

Unclassified

English - Or. English

25 November 2021

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

Global Forum on Competition

**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -
Contribution from BIAC**

- Session III -

8 December 2021

This contribution is submitted by BIAC under Session III of the Global Forum on Competition to be held on 6-8 December 2021.

More documentation related to this discussion can be found at: oe.cd/pcnca.

Please contact Mr. James Mancini [E-mail: James.Mancini@oecd.org], if you have any questions regarding this document.

JT03486213

The Promotion of Competitive Neutrality by Competition Authorities

– Contribution from BIAC –

1. Introduction

1. *Business at OECD* (BIAC) is pleased to have the opportunity to comment on the issue of competitive neutrality. For nearly two decades, the OECD Competition Committee has considered the principle of competitive neutrality. BIAC has contributed to these discussions.¹ However, the global economic and political landscape has changed over recent years, very much affecting the context in which competitive neutrality principles apply. While the COVID-19 pandemic and its impact has necessitated more recent governmental intervention in economic activity, even prior to 2020 there was evidence of increasing interventions, for example the proliferation of foreign direct investment review regimes. As such, BIAC wishes to set out a series of points related to the current state of affairs, for the consideration by the OECD Global Forum on Competition.

2. Competition authorities should remain wary of governments progressing from state investment or relief-oriented efforts towards policies that may veer close to protectionism or the promotion of national “champions.” Competition authorities must remain vigilant to such attempts and have a critical role to play as advisors to governments on regulations that may have unintended consequences on the market. Competition authorities also have an important role to play as advocates for competitive neutrality and be role-models in its application. Fulfilling these roles may be difficult at times, particularly given that competition authorities must take care to avoid appearing political but placing competitive neutrality at the core of authorities’ policies is of utmost importance especially as the incentives for government to intervene in markets continues to grow.

3. To this end, BIAC’s contribution sets out a series considerations and actions. Given pressures on the competition policy system, competition authorities should go beyond competition advocacy and actively enforce competitive neutrality rules. The OECD has an important role to play, in giving effect to its 2021 Recommendation of the Council on Competitive Neutrality, including establishing implementation guidance, best practices and scoreboards. Importantly, the OECD Competition Committee should continue to promote the independence of its members and transparency in authorities’ decision-making to reduce the dangers of state intervention in the competition process.

¹ See OECD, *The Role of Competition Policy in Promoting Economic Recovery – Note by BIAC*, DAF/COMP/WD(2020)88 (Nov. 16, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)88/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)88/en/pdf) [hereinafter *BIAC Comments on Promoting Economic Recovery*]; OECD, *Competition Law and State-Owned Enterprises – Contribution from BIAC*, DAF/COMP/GF/WD(2018)73 (Nov. 22, 2018), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2018\)73/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2018)73/en/pdf); OECD, *State Owned Enterprises and the Principle of Competitive Neutrality*, DAF/COMP(2009)37, at 289-299 (Sept. 20, 2010), <https://www.oecd.org/daf/competition/46734249.pdf> [hereinafter *BIAC Comments on State Owned Enterprises and the Principle of Competitive Neutrality*].

2. Scope of Competitive Neutrality

4. Over the years, the notion of competitive neutrality has expanded: once largely applicable to state owned enterprises (SOE), competitive neutrality has shifted to accommodate the increase in state-subsidized and state-directed enterprises. Overall, the expansion of competitive neutrality reflects a sophisticated understanding of the extent to which states and intervene in markets. This shift can be tracked through the OECD’s own work on the concept of competitive neutrality, which culminated earlier this year in the Recommendation of the Council on Competitive Neutrality published, which defines SOE to illustrate the myriad ways in which a government can have control over an enterprise.²

5. The OECD Recommendation of the Council on Competitive Neutrality makes clear that competitive neutrality extends to cover “all current or potential market participants” and calls on Adherents to ensure that competing market participants be subject to the same regulatory environment and have equivalent rules enforced, whether state owned enterprises or privately-owned enterprises.³

6. The ability to evolve the applicable scope of competitive neutrality will be increasingly important as states seek to control the fate of their economies in an increasingly uncertain world, potentially using new tools not previously considered, but that must nevertheless be subject to the principles of competitive neutrality.

3. The “New Normal”: Policy as a Tool of Economic Recovery

7. The disruption caused by the COVID-19 pandemic to national economies and the significant impact on growth prospects has led governments to take a closer hand in economic development. This was necessary in the emergency phase of the pandemic and is still relevant to stimulate economic recovery and contain the effects of recession. These efforts have ranged from fiscal and monetary policies, trade, and industrial policies, including tax relief, wage subsidies, grants, preferential loans, changes to procurement policies, loan guarantees, state equity and foreign direct investment reviews. In many cases these actions have been critical to maintaining economic stability during an unprecedented global pandemic.

