Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Global Forum on Competition

Session III: State Owned Enterprises and Competitive Neutrality

February 17, 2012

1. BIAC welcomes the initiative taken by the OECD Corporate Governance Committee’s Working Group on State Ownership and Privatisation Practices and Competition Committee’s Working Party on Co-operation and Enforcement (WP 3) to issue a report on Best Practices in Competitive Neutrality. Indeed this will bring a useful complement to the 2005 Guidelines on Corporate Governance of State-Owned Enterprises (SOEs), (“the 2005 Guidelines”) which did contain a recommendation on the maintenance of a “level-playing field” between SOEs and privately-owned commercial enterprises, but did not make it a central theme.

2. BIAC already had the opportunity to express its views on competitive neutrality at the meeting of WP3 in October 2009. These views may be briefly summarized as follows.

   a. SOEs play an important economic part in many jurisdictions, and state involvement on the market place is necessary in some instances (as the recent financial crisis has shown). BIAC’s position is in no way to oppose the maintenance of SOEs in principle.

   b. However, SOEs may also have harmful effects on economy as they can be less efficient than privately-held firms and may then actually reduce consumer welfare.

   c. Competitive neutrality is therefore an important concern, and an effective competition policy requires that competition agencies enforce their laws equally against SOEs. This may require an effort on the part of enforcement agencies to coordinate among governmental departments to avoid or solve conflicts between competition law policies, other legitimate policies that justify the creation or maintenance of SOEs, and sometimes the pursuit of the SOEs’ specific interests.

   d. Maximum transparency is required in order to allow the proper assessment of the relevance of SOEs, and the maintenance of competitive neutrality.

   e. BIAC supports the recommendations of the 2005 Guidelines, which have remained fully relevant despite the financial crisis.
3. The draft report on Best Practices in Competitive Neutrality is therefore welcome, both because the great variety of situations makes the flexible “toolkit” approach much preferable to heavy-handed regulation, and because it addresses most of the relevant issues. In particular, we appreciate that the scope has been extended to the direct intervention of states, local governments, municipalities etc. in addition to SOEs sensu stricto, and that the report addresses the issues of accounting for public service obligations (or “services of general economic interest”).

4. We would however make the following suggestions.

   a. Competitive neutrality distortions do occur in some cases in favour of private entities which enjoy a preferential treatment (e.g. because of their perceived “national champion” status) even though they are not SOEs as such.
   
   b. We wish to stress, with respect to the assessment of the desirability to maintain state ownership of enterprises or sectors, that one of most harmful effects of insufficient competitive neutrality is the potential reduction in, or the foreclosure of, innovation.
   
   c. Competitive distortions may result from the very definition of Public Service Obligations, which may vary greatly from country to country, and this point might be considered with a view to clarify section B.4 of the report.
   
   d. With respect to regulatory neutrality, distortions may result not only from the “under-enforcement” of competition law in favour of SOEs, but also from “over-enforcement”, e.g. the use of merger regulations to prevent the entry or development of private competitors in order to defend the positions of SOEs.
   
   e. The practice of so-called “in-house” procurement by state or local governments from units they control, avoiding competitive procurement rules, is a serious concern that should be addressed firmly and clearly.

5. More generally, BIAC wishes to stress that, as in other fields of competition law, a transnational approach is indispensable. While there is a wide consensus within OECD in favour of competitive neutrality, serious distortions result from the absolute lack of commitment by certain emerging countries in that respect. The draft report rightly recognizes that the efficiency of the European Union state aid control regime (including its treatment of services of general economic interest, which BIAC considers is a valid approach to the issues of accounting for public service obligations) relies on its trans-national nature. However, in many globalized markets, a regional approach is not sufficient and the existing tools made available by the WTO are not adapted to efficiently combat these distortions. This is why we recommend that OECD emphasizes the importance of competitive neutrality in its outreach efforts.

6. BIAC urges OECD to continue working on the subject of competitive neutrality beyond the 2012 Global Forum on Competition in a transversal framework that would include all Committees (and Directorates) concerned, for example through a dedicated task force.