Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee
Working Party No. 3

“The Application of Antitrust Law to State Owned Enterprises”

and

“Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises”

October 20, 2009

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No. 3 (WP3) for its Roundtables on “The Application of Antitrust Law to State-Owned Enterprises” and on “Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises” on October 20, 2009.

I. The Application of Antitrust Law to State Owned Enterprises

A. State Owned Enterprises Generally

1. State Owned Enterprises (SOEs) exist for a variety of reasons. Some are historical, created in view of what were believed to be “natural monopolies” or a need to stimulate other infrastructure projects deemed at the time too big for private industry, while others, such as many of the recent government investments, reflect decisions to rescue domestic businesses faced with potential failure. Although SOEs are more common in some jurisdictions than others, most governments involve themselves to some degree in their national economies through state ownership of, investment in, or sponsorship of particular businesses. In each case, SOEs reflect an overarching governmental policy choice wherein other policy considerations are deemed paramount to the free operation of the marketplace. Thus, in making these choices, a government arguably has considered the relative costs and benefits and determined that public intervention is appropriate, inclusive of the potential adverse effects on competition.

2. Economists, however, generally agree that SOEs are often less efficient than privately-held firms and in many cases may actually reduce consumer welfare. Indeed, from a pure microeconomic-theory perspective, market participation by SOEs, like other forms of state
intervention, should be limited to instances of market failure.\(^1\) Absent some structural defect or systematic crisis that prevents economic forces from allocating resources, allocative efficiency is theoretically maximized by allowing the market to work.

3. Nevertheless, as the most recent financial crisis has demonstrated, state involvement in the marketplace is necessary in some instances, whether by regulation, incentive programs, direct market participation, or other measures. The level of state involvement is a policy decision that tends to be based on a number of factors that reach beyond considerations of effective competition. Goals such as universal service, higher employment, national defence, and the like all play an important role in shaping the decision making in this area. BIAC recognizes that in many cases SOEs reflect a conscious choice by a government to promote various policy goals above free trade and free competition.

4. SOEs, however, can have very different effects on the market than private enterprises. Often, the stated purpose of an SOE goes beyond simple profit maximization. Moreover, in contrast to virtually all other privately held or publicly traded enterprises, SOEs are not subject to the same rigours of valuation and the ability to raise capital or otherwise merit investment. Because of these differences and a tendency for governments to prioritize non-competition policy objectives. SOEs can create a potentially deleterious impact on free trade, free competition, and consumer welfare.

5. Decisions on the creation and structure of SOEs generally fall outside the realm of competition law enforcement. Indeed, it would make little sense to suggest that a state’s competition laws should be used as a tool to attack another of the state’s duly enacted legislative policies. By the same token, it would make little sense to allow SOEs to thwart the objectives of one of the state’s duly created enforcement agencies. Therefore, to the extent that the creation or maintenance of SOEs threatens competition and consumer welfare within a jurisdiction, competition enforcement agencies should take an active role, either through advocacy or enforcement measures, in an effort to limit or remedy the anticompetitive consequences of state action. BIAC strongly supports the presence of competition authorities at the SOE decision-making table, both at the initiation of state investment and in confining the potential adverse competitive effects on an ongoing basis.

6. Although competition laws are not designed to abrogate other state policy objectives, they do have an important role to play in protecting consumer welfare in markets where SOEs operate. Notably, while justifications may exist for creating SOEs in particular instances, it is frequently the case that SOEs harm domestic and foreign consumers, and hinder growth.\(^2\) For this reason, it is important for a government to strike a balance that limits the role that SOEs

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play in the economy to the extent necessary to reach the policy goals the state is seeking to achieve, and for competition agencies to take an active part in meeting this objective.

