

Unclassified

DAF/COMP/M(2015)1/ANN2/FINAL

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

31 March 2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

**Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF
THE COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015**

Summary of Discussion of the Roundtable on Competitive Neutrality in Competition Policy

16-18 June 2015

Paris, France

The attached document is an annex to the Summary Record of the meeting held on 15-19 June 2015.

JT03393014

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/M(2015)1/ANN2/FINAL
Unclassified

English - Or. English

**Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF THE
COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015**

Summary of Discussion of the Roundtable on Competitive Neutrality in Competition Policy

16-18 June 2015

Paris, France

By the Secretariat

The Chair of the Competition Committee, Prof. Frédéric Jenny, introduced the discussion on Competitive Neutrality in Competition Policy by pointing first to the high number of contributions (23 in total) received for this roundtable, which reflects the importance of the topic and the strong interest of the Competition Committee.

The Chair presented the four main topics for discussion. The first topic will concentrate on state-owned enterprises ('SOEs'), and how ownership in itself may distort the level playing field. The discussion will then move to explore subsidies and public services. Third, delegates will be invited to describe the types of competitive neutrality provisions or frameworks that their jurisdictions offer. The discussion will last turn to competition law enforcement instruments and challenges in addressing competitive neutrality distortions, as well as relevant advocacy and non-enforcement powers.

The Chair introduced the three expert panellists invited for this session: Prof. Pierre-André Buigues, Professor at the Toulouse University Business School; Prof. Thomas Cheng, Associate Professor at the Faculty of Law of the University of Hong Kong, China; and Prof. Nicolas Petit, Professor at the Law School of the University of Liège (Belgium).

The roundtable discussion was introduced by a short presentation by the OECD Secretariat of its paper. The Chair thanked the Secretariat and opened the floor for discussion, encouraging delegates to intervene during the roundtable discussion and especially to react on the information heard in the morning during the Hearing on Competitive Neutrality which took place on the same day and which highlighted how competitive neutrality is approached and addressed by other policy areas.

1. SOEs (national and municipal levels)

The Chair first turned to Italy. According to the Italian submission, the majority of SOEs can be found at local/municipal level and most of the times their presence leads to competitive neutrality problems. In Italy municipalities often act as regulators in the field where they are active, which may lead to conflicts of interest. The Italian competition authority ('ICA') has put forward some suggestions on how to state ownership at local level and the Chair invited Italy to describe this initiative and to discuss what motivated the authority in this effort. The Chair also noted that ICA is entrusted with a (relatively new) power to ask municipalities to repeal regulations that could distort competition. Considering that this tool cannot be regarded as a common tool around the table, the Chair gave the floor to Italy to describe the usefulness of this power and the frequency in using it.

The delegate from Italy first underlined the high number of local authorities in Italy: a recent study pointed out that the central government owns more than 500 enterprises at national level, whereas the number of enterprises owned by the local administration is more than ten thousands. The size and consequent economic importance of municipality-owned enterprises are significant, especially considering the fact that these enterprises also provide public services in local utilities markets.

The ICA has proposed to the Government a rationalisation of all publicly-owned companies, either through privatisation or through the non-renewal of concessions for entities operating at a loss: in the latter case, the decision of the public body to cover the loss should meet the private competitors' standard. The ICA also advocates

introducing good corporate governance principles. The Government reacted positively to these proposals and indicated that, as part of the reform of the public administration, the Government will also address the question of local enterprises.

Finally, the Italian delegation provided some statistics on the application of the new power that ICA has since 2013. Pursuant to Article 21bis, the ICA can issue an opinion requesting public local entities or administrations to repeal any administrative act that, in the ICA's view, is contrary to competition law and principles. In case of non-compliance with its opinion, the ICA may challenge the act before the Administrative Tribunal. Italy reported that they have used this instrument intensively: there have been 74 cases so far and, in 50% of the cases, the local administration corrected its own act (either by withdrawing it or by amending it to comply with the ICA opinion). In the other cases of non-compliance with the ICA opinion, the ICA has initiated proceedings in court. The ICA considers this tool to be quite powerful: in 2014 the ICA questioned 23 regional and local acts, particularly in the sectors of insurance, retail distribution, public transport – often in the context of public procurement.

1.1 'Soft' tools against SOEs at the local level

The Chair turned to Norway, where there is a high number of locally-owned enterprises because of the strong social and political context of social services in Norway. The competition authority prepared a report on this phenomenon and the Chair invited Norway to summarise the main findings of the report.

Norway confirmed that state ownership at local level in Norway is extensive. These enterprises are competing in a wide range of areas, including transportation, electricity and real estate. In some cases, there are no private competitors due to the favourable treatment enjoyed by these public enterprises. Norway also indicated that there is no one single strategy that has driven the relatively high degree of state involvement in the market or municipal ownership. A common feature of public ownership, however, is the desire to safeguard various social and political interests (e.g. sector policy concerns).

