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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

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**ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT**

-- Note by Belgium --

**16-18 June 2015**

*This document reproduces a written contribution from Belgium submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm](http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm).*

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## BELGIUM

### 1. “Competitive neutrality” and the role of the State in the market

#### 1.1 *What does competitive neutrality mean to you? Is competitive neutrality a useful or necessary goal for competition? Is it an objective of your competition authority? What is the ultimate goal in promoting a level playing field or undistorted markets in your jurisdiction?*

1. It is a useful and necessary goal. However although the BCA can take the initiative to make comments in respect of legislative and regulatory proposals, it has no formal role in the decision making process.

2. It has occasionally made informal and confidential comments at its own initiative, and is also occasionally consulted by the government.

#### 1.2 *In your experience, what type of State measures can distort the playing field? Do you think that State-controlled or supported firms enjoy advantages or disadvantages (e.g. higher labour costs due to public status of their employees)? What types of distortions that you are mostly concerned with?*

3. With regard to the application of competition law, undertakings that are state controlled or in which the state holds a significant shareholding do not benefit of any preferential treatment or specific support. On the contrary, while ministers hesitate to file complaints against privately owned undertakings (unless they are seen to hold a strong dominant position or are incumbents in liberalised industries), they do not hesitate to complain against state owned undertakings and undertakings in which the state holds a significant shareholding.

#### 1.3 *In which sectors do you find the highest degree of State intervention and influence? Is the State’s presence growing or decreasing in your economy? What is the weight of SOEs, regulated companies and/or public services in your economy?*

4. The state’s presence is decreasing.

5. We can distinguish between:

- State or local government (co-)ownership of undertakings: telecom, postal services and public transport;
- State or local government ownership of infrastructure: mainly harbours;
- State or local government ownership/purchaser of services: mainly real estate and public works;
- State and local government purchaser of goods and services: the public procurement markets.

## 2. Rules and tools to address competitive neutrality distortions available to competition authorities

### 2.1 Rules/Tools

2.1.1 *What is the scope of your competition law vis-à-vis State activities in the market? Are there exemptions, exceptions, immunities or defences that may limit the scope of your intervention?*

6. There are no exemptions, exceptions or immunities, and the public service defences can be invoked within the framework of article 101 (3) TFEU by all types of undertakings.

2.1.2 *When a State-related distortion of competition amounts to an infringement of the competition law, what powers do you have? Can you also rely on rules other than competition law? E.g. subsidy control or state aid laws, rules governing public services obligations, competitive neutrality frameworks?*

7. We can only enforce competition law vis-à-vis undertakings (regardless of the ownership structure).

8. We can publish market studies in which we formulate suggestions (and we did in respect of retail markets) and raise issues in public or confidentially, whether or not at the request of the government (we recently gave an opinion on two legislative proposals in respect of financial services at the request of the Minister for the Economy).

2.1.3 *What other, non-enforcement powers do you have to tackle anti-competitive State measures? E.g. market studies, advocacy powers, regulatory intervention, control over public procurement processes, subsidy grants and bailouts?*

9. Please see response to previous question.

### 2.2 Challenges

2.2.1 *What challenges do you face when applying competition law to a State-influenced activity or entity? Is there any difference if the State-induced restriction of competition is at Federal/central level or at a local level? Have you encountered any undue State pressure or involvement when scrutinising the conduct of a State-influenced activity or entity?*

10. Given the federal structure of Belgium without hierarchy between the federal and the regional governments, rules and regulations, it is more delicate for a federal authority to comment on regional matters unless invited to do so by regional authorities.

11. We never experienced in the last 7 years any undue pressure from any public authority.

2.2.2 *Is it easier or more difficult to enforce your powers when the State is involved in the creating the distortion of competition that you are investigating (e.g. when a 'national champion' is involved)? Does this impact your analysis and review process?*

12. It is if anything easier when a federal entity is involved because ministers are less reluctant to complain or support the competition authority in court.

2.2.3 *Have you faced any difficulty in enforcing your decisions (e.g. on remedies or on fines) when the State is involved?*

13. No.

2.2.4 *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 cooperate on competitive neutrality distortions (domestically and internationally)?*

14. The competition authority and the courts share the power to enforce the rules of competition, but sector regulators must all avoid anti-competitive distortions. We have an active and constructive cooperation with key sector regulators (energy, telecom and postal services).

### **3. Specific issues related to public and private competition enforcement**

**3.1 *What are the most common competition law violations occurring through State-influenced activities? Are they more frequent and likely in certain sectors? Why?***

15. Abuse of dominance by incumbents in liberalised industries

3.1.1 *Have you experienced any difficulty arising from substantive standards being ill-suited to act upon State interventions in the market place? Do the standard and burden of proof vary when the State is involved or when a public service is at stake? Does the State benefit from any presumption?*

16. No.

3.1.2 *What obstacles do you face when applying turnover-based rules (e.g. for calculating corporate fines, or for merger jurisdictional purposes) to the State as a market player? For example, if the maximum sanction is turnover-based, how is this computed when fining a State-owned company? Or what is the appropriate method for computing the “group turnover” in case of State-owned enterprises?*

17. No experience with regard to merger control. With regard to the calculation of fines, we considered the telecom and the postal incumbent as stand-alone groups of companies.

3.1.3 *What obstacles do you face when applying control-based rules in establishing whether two or more State-controlled players are independent from each other? For example, are three State-controlled companies responding to different Ministries considered as a single economic entity when applying cartel rules? Or when calculating market shares in a merger control context?*

18. Please see response to previous question.

3.1.4 *Have you used competition law remedies to ensure competitive neutrality? Should remedies be far-reaching and aim at restoring competitive neutrality (e.g. imposing privatisation or structural separation)?*

19. We enforce the rules of competition without specific reference to competitive neutrality, but only to the common references to distortions of competition.

3.1.5 *What obstacles do you face in designing remedies when the government has already negotiated or ‘sealed’ the deal? Which remedies have proven effective or ineffective when applied to State-influenced entities? What obstacles do you face in designing effective remedies and in monitoring compliance in this context?*

20. We had no such experience.

3.1.6 *To what extent is your fining policy suited to deter anti-competitive conduct by State-controlled companies? (Notably since corporate fine may simply consist in a money transfer from one public budget line to another.)*

21. We see no difference in effectiveness between sanctions imposed on state owned or privately owned companies.

3.1.7 *Is it more or less difficult for consumers to seek private recovery against a State-related entity? Where a State exemption, immunity or defence is successfully invoked, does it bar public enforcement only?*

22. We do not see any significant difference. Publicly owned companies might however be held to a higher standard.