² OECD, Recommendation of the Council on Competitive Neutrality (May 31, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462> (defining SOEs as “any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership or control,” including joint stock companies, limited liability companies, partnerships, statutory corporations, and other cases in which the state owns a majority of voting shares or has an otherwise equivalent degree of control).

³ *Id.* In its background note for a discussion on competition neutrality held in 2015, the OECD Competition Committee Secretariat defined competitive neutrality as being where “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, Discussion on Competitive Neutrality— Note by the Secretariat, DAF/COMP(2015)13/FINAL, at ¶ 2 (Apr. 13, 2016), [https://one.oecd.org/document/DAF/COMP\(2015\)13/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)13/FINAL/en/pdf).

8. In addition, with the realization that supply chains may be fragile, many countries are seeking to ensure more national or regional autonomy over security of supply, especially for products critical to managing a pandemic and ensuring the safety and security of their citizens.⁴ However, governments interventions must be narrowly tailored to solve the identified issue and minimize impact on competition. As discussed during the OECD Competition Committee's session on *The Role of Competition Policy in Promoting Economic Recovery*, competition authorities have also had to show flexibility and pragmatism when faced with the impact of a global pandemic. For example, competition authorities have had to consider whether competition rules should be relaxed during the pandemic and recovery or focused activities on crisis cartels or exploitative abuses.⁵ Authorities should remain fastidiously objective in the design application of these rules.

9. The recent report *OECD Competitive Neutrality Review of Small-Package Delivery Services in ASEAN* helpfully highlights how logistics companies have had to shift their business models, partly expedited by the COVID-19 crisis and the growth of e-commerce and small-package delivery services.⁶ This timely report reiterates the importance of maintaining the principle of competitive neutrality across all entities active in the market to enhance allocative efficiency, as well as the importance of addressing distortions of competition caused by the state playing an active role in commercial markets. The latter includes state measures distorting competition between privately owned entities and entities owned by, or linked to, the state (such as state-owned postal operators).

10. Competition authorities have also been confronted with the reality of the economic crisis and other growing societal priorities, such as employment stability, environmental protection, and sustainability. While it can be expected that competition authorities demonstrate an appreciation to evolving economic conditions, often not envisaged when competition laws were first drafted, these situations cannot supersede the primary directive of the competition laws or ignore that competition law is a fundamental staple of economic recovery.⁷ Competition policy should not be seen as a luxury to be reinstated once the dust has settled on recovery efforts, but rather must be seen as a necessity to drive investment and growth, with enforcement potentially even more relevant in times of crisis.

⁴ For example, in February 2021, President Biden signed an executive order directing a whole-of-government approach to assessing vulnerabilities in and strengthening critical supply chains. E.O. 14017 subsequently led to expansion of COVID-19 vaccine manufacturing, U.S. Department of Defense investment in expanding a rare earth element mining and processing company, and U.S. government involvement with semiconductor chip manufacturers. See Fact Sheet: Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities (June 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/>.

⁵ See BIAC Comments on Promoting Economic Recovery, *supra* note 1.

⁶ OECD, *OECD Competitive Neutrality Reviews: Small-Package Delivery Services in ASEAN* (2021), <https://www.oecd.org/daf/competition/oecd-competitive-neutrality-reviews-asean-2021.pdf>.

⁷ See *id.*

4. Importance of Enforcing Competitive Neutrality Rules

11. As noted, in the pursuit of greater economic stability, governments may find themselves progressing from state investment or relief-oriented efforts towards policies that engineer greater economic autonomy, such as fostering local sourcing. Such policies risk coming close to naked protectionism, for example if governments push local industries to develop exclusively local solutions, previously sourced from overseas. There may be a political imperative to shelter local firms from foreign competition or from acquisitions or to limit the effect of competition local employment.⁸ There may also be a temptation to seek to promote national champions or local industries. For example, in developing rules for digital companies in Europe, European politicians have expressly noted that European firms should be excluded from the scope of the regulation, which some commentators have seen as potentially protectionist.⁹

12. It appears likely that competition authorities will increasingly be faced with attempts by government to intervene or regulate markets, which creates tension between the state's interest in supporting their economies and the principle of competitive neutrality. Such developments highlight the importance for competition authorities to not only view competitive neutrality as a general principle but to actively put that principle into practice and enforce competitive neutrality rules.