7. Through competition law enforcement, agencies have the ability to oversee markets where SOEs compete and create a check on any distortion of competition beyond that which necessarily flows from the choice to create the SOE in the first instance. The interplay between private companies and SOEs can create a real risk of misapplication of competition laws and regulations. For instance, where potential competition to an SOE comes from abroad, a state may be incentivized to use competition laws in ways that protect the domestic SOE from private competition. Such action deprives consumers of the benefits of competition by perpetuating, and at times extending, any inefficiency associated with the SOE. At the same time, SOEs often attempt to use their market power to influence customers, competitors and joint venture partners in ways that prevent the market from becoming competitive. Thus, proper enforcement strategy involves aspects of both vigilance and restraint on the part of antitrust enforcers: vigilance in limiting the exclusionary conduct of SOEs and promoting competition; restraint in acting against rivals to the SOE in ways that foreclose competition.

8. For purposes of these comments, it is worth pointing out a few factual distinctions that affect the analysis. One can differentiate between instances where a state intentionally and completely occupies a field of commerce and instances where the state takes an investment position in a company that is otherwise privately controlled. On one hand, state ownership of universal service providers, such as power companies, telephony providers, and postal services, is generally long-term and significantly affects the competitive landscape in these markets. These situations often reflect this historical development of a marketplace, and often result in sole control of a market, or a dominant position in a market. Often, these types of investments result from a perceived need to build infrastructure, sometimes where the costs are so significant that it initially is (or was) difficult to justify private investment of a sufficient magnitude. But these investments can also reflect other objectives. For instance, some have suggested that Venezuela nationalized its oil industry in 1976 largely to increase its status in international politics. Likewise, many states have created sovereign wealth funds ostensibly as a means of securing financial stability and promoting economic development, but arguably also as a protectionist measure for domestic industry. Where these objectives exist, the risk of governmental interference with free competition – either through non-enforcement against a dominant domestic firm or targeted actions against would-be rivals to the SOE – is high.

9. In contrast, government intervention into markets where free competition exists and where the government does not attempt to occupy the field of commerce are less likely to create a risk of harm to competition. One arguable example is the Automotive Industry Financing

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Program – and its counterpart in Europe – through which the United States government provided loans and equity investments to domestic auto manufacturers to help them avoid bankruptcy. These initiatives were developed as means to provide financial support to domestic businesses that otherwise might have failed in the midst of the economic crisis. These actions were not intended to occupy the field of commerce and may be much more competition-neutral given their shorter intended duration and more limited direct involvement. Moreover, while such initiatives may skew the competitive contest of separating more efficient companies from less efficient companies, the direct harm (putting aside the burdens of taxation, etc.) is not likely to impact consumers.

10. Indeed, in the wake of the recent financial crisis, we have seen a wave of such examples, in the US, EC and elsewhere, including in the banking and automotive sectors. Despite the fact that these financial rescues are usually competitively neutral, in some cases, the crisis has led to state intervention that creates a potential for anticompetitive effects. Yet, such investments can be made mindful of the effect of the transaction on competition. For instance, in October 2008, PNC Financial Services Group announced its intent to acquire National City Corporation using funds from the U.S. government’s $250 billion capital initiative under the Troubled Asset Relief Program (TARP). Just seven weeks after announcement, the Department of Justice approved the acquisition in December 2008, requiring divestiture of 61 National City branch locations.

B. Application of Competition Law to SOEs

11. Competition law does not normally concern itself with the creation of an SOE or in defining its fundamental objectives, as these reflect a broader public policy decision made by the government. However, given their ownership and (in some cases) governance structure, the operation of SOEs can often lead to outcomes that run counter to the objectives of competition laws. The “costs” to consumers associated with SOEs potentially come from many different sources including increased taxation, static efficiency losses, and in some cases supracompetitive prices. Importantly, they also can discourage private sector investment from both domestic and foreign enterprises. One of the most significant sources of potential harm is the reduction in, or foreclosure of, innovation. While economic theory indicates that all dominant firms have decreased incentives to innovate, the problem can be amplified where SOEs have the incentive to choose inefficient technology, as the Secretarial note aptly points out. It is well

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9 See, Background Note ¶ 49.
established that the dynamic efficiency gains resulting from innovation often can be the most important forces for increasing consumer welfare. By contrast, reduced or stagnant innovation associated with SOEs compounded with government sponsorship of the SOE can result in significant consumer harm, including by eliminating the possibility of so-called “creative destruction” that might otherwise occur where a dominant firm exists.  