Ten years ago, the Norwegian Competition Authority ('NCA') commissioned a report '*On equal terms? An analysis of competition between public and private enterprises*' in 2005 which reached the following main recommendations:

- Accounting systems should causally attribute costs to the activities generating the costs.
- Public entities should only be allowed to enter competitive markets as long as there are clear and documented synergies between the competition-exposed activity and the core public activity, and these benefits accrue to the core activity.
- Revenues from the competition-exposed activity should more than cover the fully distributed costs and prices must reflect these costs.
- Competitive activities of public companies should be separated into distinct legal entities, and these should be managerially and physically separated from the core activity.

According to Norway, the NCA only has a soft enforcement tool which allows it to raise concerns and recommend better options. The revision of the Competition Act in 2014 raised the question of whether the NCA should have stronger enforcement tools. However, the only modification introduced by the revision is the NCA's right to a reply to the concerns expressed in its opinions.

After the intervention of Norway, the Chair referred to the ongoing debate in Europe on whether competition authorities should have powerful instruments (like in Italy and Spain) to address competitive neutrality issues, or rather soft powers (like in Norway). The Chair came to the conclusion that the example of Norway demonstrates that soft instruments could also function effectively.

The Chair turned to the delegation of the United States ('US') and invited it to share the US experience and views on broadband services at municipal level and to explain why SOEs can be used correct certain market shortfalls.

The US delegation emphasised that they have limited experience with SOEs, but they have some experience in the sector of local broadband services. The US position is that there are many advantages in the widespread availability of municipal broadband (e.g. economic growth, improved education, increased healthcare). However affordable, high-capacity broadband is not available in many communities and some underserved municipalities have not attracted adequate private investment for high-speed broadband. These municipalities have thus pursued, or are

considering pursuing, the construction and/or operation of their own local broadband network, either in partnership with private enterprises or independently. The US experience shows that municipal-government provided broadband networks can help address market shortfalls by creating economic opportunities, increasing consumer choice, and driving consumer and public savings. Hundreds of communities have built publicly owned broadband networks, sometimes as sole providers of broadband services and sometimes in competition with others, such as cable and DSL providers. Yet some states enacted or are considering adopting laws limiting municipal involvement in broadband services. These laws may prevent local governments from correcting market imperfections, thereby denying consumers and municipalities the opportunities and efficiencies from a more widespread availability of broadband.

The US also emphasised that President Obama recently encouraged inter-agency discussion on some of these issues, underlining that the US Government ‘*has an important role to play in developing co-ordinated policies to promote broadband deployment and adoption, including promoting best practices, breaking down regulatory barriers, and encouraging further investment.*’ He also established a Broadband Opportunity Council, co-chaired by the Secretaries of Commerce and Agriculture, to use all available and appropriate authorities (25 federal agencies) to identify and address regulations that may unduly impede either wired broadband deployment or the infrastructure to increase wireless broadband deployment.

The Chair thanked the US for this interesting intervention and moved to next point for discussion, subsidies and public services.

2. Subsidies and public services

The Chair turned to Prof. Buigues and he asked him to provide a general overview of the various types of state interventions with a focus on subsidisation.

According to Prof. Buigues there are major differences across countries regarding the definition of state intervention (e.g. social charges are not considered as subsidies by the EU, whereas they are according to the French Inspection Générale des Finances). Differences can be evidenced in the modalities and approaches applied by the different countries, along the following criteria:

- *Centralisation/Decentralisation*: certain countries (e.g. France) follow a centralised approach in managing subsidies (90% of the subsidies is centralised in Paris), whereas other countries (e.g. Germany) have opted for the opposite, decentralised approach (40% of the subsidies concerns the Landers).
- *National champions/SMEs*: in certain countries, subsidies are reserved for small and medium enterprises (‘SMEs’), whereas in other jurisdictions subsidies can be regarded as an option for large multinational companies.
- *Number of existing subsidies schemes*: there is a large number of possible subsidies schemes. Prof. Buigues drew a distinction between, on one hand, the ‘soft model’ applied especially by the Anglo-Saxon countries (which are more in a favour of advisory support, encouragement of partnerships and dissemination of best practices) and, on the other hand, countries characterised by many SOEs and subsidies (which are more in favour of a market interventionist approach).

In the second part of his presentation, Prof. Buigues explored the possible distortive effects of state intervention. The political and economic objectives of state interventions can vary from one jurisdiction to another: e.g. (i) addressing market failures, (ii) promoting regional income equality, (iii) preventing the disappearance of a specific firm or industry deemed essential for the country, and/or (iv) raising incomes and reducing prices for households.

According to Prof. Buigues, there is little empirical literature on the effectiveness of state intervention, and this can be explained in various ways: (i) the data necessary to measure effectiveness may not always be available, (ii) it might be difficult to disentangle the effects of one intervention from another because of the large number of existing state interventions and (iii) establishing the market situation that would have taken place without state intervention is challenging.

According to Prof. Buigues, there is hardly any evidence that state interventions can induce a significant increase in productivity, especially in the long run. However, he offered some considerations on how to evaluate the effectiveness of state intervention:

- Countries should perform regular evaluations and adopt a ‘value for money’ approach.
- Countries should limit the magnitude and duration of each subsidy programme, abandoning programmes that are not bringing value for money and concentrating on few effective programmes.
- Countries should endorse transparency of state interventions; this would serve the double purpose of enhancing government accountability and enabling public authorities to learn from each other.
- Finally, countries should request opinions to competition authorities on the competitive effects of state interventions adopted by the government.

