1. BIAC is pleased that the OECD is undertaking a work programme on the anti-competitive challenges that can arise when a State-Owned Enterprise (SOE) and private sector entities are in competition. BIAC appreciates having been able to consult with the OECD Working Party on State Ownership and Privatisation Practises on 19 October 2010. As a follow-up to our oral remarks on 19 October, BIAC wishes to submit the following written comments on the OECD document ‘Competitive Neutrality in the Presence of State Owned Enterprises’ (document DAF/CA/PRIV(2010)1).

2. Ensuring competitive neutrality of SOEs is highly important to the OECD business community. More and more, private sector companies operating in global markets find that they are in competition with SOEs, and that the terms of this competition are neither fair nor equal – due to purposeful intervention by governments to confer an unearned and sustained competitive advantage for their SOEs over private sector competitors. The governments and public authorities that engage in such intervention are no longer in their appropriate position of ‘competitive neutrality’ in relation to the market. These governments compromise their ability to fulfil their responsibility to protect the competitive process, which is critical to market efficiency.

3. Intervention of this sort is troubling when the private sector is competing in an SOE’s home market, but increasingly SOEs are also investing and operating abroad - making this problem more complex, significant, and urgent. We also note that many emerging non-OECD countries view the economic model often described as ‘state capitalism’ as an appealing model. They often find inspiration in the way some Asian countries manage national SOEs.

4. BIAC recognizes that government involvement in the economy is inevitable. However, such involvement should be as limited as possible, particularly if the government is not performing governmental functions, or is providing goods or services on a commercial basis through the ownership and operation of SOEs. In general, BIAC believes that consumer welfare is maximised through competition and competitive markets, which is more likely when the market participants are primarily privately held. Our general view is that increased privatisation, where possible,
should proceed. In other cases, corporatisation of SOEs as well as conclusion of Public-Private Partnership (PPP) type contracts is desirable.

5. BIAC finds the OECD paper to be an excellent initial point of departure, as it includes a stocktaking of concerns about competitive neutrality, different competitive neutrality frameworks, remedies available to counteract anti-competitive behaviour, reasons why SOEs may operate on an uneven playing field, and a discussion of the relevance of the OECD SOE Guidelines that support ‘competitive neutrality’. Section One, on pages 5 to 8, makes a good start at identifying some of the anti-competitive measures used by governments or public authorities which preclude or subvert a level playing field for private sector business.

6. As the OECD paper points out and illustrates on page 7, the mere presence of state ownership itself, even where the state plays only a passive role, can confer and deliver advantages to SOEs. Thanks to state ownership, SOEs often need not provide any return to shareholders nor have any concern for share price, are impervious to the disciplining effects of capital markets, are often exempt from bankruptcy rules, and can engage in exclusionary pricing and generate losses without fear of going bankrupt.

7. BIAC is also concerned with governments’ active anti-competitive behaviour that favours their own SOEs and threatens competitive neutrality. These actions include: outright or discriminatory subsidisation, concessionary financing, local content requirements, public procurement preferences, exemption from antitrust and common fiscal rules and rigorous application of costly regulatory regimes that apply to their private sector competitors. Also, other preferred treatment such as requirements that business partners of SOEs transfer technology, or toleration by governments of intellectual property infringement by SOEs are examples of such actions.

8. BIAC would highly encourage the OECD to extend the paper with a study identifying the most successful measures, formal mechanisms and individual country approaches that best would achieve a level playing field, and those which inhibit such achievement.

9. The study should also ‘map’ the anti-competitive practices identified in the OECD paper to the existing OECD Guidelines for SOEs, to determine the extent to which the existing SOE Guidelines cover those practices that breach ‘competitive neutrality’. This suggestion is based on the fact that the paper itself states on pages 27-29 that the full application of the SOE Guidelines, which grew out of the OECD’s corporate governance work, will not achieve ‘competitive neutrality’.

10. The SOE Guidelines do not address the issues raised by purposeful government intervention favouring domestic SOEs. The study should address measures such as the ones mentioned in paragraph 7 above and in the OECD paper on pp. 6-8. It should equally address the competitive neutrality principles discussed on pp. 15-17, as well as technological neutrality. The list of elements just mentioned is not an exhaustive list, but underscores the point that BIAC is primarily concerned with the
behaviour of governments in relation to their SOEs, and SOEs’ behaviour responding to government intervention.

11. As a matter of principle, roles and obligations applied to SOEs acting in a market should be the same as for private entities. In particular, this should be the case for fiscal obligations, accounting, transparency, reporting, public service obligations, human rights etc. Operating contracts or licenses can include these kinds of obligations. There are many examples where this is done when the private sector is concerned. Also, there are examples where SOEs are supposed to respect these kinds of obligations but in practice do not, thereby weakening or invalidating competitive situations.