12. Although competition law enforcement may not directly impact innovation in markets where the SOE occupies the field, it can be an essential tool for ensuring long run efficiency in markets where SOEs compete with private enterprises. In theory, less efficient SOEs should be overtaken in the long run by more efficient competitors as long as there is at least some level of innovation that can be brought to bear on the market. However, in many cases the efforts of innovative rivals may be thwarted either by an SOE’s anticompetitive conduct or by governmental policies designed to protect an SOE from competition by private firms. In other words, whether you believe in the principles of Schumpeterian economics or not, state sponsorship of SOEs, including through selective competition law enforcement, ensures that creative destruction will not occur.

13. To promote maximization of consumer welfare, competition policy should focus on establishing a model where innovation is permitted to have its full effect on the market. *Ex ante*, this means that competition authorities should focus efforts on advocating removal of barriers to competition, including statutory and regulatory hurdles, foreign investment restrictions, standards setting, etc. This is particularly critical where the hurdles are likely to dampen incentives to innovate by private firms. *Ex post*, authorities should recognize that while SOEs are not inherently anticompetitive, the conditions that accompany an SOE are frequently anticompetitive, and agencies should enforce the competition laws to reign in abuses. Given the importance of innovation in promoting consumer welfare, competition law enforcement against dominant SOEs is a prerequisite to achieving long run dynamic efficiency.

14. Indeed, the creation of “national champions” arguably has a similar impact to the creation of an SOE. Such enterprises can result in significant distortions to competition and elevate the interests of the individual enterprise above the interests of the consumer. As with SOEs, where the creation or promotion of national champions has the effect of sheltering the domestic competitor from competition, consumers are harmed and such market distortions should not be overlooked.

10 **JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY** 83 (3d ed. 1950).


C. Enforcement Actions and Policies Involving SOEs

15. Proper enforcement of competition laws should include direct enforcement against SOEs to maintain a level playing field for private enterprises to the greatest extent permissible under the law. Different jurisdictions have adopted enforcement strategies that accomplish this goal to differing extents. Although there are historical and political reasons for the divergence, on a going-forward basis each competition agency should focus on enforcing its antitrust laws with respect to SOEs and remedying violations by SOEs, especially those likely to diminish long term competition and innovation. At the same time, care must be taken to avoid application of antitrust laws in ways that disadvantage private firms in order to benefit SOEs.

16. Perhaps because US policy historically has disfavoured the creation and maintenance of SOEs, the current law in the United States has had only limited application to SOEs. In the past, U.S. courts have been deferential to other government policies, including in cases that otherwise would constitute anticompetitive conduct. The state action doctrine in the United States also places restrictions on the ability of antitrust enforcers to challenge certain state-authorized conduct. The doctrine is rooted in *Parker v. Brown*, in which the Supreme Court addressed the application of federal antitrust laws to a California law that sought to maintain inflated prices for raisins by restricting competition among growers. Attempting to reconcile the notion of state sovereignty with the application of the Sherman Antitrust Act, the Court stated, “[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”

17. In subsequent history, the Supreme Court has also held that where the state itself is acting in an anticompetitive manner, it is immune from challenge under federal antitrust laws. The same principle applies to actions authorized by the states but undertaken by private companies or SOEs. For example, based on principles of federalism, the Supreme Court has held in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, that the states allow private actors to engage in anticompetitive conduct through enactment of legislation promoting from competition, is as flawed today as it was always was. I have never seen any company leap to the defence of anyone else than its shareholders. And quite rightly so: companies have to care about return on investment. We can only expect national champions to champion themselves. This is why protecting "national champions" is doomed to fail.