The Chair thanked Prof. Buigues for his presentation and asked why we should be worried about subsidies if it is not possible to draw any conclusion as to whether state interventions are effective or not. Prof. Buigues responded that economic studies on the efficiency of state intervention are very limited and confirmed that results are not convincing in showing positive impact. The European Union agreed with Prof. Buigues that there are not many empirical studies available on the effects and efficiencies of state aid. The EU indicated that they have a framework for regional state aid which sets the rules under which member states can grant state aid to companies to support investments in the less advantaged regions of the EU. This framework was revised a couple of years ago and the review was preceded by the conclusion of a study which did not focus on efficiencies but examined whether subsidies were a determining factor for their decision to invest in a particular region. Companies listed many different reasons for investment, but subsidies were generally not included. This led the EU to conclude subsidies of these companies could be regarded as unnecessary. The Chair concluded that more studies on the effectiveness of state intervention might be necessary and thanked the EU for raising attention to a relevant example.

3. Competitive neutrality frameworks and rules

The Chair moved to the third part of the discussion focusing on competitive neutrality frameworks and on specific competitive neutrality provisions in certain jurisdictions.

The Chair invited the European Union (‘EU’), where competitive neutrality is explicitly recognised by the Treaty on the Functioning of the European Union (‘TFEU’), to summarise the EU system and principles that ensure competitive neutrality.

The EU indicated that they have a specific competitive neutrality framework which is based on the principle of ‘ownership neutrality’. The TFEU guarantees the neutral treatment of all undertakings, irrespective of whether they are publicly or privately owned. The neutrality principle is also reflected in the application of EU competition rules, which apply to all businesses or undertakings, irrespective of whether they are publicly or privately owned provided that they qualify as an ‘undertaking’, i.e. are entities performing an ‘economic activity’.

The EU framework relies on Article 106 TFEU and its interpretation by the case law. Article 106 TFEU reminds EU member states that competition rules apply also to SOEs and undertakings entrusted with special or exclusive rights (so-called ‘privileged’ undertakings) and that national laws depriving the competition rules of their effectiveness are in violation of TFEU, unless such a measure is necessary for the provision of a service of general economic interest (‘SGEI’). Article 106(3) TFEU allows the European Commission (‘Commission’) to specify the meaning and extent of the exception under Article 106(2) TFEU, and to set out rules intended to enable effective monitoring of the fulfilment of the criteria set out in Article 106(2), where necessary. The Commission may use the powers under Article 106(3) to deal with existing infringements of the TFEU or to take steps to prevent future infringements.

State aid rules make also part of the EU competitive neutrality framework (Article 107(1) TFEU). This framework is also interpreted by case law and actively enforced by the Commission, notably to determine when compensation for a public service (SGEI) can be deemed excessive and therefore qualify as unlawful state aid. In March 2011, the Commission launched a broad consultation, which led to the adoption in December 2011 of a revised package of EU state aid rules for the assessment of public compensation for SGEI. The new package which applies to national, regional and local authorities alike covers all undertakings independent of the ownership structure. It clarifies key

state aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while better taking account of competition considerations for large cases.

The Chair asked the EU whether it shared Prof. Buigues's point about the differences regarding to the definition of state aid/subsidy. The EU confirmed that this is a problem constantly faced by the EU in trade negotiations where the EU is trying to use the same definitions and principles which are applicable within the EU. The concept of state aid and subsidies differs from one jurisdiction to another, which makes the comparison very difficult. These difficulties raise challenges especially in trade negotiations. The EU would strongly support the harmonisation of the differing definitions at international level.

3.1 Competitive neutrality provisions

The Chair thanked the EU and turned to the Netherlands, which has adopted a new provision allowing the competition authority to directly address government organisations rather than the undertakings through which they participate in the market. The Chair asked how this provision was elaborated and whether the authority already had an opinion on its effectiveness.

The Netherlands clarified that the Dutch competition law is applicable to all undertakings irrespectively of whether they are owned by the state or not. The new legislation was enacted in July 2012 but has been in force only since July 2014 in order to give government organisations some time to comply with it. The provision may cease to be effective in 2017 (sunset clause). Due to the sunset clause, the act was recently evaluated by the Ministry and a report will be soon published.

In line with these new rules, the government is free to decide whether it wants to enter into a market or not, but if it decides to do so, it must comply with the new rules which prohibit preferential treatment and impose the principle of separation of functions. If the competition authority ('ACM') finds that the Government has violated these principles, it can adopt an administrative order and subject the government organisation involved to periodic penalty payments and force it to terminate the violation. In the last four years, the ACM received approximately 200 complaints. However, more than half of the complaints did not relate to commercial activities by the Government; only 30 or so related to issues that ACM could in fact examine under the said legislation. Most of the admissible complaints concerned municipalities and the following sectors: sports facilities, marina berths, real estate, training and educational programmes, commercial waste, motorhome campsites (or RV parks), parking garages. A recurrent complaint is that the Government carries out too many activities which could be left to the market (e.g. towing cars or cleaning municipality offices).