5. A Bridge Too Far? Competitive Neutrality and National Interests

13. The debate on competitive neutrality should also apply to enterprises considered “national champions” if they receive particular benefits that distort the market. As noted by BIAC in 2010, the creation of “national champions” arguably has a similar impact to the creation of an SOE.¹⁰ Private enterprises that seek or are granted benefits or protection due to their government funding or proximity to government can also result in significant distortions to competition and elevate the interests of the individual enterprise above the interests of the consumer.

14. As with SOEs, market distortions should not be overlooked where the creation or promotion of national champions has the effect of sheltering the domestic competitor from competition and harming long-run consumer welfare.¹¹ This is particularly important given the trend towards protectionism or strategic autonomy and the increased sophistication is state “support” for particular enterprises. This inclination towards protection of national champions calls to mind the U.S. government's \$80 billion bailout of failing automotive manufacturers in the wake of the 2008 financial crisis, with many calls for financial assistance relying on the automotive industry's intrinsic ties to American history while ignoring poor decision-making and inefficiency relative to overseas competitors. While the

⁸ The pandemic has also seen a significant increase in the creation of foreign direct investment screening mechanisms, usually outside the purview of competition authorities, or changes in merger rules to address these public policy imperatives.

⁹ See Meredith Broadbent, Implications of the Digital Markets Act for Transatlantic Cooperation (Sept. 2021) (Cntr. for Strategic & Int'l Studies), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210915_Broadbent_Implications_DMA.pdf?xiVAF5jjSEdwakIvtNE3v2dSWIVdIUTG.

¹⁰ See BIAC Comments on State Owned Enterprises and the Principle of Competitive Neutrality, *supra*, note 1.

¹¹ See Mathew Heim & Catarina Midões, *European Champion-ships: Europe's Industrial Champions and Competition Policy*, BRUEGEL (July 25, 2019), <https://www.bruegel.org/2019/07/european-champion-ships-industrial-champions-and-competition-policy/>.

majority of the funds paid to bail out these companies was eventually repaid, the decision to “rescue” these companies is still debated as an unnecessary disruption of normal market processes. While authorities can seek to create a shield between the state’s interests and the authorities’ objective application of competition rules, these distinctions will increasingly become blurred.

15. In May 2021, the European Commission proposed new regulation to address the “potential distortive effects of foreign subsidies in the Single Market.”¹² The draft regulation introduces three tools to investigate financial contributions granted by public authorities of non-EU countries that benefit companies engaging in economic activity in the EU, including a notification-based tool allowing investigation of concentrations involving a financial contribution by a non-EU government.¹³ Although understanding the potential impact and motivations of subsidies is important, this proposal directly wields competition law against targets selected solely based on foreign government support. The proposed regulation also does not limit the countries, types of subsidies, or types of markets that may be subject to this tool. As the proposal vests the Commission with significant discretion in its prioritization of cases, it would seem prudent to set out its prioritization principles and transparency in the application of such a regulation, in order to avoid the misapprehension that it is wielded subjectively.

16. Even without explicit state action such as bailouts or selective application of competition law, industry regulators may favor SOEs and other state-affiliated companies over private operators. Airport Companies South Africa, which manages nine of South Africa’s airports, has been accused of excusing South African Airways, Mango (a South African domestic carrier), and South African Express from meeting certain regulatory obligations and of not enforcing payment of ACSA fees by these entities. Such action potentially grants an unfair competitive advantage over private airlines. Elsewhere in the air industry, Delta was recently blocked from including Cape Town in its U.S. – South Africa route by the country’s Department of Transport, with no justification provided for the decision.

6. Competitive Neutrality and the Role of Competition Authorities

17. It is well understood that one of the core advocacy function of competition authorities is to avoid the creation of barriers to competition when policymakers consider adopting regulations. In the context of digital markets, the G7 competition authorities have noted that “Governments should assess whether policies or regulations unnecessarily restrict competition in digital markets or between digital and non-digital players and should consider procompetitive alternatives where possible. Competition authorities can play an important role in identifying such restrictions, and advising on possible solutions, through evidence-based market studies and competition advocacy.”¹⁴

¹² Press Release, Eur. Comm’n, Commission Proposes New Regulation to Address Distortions Caused By Foreign Subsidies in the Single Market * (May 5, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982.

¹³ *Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market*, COM(2021) 223 final, 2021/0114 (COD) (May 5, 2021), https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf.

¹⁴ See G7, Common Understanding of G7 Competition Authorities on “Competition and the Digital Economy,” (June 5, 2019), https://www.autoritedelaconcurrence.fr/sites/default/files/2019-07/g7_common_understanding.pdf.