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14 See, e.g., *Hammons v. Alcan Aluminum Corp.*, 1996 WL 438605 (C.D. Cal. July 1, 1996), aff’d 132 F.3d 39 (9th Cir. 1997), where the court dismissed a challenge brought by an aluminum distributor against several U.S. aluminum companies alleging collusive conduct. The conduct at issue involved the Department of Justice negotiating with each of the aluminum producers to restrict output in connection with an attempt to accommodate Russian concerns about low prices. The court found that this conduct was insulated from antitrust challenge under the Political Question doctrine and the Noerr-Pennington doctrine.


such conduct. For immunity to attach for private actors, the *Midcal* Court imposed a high standard, requiring that the conduct at issue was both authorized by state law and was actively supervised by the state.\(^{17}\) The Court has also sought to distinguish actions taken by “persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition.”\(^{18}\) Application of competition laws to such individuals, even when acting in a quasi-governmental role, as in a standards-setting body, is appropriate, according to the Court.

18. Despite these limitations, in practice the Supreme Court has been very reluctant to strike down SOE conduct. Most commonly, this is apparent in cases dealing with municipal governments. For example, in *Town of Hallie v. City of Eau Claire*, the Supreme Court addressed a situation where Eau Claire had constructed a sewage treatment plant and sold sewage collection and disposal services.\(^{19}\) The city subsequently refused to provide sewage treatment to residents of nearby towns unless they agreed to use the city’s collection services as well. The nearby towns, which had no other option for sewage treatment, sued the city alleging this constituted an illegal tying arrangement. The Supreme Court found that this conduct was immune from challenge. Notably, the Court held that a municipality is presumed to act in the public interest absent evidence to the contrary and will receive immunity from antitrust challenge as long as it is operating within the scope of a state policy favouring some other objective over free competition. While the Court’s position follows from its earlier precedents, it is evident in this situation that a more restrictive application of the State Action Doctrine would be more conducive to curbing potentially anticompetitive activities by SOEs, despite their limited presence in U.S. markets.

19. The US agencies, however, have vigorously sought to ensure that the scope of immunity in the US is not extended further than required by existing precedent. In 2003, the FTC convened a State Action Task Force to re-examine Supreme Court precedent and make recommendations to “ensure that the state action exemption remains true to its doctrinal foundation of protecting the deliberate policy choices of sovereign states and is otherwise applied in a way that promotes competition and enhances consumer welfare.”\(^{20}\) The FTC fulfilled that objective, inter alia, testifying before state legislatures in opposition to specific exemptions that would further expand the doctrine and bringing actions against several parties that sought to use state action immunity as a shield for anticompetitive conduct.\(^{21}\)

\(^{17}\) See, *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-6 (1980).


\(^{19}\) 471 U.S. 34, 44 (1985).


20. Europe, which generally encounters a larger number of SOEs than the United States, also has greater latitude in addressing competition issues relating to SOEs. Largely due to its extensive history of state ownership and the need to break down barriers to the functioning of the common market, Europe has a much more established body of law regarding “state aids”. The state aids body of law is targeted at the aid itself, rather than the character of ownership. It is indifferent as to whether the recipient is a public or private enterprise.

21. The EC also has tools for competition law enforcement against SOEs through Articles 81 and 82. The EC Treaty specifically recognizes that SOEs can distort the common market and should be subject to competition laws. Europe has demonstrated a willingness to apply that framework to predatory SOE conduct. For example, in its Deutsche Post Predatory Pricing Decision, the Commission analyzed the conduct of Germany’s postal monopoly, and found that Deutsche Post had abused a dominant position, in violation of Article 82 of the EC Treaty. Specifically, the Commission responded to a complaint by UPS that Deutsche Post was using its profits from its state-granted letter mail monopoly to subsidize its sales of parcel delivery services, where it competed with private enterprise. After investigating the situation, the Commission determined that Deutsche Post was offering its parcel delivery services at prices that were below its incremental costs, violating the predatory pricing rule laid down earlier by the European Court of Justice in AKZO Chimie BV v. Comm’n. As a result, the Commission imposed a fine of €24 million on Deutsche Post.