The new law however does not apply to services/goods deemed of public interest. It is for the relevant government organisation to determine whether the goods or services offered are of a public interest, so that they are exempt from the Act. The government organisation must first consider whether it is entrusted with providing that service, and second whether financing through public funds is vital to the provision of the service. Interested parties may influence this decision-making process, using the normal public-inquiry procedures or other instruments. Interested parties may also object to such decisions before the administrative courts. Recently a first law suit was filed against a municipal decision determining that certain goods or services had a public interest.

The Chair turned to Spain and asked to describe the effectiveness of the Law on Public Administration Wealth, which has been in effect since 2003 and establishes that SOEs must be managed according to the constitutional principles of efficiency.

Spain indicated that their general framework is in line with European law, so competition law applies to all undertakings irrespectively of their ownership. Spain emphasised that the competition authority faces challenges though in applying competition law to other parts of government. They reported a number of cases where challenges arise from the fact that economic activity was not carried on by a public company, but another part of the administration. In these situations the competition authority – which is part of the administration itself – faces difficulties in applying competition law against another administrative brunch. According to the competition authority, if Parliament allows other parts of the administration to intervene in the economy, then competition rules

may not be applicable or enforceable against them. Spain added that it is up to the Government or the Parliament to decide which types of cases should be a subject of competition law. When enforcement actions are not available, Spain relies on other tools (like advocacy).

On top of the general framework, Spain clarified that there are other specific pieces of legislation addressing competitive neutrality issues. The law 33/2003 mentioned by the Chair explicitly states that SOEs must be managed according to the constitutional principles of efficiency and economy and they must neither jeopardise nor distort market competition. This piece of legislation also urges public firms to be transparent and identify costs related to the provision of services of general economic interest (SGEI) and to the remaining obligations set by law. Finally, it also states that the SOEs management model must be adapted in order to meet the OECD SOE guidelines (2005).

The Chair noted with interest that according to Spain's submission one of the main reasons why Spain could effectively intervene in competitive neutrality cases is that it has a structure that combine the roles of regulator and enforcer. According to Spain, many of the heavily regulated sectors in Spain are in fact dominated by SOEs. So thanks to the combination of different functions within the same institution, the authority can intervene more effectively to address competitive neutrality issues.

3.2 *Specific competitive neutrality framework*

The Chair turned to Australia which is considered a pioneer in establishing a competitive neutrality framework, including ex ante and ex post response mechanisms to competitive neutrality distortions, and asked to present the key elements of the Australian framework, its main achievements, and to elaborate on what remains to improve.

Australia clarified that there are two sets of provisions dealing with competitive neutrality in Australia and both of them were established in the early 90s: the Competition and Consumer Act, insofar as it concerns government activity as long as it pursues a business activity; and a special competitive neutrality framework. Both have been subject to recommendations by an independent review of Australia's competition laws and policy chaired by Professor Harper ('Harper Review'). The recent Harper Review put forward many recommendations in relation to the competitive neutrality framework in order to increase its effectiveness and also to extend the reach of the competition act to government activity in trade or commerce. The report focuses especially on the lack of obligation to respond to the recommendations by the Australian Government Competitive Neutrality Complaints Office ('AGCNCO').

Australia indicated that the operation of a nationwide consistent competitive neutrality policy was achieved through an agreement among governments at both federal and state level known as the Competition Principles Agreement ('CPA'). Each state has its own competitive neutrality policy and separate mechanisms for investigation. The competitive neutrality policy applies to 'significant government businesses' and covers taxation neutrality, debt neutrality, regulatory neutrality, commercial rate of return requirements.

The Australian complaint mechanisms are handled by independent units, by regulators or departments. The AGCNCO is an autonomous unit within the Productivity Commission and operates as the Australian Government's competitive neutrality complaints body. It receives and decides on complaints and provides an independent advice to the Treasurer on each matter. The AGCNO makes recommendations in individual cases, however, there is no requirement for a response and no penalties are involved in the process.

As an example, Australia referred to the PETNET case. The complainant ('Cyclopharm') argued that PETNET Australia failed to comply with the competitive neutrality principles by not passing the rate of return ('ROR') test. In March 2012, the AGCNCO found that revenue and expenditure forecasts over 10 and 15 years demonstrated that PETNET's commercial operations were unlikely to achieve a commercial ROR on the equity invested over either time periods, and concluded that this represent an *ex ante* breach of competitive neutrality policy. AGCNCO recommended adjusting PETNET's business model to achieve a commercial ROR that reflects its risk profile and the full investment in PETNET Australia. As there is no requirement to respond to recommendations of the AGCNCO, the complainant turned to the Federal Court under the misuse of market power rules to challenge the pricing policy applied by PETNET. Finally the complainant decided to withdraw from the market and settle the private action when it was clear that its opponents were entering into markets at even lower prices than the ones that had been the subject of the complaint.

