Discussion Points

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

“Publicly Provided Services”

20 October 2011

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to participate in the Competition Committee’s “scoping discussion” on competition in publicly provided services. As this is intended to be a short discussion, BIAC will only provide brief remarks rather than a full contribution, mainly to express its view that indeed the subject is worthy of a full-fledged roundtable to be put to the Committee’s agenda in the near future.

2. BIAC concurs with the analysis provided in the “preparatory paper” submitted by the UK’s OFT, the Spanish CNC and the Finnish FCA, of which the main conclusions are that publicly provided services are one of the forms of government intervention that may be made dispensable by market failures, that it is both necessary and possible to preserve competitive neutrality, and that the models of government intervention undergo significant changes.

3. The prevailing model for publicly provided services has been for a long time direct interventions by state-owned enterprises. As noted in the three agencies’ preparatory paper, this model evolves from monopolies to mixed market situations, and also towards the increased recourse to private parties receiving a subsidised compensation in return for undertaking activities which otherwise would be loss-making and are generally subject to “universal service obligations” (USOs). These Services of General Economic Interest (SGEIs) are a form of state aid which raises specific competition problems.

4. BIAC recently had the opportunity to express its views on the general subjects of “State-Owned Enterprises” (SOEs) at the 20 October 2009 session of the Committee’s Working Party No. 3, and of “Competition, State Aids and Subsidies” at the Competition Forum on 18 February 2010. Not surprisingly, BIAC’s position is that it does not oppose in principle either SOEs or state aids, which are justified by broader policy concerns or necessary because of market failures, as long as
competitive neutrality is preserved. In particular, while not immune from short-term considerations because of electoral preoccupations, government intervention may be the only way to ensure that certain long-term investments necessary for the whole economy are made, for instance with respect to infrastructure or fundamental research and development, or that certain sub-groups of citizens can have access to certain products and services at affordable prices.

5. Conversely, BIAC insisted on the importance of two conditions: maintaining a level playing field between SOEs and private companies, including by regulation ensuring that competition law is enforced on them on the same terms as private industries; and limiting the harmful distortions of competition that may result from state aids by defining and enforcing clear rules. In both cases, BIAC drew attention to the necessity of developing a supra-national framework for these rules and regulations, in view of the globalization of competition.

6. As both SOEs and state aids have been discussed extensively in recent roundtables, BIAC respectfully suggests that the Competition Committee now focuses on the more specific subject of SGEIs.

7. These are defined rather precisely in European competition law as economic activities that public authorities identify as being of particular importance to citizens, that would not be supplied or would be supplied under different conditions absent public intervention. They concern primarily the big network industries such as transport, postal services, energy and communications. Their specificity was officially consecrated as early as the first version of the Treaty of Rome (currently article 106, paragraph 2) and the principle was established that they must be subject to competition law. A number of rules were defined in more detail by various documents and decisions of the European Commission and the Court of Justice, which makes European competition law probably the most advanced on the subject. Incidentally, these rules are now under review on the occasion of a proposed updating “package” including two communications, a regulation and a decision of the Commission. They are based on the doctrine set by the Court in its landmark decision of 2000, Altmark, which establishes four conditions under which compensation for SGEIs can be excluded from the régime of state aid control:

- that the universal service obligation in consideration of which it is granted is clearly defined;
- that its parameters are objective, transparent and established in advance;
- that it should not exceed cost and a reasonable profit;
- that it is determined either through public procurement or “on the basis of the costs of a typical well-run company”.

\[1\] Case C-280/00, Altmark transGmbH and Regiesrungpräsidium Magdeburg/Nahverkersgesellschaft Altmark GmbH, Rec. 2003, p. I-7747
8. These rules, focusing on the extremely commendable purpose of avoiding “overcompensation”, are very clear at first reading. However, they raise a number of significant issues, for instance and without limitation:

- the appreciation of “general economic interest” and the eligibility of industries to that definition is the (legitimate) prerogative of national governments and may vary greatly from country to country, thus affecting international competition; so can in particular the scope of the “universal service obligations” (which can be an obligation of universal coverage or universal pricing) required;

- the application of public procurement rules, i.e. open tendering, may not prevent distortions in favour of large incumbent players who enjoy the benefits of long-established investments; these rules may also be uneasy to apply if the quality of service is an important parameter;

- the comparison with a “typical well-run company” may prove very difficult to achieve, as there are not necessarily comparable undertakings available, as the costs of the SGIE activity may be difficult to evaluate especially if they have to be isolated in the activities of a large-scope company, as incentives to productivity gains have to be taken into account, etc.;

- the prohibition of overcompensation, even if achieved, may not prevent the maintenance of inefficient operators;

- the complexity of the regulatory framework to be set up in order to exercise a fair and efficient control over SGIEs, while not unduly spending the agencies’ and the undertakings’ resources.

9. This brief overview shows that, in the opinion of BIAC, the issues of SGIEs are worth debating more extensively, confronting the solutions brought by European competition law to the treatment given by other jurisdictions, and could be made the subject of a roundtable of the Competition Committee or one of its Working Parties.