22. Canadian competition law enforcement with respect to SOEs has primarily focused on review of activities of state-owned Crown corporations which are regarded as agents of the Crown. Canada has amended its laws to more fully encompass activity by SOEs. In R. v. Eldorado Nuclear Ltd.; R. v. Uranium Can. Ltd., [1983] 2 S.C.R. 551 ("Eldorado Nuclear"), the Supreme Court of Canada held that the Combines Investigations Act, the predecessor of the Competition Act, was not binding on an agent of the Crown when that agent was acting “within the scope of the public purposes it is statutorily empowered to pursue.” This Canadian case was part of the international proceedings in various jurisdictions related to the uranium cases of the late 1970s and early 1980s.

23. Three years after the Eldorado Nuclear judgement, the modern Canadian Competition Act came into force, including section 2.1. which states: “This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.” Section 2.1 made it clear that the Act potentially applies to Crown agents in respect of commercial activities where the agents engage in competition with private entities.

24. In Canada, where agents of the Crown (or private sector corporations) engage in commercial activities in competition with other persons, it is still possible to escape scrutiny from competition legislation by making use of the Regulated Conduct Defence (the “RCD”). This

22 Case COMP /35.141, Deutsche Post AG, 2001 O.J. (L 125) 27.
doctrine was introduced in *Reference Re: The Farm Products Marketing Act* [1957] 1 S.C.R. 198, which established that any marketing scheme within the authority of the provincial legislature cannot be against the public interest when the legislature is seized of the power and obligation to take care of that interest in the province.\(^{24}\) However, it should be noted that most of the cases involving the RCD deal with allegations of joint conduct including with respect to pricing, advertising and other commercial activities; it is not yet settled whether the RCD applies in the case of unilateral conduct (e.g., abuse of dominance).

25. Finally, the Competition Bureau, through the Commissioner of Competition (the “Commissioner”), can also influence the activities of an SOE by advocating for pro-competitive sector specific regulation. Sections 125 and 126 of the *Competition Act* outline an advocacy role for the Commissioner in front of federal and provincial boards, commissions or other tribunals that carry on regulatory activities (which may include overseeing an SOE) and are expressly charged pursuant to an Act of Parliament or a legislative enactment of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product. Notably in Canada, Commissioners have advocated for the introduction of competition into certain segments (such as telecommunications, transportation) pursuant to the powers under these sections.

26. Each of these jurisdictions has sought to provide a framework that balances the need to enforce competition laws to prevent abuses by SOEs against the needs of a given state to promote policies that may impact the free market. Thus, many of the above policies are designed to avoid “underenforcement” of competition laws when SOEs are involved. However, it is often equally important to avoid overenforcement against competing enterprises. For example, in the area of merger enforcement, there are occasionally suggestions that a government may attempt to enforce its competition laws in ways that favour local companies over outsiders. While in the past, this type of overenforcement has typically involved private companies, it can just as easily raise concerns when the acquisition target is an SOE or national champion. One salient example is the Spanish government’s effort to block the acquisition of Endesa by the German company E.ON. This interference, which occurred despite the Commission’s approval of the deal, resulted in the Commission referring Spain to the Court of Justice.\(^{25}\) The Commission’s challenge to the acquisition of McDonnell Douglas by Boeing raised similar concerns when U.S. leaders suggested that the Commission’s objective was to insulate Airbus from competition.\(^{26}\) When considering the proper application of competition laws


to SOEs, regulators should be careful to avoid similar actions that are directed to favour national companies over other competitors.

27. An effective competition policy requires that competition agencies enforce their laws equally against SOEs and private entities. This may require a conscious effort on the part of enforcement agencies to coordinate among governmental agencies to avoid conflict in SOE and competition law policies, or instead for competition agencies to challenge what in fact may be little more than another government ministerial department acting in its own interests rather than in the interests of consumers. In some countries, this process is already underway and should continue.\textsuperscript{27}

28. Likewise, enforcers should maintain vigilance in areas of formerly state-owned or heavily regulated industries, which tend to face large challenges when moving to a competitive world. Historically, for example, the airline and telephone industries have witnessed numerous antitrust actions brought by both states and private parties as these firms move from a state-controlled world to what should be a free market. Some of this may be due to a corporate culture or other holdover from the days when these companies operated in a world without antitrust scrutiny. Enforcement in this context is often appropriate, especially when the conduct involves horizontal agreements.

II. Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises

29. The potential inefficiencies of SOEs, especially with respect to the reduction in or foreclosure of innovation, can often be traced back to corporate governance problems. In fact, the defects in an SOE’s corporate governance structure often play a greater role in producing inefficiency than the state’s regulatory intervention in a given industry. This issue was identified well before the current economic crisis, which has shed a new light on the proper role of SOEs.

30. In 2005, the OECD issued its “Guidelines on Corporate Governance of State-Owned Enterprises” (the Guidelines). This document was meant as a complement to the OECD Principles of Corporate Governance (the Principles), which were first issued in 1999 and revised extensively in 2004. Closely following the Principles, the Guidelines set forth a number of recommendations to address the specific challenges faced by SOEs. The main challenges were recognized to be:

- the sometimes passive attitude of the state in the exercise of its ownership responsibilities and/or undue political interference with company management;
- the softness of budget constraints resulting, in particular, from SOEs being spared the risk of bankruptcy and the threat of takeovers; and

the complex chain of accountability.

31. These characteristics were perceived as having significant negative consequences. As shown by the proceedings of the June 2004 Competition Committee Roundtable on Regulation Market Activities by the Public Sector, corporate governance specificities may directly result in distortions of competition. Acknowledging this, several national authorities have based their policy for the administration of SOEs on the principle of competitive neutrality. With its “Commonwealth Competitive Neutrality Policy Statement” of 1996, Australia is one of the earliest and most accomplished examples. There was also a strong concern as to the sheer economic inefficiency of SOEs due to the specificities of their corporate governance set-up. In several countries this had prompted reports exposing the inadequacy of the model to the globalization of the economy. In other words, faulty corporate governance of SOEs could harm the citizen both as a consumer and as a taxpayer.

32. As explained by the OECD staff, the issuance of the Guidelines was prompted by the pressure deriving from globalization and liberalization, accompanied by a strong demand from non-OECD economies. Indeed, while SOE issues were important in several OECD countries, the Guidelines were also, and perhaps mainly, directed at Central and Eastern Europe and Latin America. This direction is hinted at by the choice of languages other than the Organization’s official languages into which the Guidelines were translated.

33. The Guidelines identified three priorities:

- reinforcing the exercise by governmental (or local) authorities of their ownership functions (this had been facilitated in the previous years in several OECD countries by the formation of dedicated agencies);

- strengthening and empowering the boards of directors, so that they operate as in “normal” companies; and

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31 Bosnian-Croatian-Serbian, Polish, Slovenian and Portuguese.
• imposing transparency on the SOEs' objectives and performance.

34. Today, this subject, like many others, deserves to be revisited in light of the financial and economic crisis. Recognizing that failures in corporate governance played a clear role in some of the larger financial firms at the centre of the crisis, the OECD undertook to review its general policy on corporate governance. Its Steering Group on Corporate Governance analyzed weaknesses in the fields of executive remuneration, risk management, board practices and the exercise of shareholder rights, and it concluded that “at this stage, there is no immediate call for a revision of the OECD Principles. In general, the Principles provide for a good basis to adequately address the key concerns that have been raised. A more urgent challenge for the Steering Group is to encourage and support effective implementation of already agreed standards.”

35. The OECD’s position with respect corporate governance on SOEs in the context of the financial and economic crisis is similar, “[M]any firms have received public funds or are owned by governments, and important conflicts of interest may arise. During this period, they should be run in line with the OECD Guidelines on Corporate Governance of State Owned Enterprises. Before governments exit from their role as owners, it would be desirable to strengthen the implementation by financial institutions of the OECD Principles of Corporate Governance.”