The Chair then turned to Finland and asked to present its ‘soft’ competitive neutrality regime.

Finland clarified that the Finnish Competition and Consumer Authority (‘FCCA’) has the authority to intervene – within legally mandated requirements and restrictions – if a business practice or organisational structure is applied in the economic operations of a municipality, an association of municipalities, a state or an entity under their control is active in the provisions of goods and services in public sector business activities and is such activity distorts or prevents competition in the market. The FCCA primarily carries out this task through negotiations. If those negotiations fail, then the FCCA can prohibit the act subject to certain limitations or it can oblige the public undertaking to change its pricing policy or market behaviour. The decision of the FCCA can be appealed to court. The FCCA finds the system effective, although negotiations can be time consuming. The FCCA emphasised an interesting feature in the process: it is the municipality (which owns the company concerned) that is the defendant in the FCCA’s procedure, and not the undertaking carrying out the activity under scrutiny.

To close this part of the roundtable discussion, the Chair noted that the discussion revealed that some jurisdictions have specific frameworks for competitive neutrality. Not all of them seem very effective, but experiences show that their existence in itself can have a positive affect to ensure a level playing field. The Chair also noted that the number of jurisdictions with competitive neutrality frameworks seems to be on the rise.

4. Competitive neutrality and competition law enforcement

The last part of the discussion explored what competition law enforcement actions can address competitive neutrality issues. The written material also highlighted some specific challenges faced by competition authorities in enforcing competition law against state-related distortions of competition.

4.1. Scope of competition law

The first question concerned the scope of application of competition law. While most written submissions establish that competition law is and should be broadly applicable, there are exceptions, which may in themselves have distortive effects. The Chair pointed to Germany, which has a partial exemption regime: in Germany, prices in private transactions are subject to competition law whereas fees for a public service are exempted from it. The Chair asked Germany to explain if such an exemption undermines the effectiveness of the application of competition law.

Germany indicated that a sector that can illustrate this problematic is water supply: the Bundeskartellamt (the Federal Cartel Office, ‘FCO’) has led several investigations with regard to abuse of dominance in this sector. In 2012, the FCO concluded an abuse proceeding against the Berlin water supplier BWB. BWB charged prices under private law (not public fees). In its decision the FCO ordered that the utility’s revenue (excluding taxes and duties) from the supply of drinking water in Berlin be reduced by 18% for 2012 and by 17% on average for the period 2013-2015, as compared to 2011. In 2013, the legislator adopted a new regulation. According to the new regulation, if the municipality handles prices under a private regime, the FCO is allowed to evaluate it under competition law, but if the municipality decides to supply water under public law regime (fees), it is exempted and cannot be reviewed by the authority. Therefore, control by the FCO over pricing practices is now explicitly limited to prices under private law. Water suppliers for example fall under two different regimes depending on whether they charge prices or fees: municipal water suppliers can easily avoid competition law enforcement by switching from prices to fees. The FCO is strongly advocating the repeal of this regulation as it is convinced that the regulation undermines the authority’s power to act against antitrust violations (e.g. abusive pricing).

4.2 Overview of distortionary risks in competition enforcement

The Chair pointed out that Germany’s intervention was a great introduction to some of the challenges faced by competition authorities in applying competition law in the field of competitive neutrality. To continue the discussion, the Chair invited Prof. Petit to comment on the competitive neutrality questions which may arise in the daily work of the competition authorities.

Prof. Petit identified four stages in which competitive neutrality distortions could take place: case selection, investigation, evaluation and remedies. He examined these various stages through three scenarios: (i) the state-related firm acting as a *defendant*, (ii) the same firm acting as a *complainant*, and (iii) the cases where the state plays the role of an *outsider to the dispute* at stake.

The *first scenario* is the situation when the state-related firm is a defendant. The basic principle is that there should be no undue procedural restraint against state-related firms that are defendants in competition proceedings. Competitive neutrality risks can arise at all stages of the procedure: for instance

- at the selection stage, the agencies could turn a ‘blind eye’ to complaints filed against state-related firms;
- at the investigation stage, if the authority is reluctant to investigate cases with the required due diligence;
- at the evaluation stage, where the agency might apply a very high standard of proof; or
- at the remedial stage, where the agency could be tempted to impose (too) soft remedies.

Prof. Petit also raised some concrete examples. In *co-ordinated conduct* for instance there have been suspicions of cartel activity in the financial markets recently, while at the same time a lot of rescue measures by governments took place in the sector. Therefore, agencies could fear that by fining these financial institutions they will undermine the state measures taken to rescue them. This means that the measures undertaken by the state could to some extent ‘shield’ these undertakings from competition law enforcement. In *unilateral conduct* cases the same types of issues may arise, especially in the case of utilities, which are often owned by the state. They are economically and strategically important players and therefore, a fiscal-minded agency might be more inclined to apply regulated remedies in abuse of dominant cases instead of imposing fines.

