.g. subsidies) to enterprises? What are the tools (including advocacy) you have to ensure competitive neutrality in that context (e.g. obligatory ex ante notification of public support, ex post monitoring of public support, issuance of reports concerning public support)?
9. What are the tools (including advocacy) that your competition authority has to ensure competitive neutrality of
 - a. Laws and regulations (e.g. assessing the impact of individual laws and regulations on competitive neutrality (before or after implementation) and for example, issuing an opinion or challenging the regulation before a court)
 - b. Public service obligations

- c. Industrial policy (e.g. political involvement in strategic M&A, the selection of national champions or the favouring of certain sectors)
10. What are the main challenges you face when trying to protect competitive neutrality?
For instance:
- a. What challenges do you face when applying competition law on a competitively-neutral basis? Is there any difference if the state-induced restriction of competition is at federal/central level or at the local level? Have you encountered any undue state pressure or involvement when scrutinising the conduct of a state-influenced activity or entity?
 - b. Have you faced any difficulty in enforcing your decisions (e.g. on remedies or on fines) when the state is involved?
 - c. Are other public authorities, such as sector regulators, entrusted with powers to address competitive neutrality distortions? Does this limit the scope of your action? How do you co-operate on competitive neutrality distortions (domestically and internationally)?

Suggested bibliography

- OECD (2021). Recommendation of the Council on Competitive Neutrality. <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.
- OECD (2020). Roundtable on the Role of Competition Policy in Promoting Economic Recovery. <https://www.oecd.org/daf/competition/role-of-competition-policy-in-promoting-economic-recovery.htm>.
- Crane, D. (2019). *Scrutinizing Anticompetitive State Regulations through Constitutional and Antitrust Lenses*. William & Mary Law Review, 60(4), 1175-1214. <https://scholarship.law.wm.edu/wmlr/vol60/iss4/4/>.
- Healy, D. (2019) *Competitive Neutrality and the role of competition authorities: a glance at experiences in Europe and Asia-Pacific*. In P. Burnier Da Silveira & W. Kovacic (Eds.), *Global Competition Enforcement: New Players, New Challenges*. Wolters Kluwer. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703420.
- OECD (2018). Roundtable on Competition Law and State-Owned Enterprises. <https://www.oecd.org/daf/competition/competition-law-and-state-owned-enterprises.htm>.
- OECD (2016). Roundtable on Public Interest Considerations in Merger Control. <https://www.oecd.org/competition/public-interest-considerations-in-merger-control.htm>.
- OECD (2015). Inventory of Competitive Neutrality Distortions and Measures – Discussion on Competitive Neutrality. [https://one.oecd.org/document/DAF/COMP\(2015\)8/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)8/FINAL/en/pdf).
- OECD (2015). Note by the Secretariat: Competition Policy & Competitive Neutrality – Discussion on Competitive Neutrality. [https://one.oecd.org/document/DAF/COMP\(2015\)13/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)13/FINAL/en/pdf).
- OECD (2015). Issues paper by the Secretariat – Roundtable on Competition Neutrality. [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)5&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En).
- UNCTAD (2015). Competition Law and the State – Volume 1: Summary of answers to questionnaire. https://unctad.org/system/files/official-document/ditccpl2015d3_en.pdf.
- Fox, E. & Healey, D. (2014). *When the State Harms Competition – The Role for Competition Law*. Antitrust Law Journal, 79, 769-820. https://awa2015.concurrences.com/IMG/pdf/at_journal_79i3_fox_healey.authcheckdam.pdf.
- OECD (2014). Evaluation of Competitive Impacts of Government Interventions. <https://www.oecd.org/daf/competition/evaluation-competitive-impacts.htm>.
- OECD (2012). Competitive Neutrality: National Practices. <https://www.oecd.org/daf/ca/50250966.pdf>.
- OECD (2012). Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practices. <https://www.oecd.org/daf/ca/50250955.pdf>.
- OECD (2012). Recommendation of the Council on Fighting Bid Rigging in Public Procurement. <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396>.
- OECD (2010). Roundtable on Competition, State Aids and Subsidies. <https://www.oecd.org/daf/competition/sectors/48070736.pdf>.
- OECD (2009). Roundtable on State-Owned Enterprises and the Principle of Competitive Neutrality. <https://www.oecd.org/daf/competition/46734249.pdf>.
- OECD (2009). Roundtable on Competition Policy, Industrial Policy and National Champions. <https://www.oecd.org/daf/competition/44548025.pdf>.

OECD (2004). Roundtable on Regulating Market Activities by the Public Sector.
<https://www.oecd.org/daf/competition/sectors/34305974.pdf>.