36. The Guidelines were initially established with a view to promoting competitive neutrality and economic efficiency in respect of companies which were state-owned either because of public service requirements or for historic legacy reasons (in a general context where privatization was encouraged). Given this, some may question whether they are still applicable to newly-acquired ownership positions motivated by a specific “service of general interest”, that of rescuing failing industries. However, BIAC believes that the sets of recommendations to be found in the Guidelines are indeed fully applicable in the new circumstances.

37. The Guidelines’ first recommendation is “ensuring an effective legal and regulatory framework for SOEs”. The injection of capital by public authorities has been a necessity and in many cases has deterred the disastrous systemic effects of the failure of strategically positioned firms, but the requirement not to distort competition with the healthier companies which did not call for assistance remains fully relevant. This means in particular avoiding confusion between the state’s ownership responsibilities and its market regulation functions (which have taken a paramount importance in financial markets), not providing any form of immunity from the jurisdiction of courts and regulatory authorities (including with respect to the rights of creditors to initiate insolvency procedures) and ensuring that there is no competitive distortion as to the further access to finance (even though the sheer presence of the state as a shareholder is in itself a strong factor of confidence for lenders and investors). As discussed above, in Europe the regulation of state aid provides a valuable safeguard on some of these issues.


38. The recommendations applying to the state acting as an owner are also relevant to the handling of interests taken for rescue purposes. It is more important than ever that the state acts as a responsible shareholder, since the whole purpose of the government’s stake is to drive the companies back to economic health. This implies in particular a well structured and transparent process for the nomination of state-appointed directors, allowing the selection of candidates on the basis of competencies and strict ethical standards rather than political reward or administrative rank criteria. Exercise of the ownership responsibility by a co-coordinating agency facilitates transparency and accountability. A particular concern may arise in the case where the shareholder is a municipal or local government, which is likely to have less competencies and technical support at its disposal.

39. It is legitimate that financial aid by the state is conditioned upon the restoration of adequate corporate governance where it is clear that past governance has failed, especially with respect to risk control. But letting the boards of directors fully exercise their responsibilities first implies non-interference by the legislator or regulator, even in politically sensitive areas. For instance, while it is clear that the excesses in executive compensation that played a part in the formation of the crisis are even more unacceptable in companies where taxpayer money has been injected, this subject cannot be dealt with by decree. It should remain the responsibility of the boards, which are indisputably best placed to appraise the specificities of each company’s situation on its market, and are accountable to the shareholders and other stakeholders in this now highly-scrutinized matter.

40. Preserving the independence and empowerment of the boards also implies that the mandate of the state-appointed directors should remain to act in the best interest of the company. Again, this may pose difficult issues where politically sensitive situations are at stake, especially the preservation of employment in certain sectors or geographic areas. While the companies have a clear responsibility to their employees who are not only prime stakeholders but often also their prime resource, the boards should not be forced to take positions which encourage the preservation of non-viable situations.

41. The Guidelines’ recommendations relating to transparency are also fully transposable to post-crisis situations. Preserving the rights of other shareholders (whether minority or not) and ensuring impeccable disclosure of financial information are essential, especially in listed companies because of the urgent need to restore and maintain the stability of financial markets.

III. Conclusion

42. BIAC does not favour heavy-handed regulation of SOEs. Rather, BIAC supports a level playing field between SOEs and private companies, including with respect to the enforcement of competition laws. Thus, BIAC favours the regulation of SOEs on the same terms as regulation of private industries. In addition, BIAC opposes the use of antitrust laws as a shield by governments seeking to protect domestic SOEs (or other “national champions”).

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34 See, OECD, “Finance, Competition and Governance: Priorities for Reform and Strategies to Phase-Out Emergency Measures” (June 2009), at 52-54.
acknowledges that in some instances, it may be appropriate to deal with alleged unfair practices of SOEs through the use of trade laws, including state aid analysis and the WTO dispute resolution mechanism.

43. BIAC further believes that the OECD’s Guidelines should continue to apply in the wake of the recent financial crisis. The Guidelines provide appropriate criteria for running SOEs, and they seek to promote adequate oversight without unnecessarily hindering the management of SOEs in ways that will reduce efficiency.