The *second scenario* is when the state-related firm acts as a complainant. Under the principle of competitive neutrality, agencies should not show undue or disproportionate procedural zeal, enthusiasm or proactivity in pursuing claims which lodged by state-related firms. In other words, a state-related firm must not receive outright preferential treatment in competition proceedings. Heightened severity can be found to depart from the principle of competitive neutrality, and it can be evidenced in investigating bid-rigging cartels in public tenders. In *co-ordinated conduct* cases, agencies may give over-priority to sectors where state-related customers resort to public tenders (e.g. construction, machinery and equipment). Similarly, as it was demonstrated by the elevator case in the EU, cartel cases may be unduly tainted by the fact that the victim is a state-related customer financed by the taxpayer. In relation to *unilateral conduct*, a deviation from competitive neutrality could be illustrated by active enforcement in the pharmaceutical sector, where the state is the ultimate buyer.

The *third scenario* is the situation where the state acts as an ‘outsider’ or is a third party in a competition proceeding. The state may in fact try to influence the competition proceeding from the outside. This could lead to distortions for example in the field of merger review: for instance if the state influences the takeover of a national champion or state-related firm by a foreign acquirer. This type of intervention may create what Prof. Petit called remedy ‘fatigue’ referring to the situation where companies arrive exhausted at the last stage of the competition procedure limiting their ability to negotiate remedies with the agency. This ‘fatigue’ places companies into a very uncomfortable situation while discussing remedies with an agency (which may have already been negotiated with the intervening government), and the competition agency may end up prohibiting a merger that it may otherwise have cleared subject to remedies.

The Chair thanked Prof. Petit for his presentation and asked Belgium to elaborate on its contribution which takes an approach or opinion opposite to Prof. Petit’s, by suggesting that while ministers in Belgium are rather hesitant to file complaints to the competition authority against privately owned undertakings, they are not reluctant to lodge a complaint against SOEs. Belgium responded that they did not aim to allege that the legislator and government systematically target the interest of companies in which they hold shares. However, experience from the last 8 years shows that ministers are very hesitant to intervene in procedures before the competition authority or in court cases, except when SOEs are involved.

The Chair turned to the EU delegation and asked the reasons behind focusing on public procurement markets where tax payer’s money is involved, rather than on markets where consumers’ money is involved. The Chair recalled Prof. Petit’s point that, in the Commission’s elevator case, there was a high degree of severity in the sanctions due to the public procurement nature of the conduct concerned. The EU clarified that the case concerned cartel activities involving not only procurement by public entities, but also by private bodies. The EU also put this question into a broader context by highlighting that, in the European Union the Commission has to evaluate very carefully how it uses its resources. In this decision it also takes into account if the anticompetitive conduct affects public (so taxpayers’) money. This part of the decision was also used as an advocacy element which was well-appreciated by many EU citizens.

4.3 *Specific challenges in competition enforcement*

The Chair turned to the challenges faced by competition authorities in dealing with distortions of competitive neutrality under competition law. The Chair invited Norway to elaborate on their written contribution, especially on the difficulties of using the traditional antitrust law concepts in cases where SOEs are involved.

Norway indicated that the Norwegian competition law is very much in line with EU competition law. Hypothetically the competition authority could conduct an abuse of dominance case against municipality-owned companies (utilities) operating in a non-reserved market, but in reality the NCA often faces problems in proving the abuse in such cases. In particular, obtaining information on the cost structure of these companies is very challenging in the authority's opinion.

However, the Norwegian competition authority (NCA) can rely on another tool worth mentioning which is laid down in section 14 of the competition act. This section authorises the authority to intervene where necessary by way of regulation. The NCA can use this power against practices that do not qualify as restrictive agreements or abuse of dominance under competition rules. In 2002, this tool was very successfully used in the air transport sector, and led to a regulatory action against the airline SAS (which is owned 50% by the Norwegian, Danish and Swedish states). The intervention banned SAS's frequent flyer programme, which contained some restrictive loyalty provisions on domestic routes (but could not be showed to be an abuse of dominance). This intervention had an instrumental effect on the market, as it made possible for a Norwegian low-carrier airline to enter the market and to start competing with SAS. The NCA considers that this was a fairly successful use of this instrument as the new company is now the 9th largest low-cost carrier company in Europe.

4.4 *Non enforcement tools*

For the last part of the discussion the Chair turned to non-enforcement tools that can address competitive neutrality distortions – especially where they cannot be caught under antitrust law. To open his discussion, the Chair invited Prof. Cheng to describe the competitive neutrality situation in Asia, and to discuss how distortions are handled in that region of the world and how this may differ notably from the European experience.

Prof. Cheng opened his presentation by identifying three aspects where competitive neutrality is relevant in Asia:

- Anticompetitive conduct by SOEs,
- Government policies that give SOEs an undue advantage, and
- Private vs. public ownership.

Prof. Cheng warned that the situation in Asia cannot be generalised. Asia is a wide geographic area with significant differences in the government structures and the stages of development of national economies. Prof. Cheng emphasised that he will comment on three individual countries examples, namely China, India and Malaysia.