18. Governments may fail to take into account the full consequences on markets resulting from intervention and competition authorities are well placed to provide expertise and guidance. In addition, competition authorities' advocacy function ensures that competition enforcement and merger control continue to be relevant tools for well-functioning markets. For example, it is precisely the competitive pressure that "foreign" firms may bring to the local market that governments may be tempted to reduce, whereas competition policy seeks to foster long-run consumer welfare and allocative efficiencies. Competition advocacy can also counterbalance misinformation by firms seeking to influence the regulatory framework to protect or increase their market power at the expense of long-term market health.¹⁵

19. The OECD Recommendation of the Council on Competitive Neutrality "calls on Adherents to preserve competitive neutrality" and avoid discriminatory measures that enhance an enterprise's market performance over others and thus distort competition.¹⁶ This requirement could be enacted in a variety of ways, including an annual report and scoreboard objectively assessing government interventions, actions that breach competitive neutrality norms can be flagged, and authorities demonstrating adherence to the Recommendation can share best practices and implementation guidance for collective benefit.

20. A more acute challenge for the competition community arises from clear political desires to assert autonomy in an ever-broader range of sectors, notably sectors or technologies considered "strategic." The political imperatives to foster technology sovereignty or other forms of "autonomy" can create tensions between government priorities and competition authorities' activities. Governments may well be tempted to call upon competition authorities to be take decisions that are consistent with industrial policy or expect authorities to be actively involved in supporting such policies, notably in the context of merger review (where proceedings may run concurrently to foreign direct investment review) or subsidy review.

21. The broad understanding of competitive neutrality is closely linked to the need for competition authorities to avoid taking decisions that pick "winners" or technologies, notably where the beneficiaries are companies in the government's favor. For example, in South Africa, all ministers have broad intervention rights and rights to access information. This is particularly true for the minister of the Department of Trade, Industry, and Competition, which oversees the Competition Commission. This has led to concerns over agency objectivity and independence if ministers or other government officials have certain objectives or priorities.¹⁷ Intervention in competition matters should be reserved for extreme cases, clearly bounded and reviewable by the courts, and not encouraged as a matter of course.

¹⁵ See BIAAC Comments on Promoting Economic Recovery, *supra* note 1.

¹⁶ OECD, Recommendation of the Council on Competitive Neutrality, *supra* note 2. Although the Recommendation provides scope for exceptions, when seeking to achieve an overriding public policy objective, like all exceptions, these should be limited and "transparent. . . , proportionate and periodically reviewed." *Id.*

¹⁷ Although not yet in force, amendments to South Africa's Competition Act introducing a national security interest clause (which provides for a separate committee outside of the competition agencies to assess whether a foreign merger should be blocked based on national security interests) has raised concerns due to the broad definition of "national security," which could lead to any range of industrial policy issues being used to prohibit transactions. Coupled with the potential for ministerial intervention, this increases the risk that competitive neutrality could be significantly undermined.

22. Competition authorities should increase their advocacy initiatives to ensure that broader government involvement is predicated on principles of competitive neutrality and to minimize any government inclination to engage in discriminatory policies.

23. The risk of authorities buckling to such pressure or being publicly subject to such pressure may well translate into authorities being seen as creatures of government. This is a risk to the integrity of competition law and policy. For this reason, the independence of competition authorities should be reinforced, as well as the transparency of decision-making processes and appropriate checks and balances that can weed out inappropriate elements from decision-making in competition matters. In the enforcement of competition law, authorities should consider clearly setting out their prioritization principles and engaging in a transparent and specific process as to how these principles will be applied in order to isolate themselves from pressure to support government policies that create or suggest an unlevel playing field. Indeed, the ability of the courts to undertake a full review of competition decisions is critical in ensuring the independence of authorities from government intervention. The OECD Competition Committee should be very clear in reasserting the importance of independence of its members.

24. Given fast-evolving and ever-expanding scope of competitive neutrality, competition authorities face a delicate balance in effectively advising and advocating with governments while avoiding the appearance of politics and partiality. Support from the OECD will be critical in providing a framework to the competitive neutrality work of authorities. This task, while difficult, is ultimately critical to ensuring the continuity of competition principles and the success of economic recovery efforts.

25. The past two years have shown that, although perhaps initially spurred by an unexpected and unprecedented period, the increased involvement of governments in economic development is likely to remain (if not increase) for the foreseeable future. Competition authorities must remain “above the fray” and steadfast in their application and enforcement of competition laws.