12. The OECD paper also notes another gap in the SOE Guidelines. As paragraph 66 admits, the key recommendation in SOE Guideline I, that governments maintain ‘a level playing field in markets where SOEs and private sector companies compete’, does not apply to markets where SOEs and private sectors do not compete. The paper finds that if ‘incumbent SOEs are so heavily favoured that no private enterprise perceives a market opportunity, then it is a distortion of competition which is not covered by the SOE Guidelines’. BIAC agrees fully with this statement and would encourage the study to include and develop this issue.

13. The distortions caused by SOE behaviour, and by government intervention for and through SOEs, also go beyond horizontal competition in the same market. SOEs also affect their suppliers – through requirements to use domestic goods or services, or requirements to transfer technology, or adoption of standards that effectively exclude foreign technology or foreign suppliers. These actions are also of concern to BIAC, and the study should therefore also address such vertical concerns.

14. The OECD and its member countries should also further develop and promote transparency of SOEs, as a first step toward determining and addressing anti-competitive advantages conferred on SOEs. Full transparency regarding direct and indirect relationships between SOEs and the state, the respective roles of each, relationships and influences (visible as well as invisible, such as market preferences for SOEs, procurement preferences, and direction of SOEs by government or public authorities), board/senior management appointments, board decision making, and the cost of, and compliance with, state service/social obligations is vital to the concept of ‘competitive neutrality’. The same is true when SOEs are operating abroad and engaging with business counterparts in those countries.

15. It would be worthwhile for the study also to include state assistance, such as specific forms of state aid to industries. A thorough stocktaking of such measures would give a broader picture of SOE incentives and the distortion to competitive neutrality.

16. Additional problem areas in relation to the issue of competitive neutrality for SOEs include cases where states have a significant share ownership in a "commercial" joint-venture or when the SOE becomes the client and/or regulator of a service that has been contracted out to a private operator. Such areas could also constitute avenues for further exploration in the study.
17. As for the three suggested courses of action proposed in paragraph 74 on page 31:

- BIAC believes and urges that the OECD should adopt the first option of extending the work programme so as to reach a consensus position on the key elements of competitive neutrality as a path for future work. The study suggested in paragraphs 5 to 13 above would be an essential first step.

- The paper also proposes establishing a broad monitoring mechanism for application of the SOE Guidelines. However, many of the most urgent concerns occur with SOEs from non-OECD countries, which would not participate in such monitoring. Efforts on monitoring must not come at the expense of work on developing a common definition of competitive neutrality, although they could complement such work.

- As for the third option, BIAC notes that some OECD agenda work takes place between member countries, while other activities include outreach countries. We recommend that work on defining ‘competitive neutrality’ first seek agreement among OECD countries, before including any others.

18. Furthermore, it is BIAC’s impression that in emerging economies, where often the state owns and operates a large proportion of commercial entities, the SOE Guidelines are not well known or understood at either the national or sub-national levels. More must be done to promote the SOE Guidelines, keeping in mind that the actions of both national and sub-national levels of government can adversely impact competitive neutrality.

19. BIAC wishes to call attention to the paper “Australian Government Competitive Neutrality Guidelines for Managers”, which describes specific conditions that, in Australia’s system, must be met in order to sustain competitive neutrality, such as taxation neutrality, debt neutrality, regulatory neutrality, etc. This list of minimum conditions effectively helps to set parameters that work to transform monopolistic market agents into competitive market agents. Such education of managers within SOEs is critical, and parallels the extensive antitrust and regulatory compliance programs many major companies have in place to instruct their own management teams. SOE managerial training of this type would be an important best practice for the OECD to identify in its expanded paper on competitive neutrality.

20. In the longer run, the OECD could develop a guide on best practices, to identify and share with governments and the public the measures that have proven to be the most effective in relation to obtaining ‘competitive neutrality’.

21. Finally, while the OECD discussion to date has been on SOEs, increasingly the same competitive neutrality concerns arise in relation to state assisted enterprises, where the state directly or indirectly provides advantages to certain private enterprises at the expense of others, in attempt to develop and promote “national champions”. It may be useful to frame the ‘competitive neutrality’ concerns going forward in a broader context.
22. BIAC looks forward to working with the OECD on this important policy area, and suggests that the OECD coordinate its resources, and the high-quality expertise of the OECD Corporate Governance Committee and the Working Party, with those of other relevant OECD Committees.