China, for example, has a different starting point compared to other market economies and about one third of the undertakings are still state-owned. Prof. Cheng referred as an example to the oil industry, which is dominated in China by three large oil companies enjoying preferential treatment. Prof. Cheng also indicated that the selective enforcement of the Anti-Monopoly Law of China ('AML') could lead to violation of competitive neutrality. When the AML was first adopted, some suggested that SOEs were exempted from the law under Article 7. Recent examples also gave rise to allegations of selective enforcement of the AML in favour of SOEs. In 2009 the Ministry of Industry and Information Technology restructured the Chinese telecom sector from four providers to three. The merger that resulted from this consolidation would have met the notification thresholds stipulated by the Ministry of Commerce ('MOFCOM'), the authority in charge of merger review in China, and should have been notified. However, MOFCOM confirmed that the merger between China Unicom and China Netcom was not notifiable to MOFCOM.

Prof. Cheng then described the enforcement tools that competition agencies in China could use against competitive neutrality distortions, for instance Chapter 5 of the AML applies to 'abuse of administrative monopolies'. This provision broadly refers to government bodies that distort competition through various types of behaviours such as discriminatory charges, discrimination against non-local investors and discriminatory inspection standards.

Moving to India, Prof. Cheng emphasised that the sectors where most competitive neutrality issues can be found are the coal industry, the oil industry and the railway and aviation industry. For example, Air India was recently bailed out by Government who saved the company from bankruptcy, while Kingfisher Airline did not benefit of the same treatment, which can be taken as an illustration of deviations from the principle of competitive neutrality in India. As for the applicability of competition law, Prof. Cheng emphasised that the Indian competition act applies not only to undertakings, but also to government departments when they are not exercising sovereign functions.

Regarding Malaysia, according to Prof. Cheng eight of the twenty largest companies on the national stock exchange are government-linked. Some notable Malaysian SOEs include Malaysian Airlines, Petronas, the state oil company, and Tenaga Nasional Berhad ('TNB'), the state power transmission operator. In Malaysia, the competition act has also been applied to SOEs, in particular to airlines.

Prof. Cheng then listed the tools that competition authorities may use in Asia to tackle competitive neutrality issues:

- Competition law enforcement: competition laws apply to SOEs in all Asian jurisdictions.
- Semi hard enforcement tools, such as Chapter 5 of the AML, which has elements of advocacy and enforcement (as it looks like an enforcement tool, but the consequences of the provision are rather of the advocacy type).
- Traditional advocacy tools, which can and should be used by a number of Asian competition authorities.
- Competition or regulatory impact assessment rules: the proposed national competition policy should require a competition impact assessment of all the proposed laws and regulations.
- Minimisation of state ownership, as is the case in Malaysia which aims to reduce state presence in companies and therefore privatised some of the major SOEs.

The Chair thanked Prof. Cheng for his presentation and invited delegates to share their experience with advocacy tools as a way to restore or ensure competitive neutrality. He turned to Japan and asked to describe the phenomenon of "revitalisation" described in the Japanese contribution.

Japan first underlined that the Japanese Antimonopoly Act applies to all undertakings, including SOEs and government organisations, and there is no exemption applicable. To restore distortions caused by Governmental measures and ensure competitive neutrality, the competition authority relies on enforcement and non-enforcement (advocacy) tools. One experience with the use of advocacy tools consists in the study group recently set up on competition policy and 'public support for revitalisation'. In Japan, public support for revitalisation is provided to achieve various policy objectives such as maintaining community health care, public transportation and other infrastructures, securing employment, stimulating the local economy, and preventing chain-reaction bankruptcy.

The '*Study Group on Competition Policy and Public Support for Revitalization*' has been active since August 2014 by decision of the Minister of State for Special Missions, Cabinet Office, recognising that it is important to minimise the effect of public support for revitalisation on competition in the relevant markets. The study group's assessment led to the publication of an interim report in December 2014, finding that public support for revitalisation interferes with, and distorts, market mechanisms. There are three main principles set by the report that must be satisfied when providing public support: 1) principle of subsidiarity 2) the principle of minimum necessity and 3) the principle of transparency. It is also necessary to examine the structure of the market, the frequency of the support, scale of support, etc. Furthermore, responding to the recommendation of this report, the JFTC has started to prepare guidelines on the issues from the competition policy viewpoint that supporting organisations should keep in mind when providing public support for revitalisation.

To conclude on advocacy, the Chair invited Chile to take the floor. Chile is the only jurisdiction around the table where competitive neutrality is included in the Constitution. The Competition Tribunal in Chile has the power to advocate for the respect of competitive neutrality. The Chair asked how effective these tools were.

Chile confirmed that participation by the Chilean State in markets (particularly as a supplier of goods or services) is regulated in the Constitution, which establishes the principle of subsidiarity according to which the state should only develop or supply goods or services that private parties are unable to provide. The representative of the Competition Tribunal ('TDLC') emphasised that there are around 25 SOEs in Chile and all of them existed before the enactment of the Constitution in 1990. The delegation of Chile noted that some competition cases involved SOEs in sectors such

as infrastructure, water companies, banks, refineries, mining, and agriculture. Chile has also the power under competition law to sanction ‘any person’, a notion which is interpreted broadly so as to include any enterprises irrespectively of its ownership. In only one case the TDLC analysed the notion of economic activity in detail and established that an activity can be regarded as economic depending on its nature and not on the basis of the person engaged in such activity.

The advocacy role of the Chilean competition authorities is explicitly provided for in the Competition Law, Article 1. In particular, the TDLC has the function of promoting competition principles in the law-making process: Article 18, number 4 of the Competition Law states that one of the TDLC’s duties is to “*propose to the President of the Republic of Chile, through the corresponding State Minister, the modification or the derogation of legal and statutory precepts it deems contrary to competition, as well as legal or statutory precepts, when deemed necessary to promote competition or regulate the performance of determined economic activities carried out under non-competitive conditions*”. As of May 2015, the TDLC had issued fifteen different opinions suggesting various modifications to specific laws. To date, several of these opinions have been taken into account by the government, two of them related to SOEs. For instance, the TDLC recommended opening access to natural gas pipelines, which used to be a state-owned monopoly. The TDLC also recommended the instauration of telephone number portability, in order to reduce barriers faced by consumers in the mobile telephony market.

5. Conclusions and future work

To conclude, the Chair summarised some of the main points of the roundtable discussion:

- The problem of competitive neutrality is quite extensive in Asia, but also in a number of European countries (especially at local level, where there are a lot of municipally-owned enterprises).
- There are many different ways to deal with competitive neutrality distortions: while some jurisdictions have a variety of rules and tools to address such distortions, in others, only competition law is the only tool that can apply.
- There are challenges to using competition law. Although competition law should apply widely to any enterprise/economic activity, there are still many exemptions applicable in various jurisdictions. Even when exceptions do not apply, competition authorities may still be inclined to enforce competition law to favour the state.
- Outside of competition law, there is a wide variety of solutions to address competitive neutrality problems, e.g. advocacy and soft powers. The Chair recalled some examples, like the Competition Tribunal in Chile which can propose recommendations to the Government, or the Italian competition authority which can bring court suit against a public entity for measures that are distorting competition.

According to the Chair the discussion also revealed remaining challenges and that none of the current tools seems completely satisfactory. This opens the question of possible future work. The Chair turned to the Secretariat and asked to share its views on possible future work on competitive neutrality.

The Secretariat pointed to the number of open questions and suggested that future work could be articulated along two main lines:

1. Establish the basic principles on which there seems to be broad agreement in the competition community (e.g. competitive neutrality and competition policy are interdependent; competition law should apply broadly while exclusions should be defined as narrowly as possible). Elaborating basic principles would be also very beneficial for other policy areas such as investment and trade.
2. Explore further some of the topics and common challenges that deserve further discussion, such as: (i) elaborating a typology of the main types of competitive neutrality distortions, (ii) summarising rules and tools available to address each of them and (iii) identifying areas/distortions that lead to specific enforcement challenges.

‘Public interest’ considerations were also identified by the Secretariat as a field which might deserve further work. Enforcement agencies seem to struggle with the evaluation of non-competition related considerations while performing their enforcement/regulatory activities. Thus, the question arises whether to approach competitive neutrality from the angle of public interest/public service considerations.

In light of the Secretariat's proposals, the Chair supported the idea of identifying and describing the different types of distortions and the different ways to addressing these distortions. The Chair invited delegates to share their views on the possible future work.

Before opening the floor for discussion, DAF's deputy director was invited to speak on the question how the topic could be approached from the perspective of the various committees that are dealing with competitive neutrality. DAF underlined that the topic could be further developed in two directions: 1) one which identifies the distortion induced by the state going beyond state ownership, and 2) one that other evaluates the cross-border dimension of the topic. The latter direction is where DAF has received a mandate from ministers to conduct a horizontal project and bring together interested committees. A task force was established with volunteers from four OECD committees (investment, competition, corporate governance and trade) and there will be a synthesis paper presented in October on cross-border competitive neutrality of SOEs with the following blocks: 1) concerns, 2) evidence, 3) existing rules and 4) gaps.

The delegation of the US expressed interest in a compendium of competitive neutrality distortions. The US values the horizontal approach undertaken by the OECD and support further future work on the topic. However, the US had some concerns if the proposal was to develop a document containing normative value. Therefore, the US supported future work on competitive neutrality, however, in a form that does not contain any normative principles.

The EU found both the roundtable discussion as well as the Hearing very useful from the EU's perspective. The EU delegation also strongly supported further work on this area. One of the lines of work in which the EU was interested concerned the creation of an inventory describing the main (common) legal framework and policies in place to deal with this matter.

BIAC took the floor and emphasised that this issue is of a great interest to the business community. BIAC strongly supported the continuation of the project along the lines of the EU's idea of an inventory document that brings together commonly agreed principles and different tools.

The Chair proposed that, following the views expressed by delegates, the Secretariat would prepare an inventory describing the types of competitive neutrality distortions, the different ways in which such distortions are treated and addressed across jurisdictions, and how similar or different that is in relation to other areas (e.g. the distinction of domestic and cross-border).

The Chair closed the discussion by thanking the delegates, the Secretariat and the experts for contributions.