Comments to Item 6.iii of the Agenda

Of the OECD Council Meeting

Of December 13, 2011

Recommendation of the Council concerning structural separation in regulated industries of 2001, recommends as follows to Governments of Member countries:

“When faced with a situation in which a regulated firm is or may in the future be operating simultaneously in a non-competitive activity and a potentially competitive complementary activity, Member countries should carefully balance the benefits and costs of structural measures against the benefits and costs of behavioural measures.

The benefits and costs to be balanced include the effects on competition, effects on the quality and cost of regulation, the transition costs of structural modifications and the economic and public benefits of vertical integration, based on the economic characteristics of the industry in the country under review.

The benefits and costs to be balanced should be those recognised by the relevant agency(ies) including the competition authority, based on principles defined by the Member country. This balancing should occur especially in the context of privatisation, liberalisation or regulatory reform.”

Item 6.iii of the agenda for the Council’s meeting of December 14 is a report by the Competition which puts to the consideration of the Council the following amendment to the Paragraph 2 of the 2011 Recommendation:

“The benefits and costs to be balanced include the effects on competition, effects on the quality and cost of regulation, effects on corporate incentives to invest, the transition costs of structural modifications and the economic and public benefits of vertical integration, based on the economic characteristics of the industry in the country under review.”

The proposed amendment seems to be a direct reference to the work of the Competition Committee on the effect of structural separation on corporate incentives to invest, which arguably characterized structural separation as bringing a positive “corporate incentive” to invest. Irrespective of whether we believe this to be true (past experience in Ireland, for instance, would alone call this into question), no past work on the separation issue within the OECD has advanced such a direct correlation, and particularly for Council level decision.

However, it is unnecessary to debate the substantive issue in order to draw the conclusion that this amendment is worthy of change.

First, a Council Recommendations are supposed to be capable of the broadest interpretation on the face of their own (or directly referenced) wording. Therefore, the amendment should not refer to a specific OECD approach or to one factor of an investment decision. However important, “corporate incentives to invest” are only one factor in a decision to invest. For
example, the availability of resources is another key factor. As the imposition of structural separation may very well affect the firm’s revenues and resources, there is no reason why Member countries should not focus on this issue also. The cost-benefit analysis should address all variables affecting investment.

Second, the lack of context and/or clarification between “corporate incentives” and “incentives” generally, the amendment renders the recommendation less clear or helpful.

On these grounds, BIAC proposes a far less controversial (and clearer) solution to phrase and place the amendment:

“The benefits and costs to be balanced include the effects on competition and investment, effects on the quality and cost of regulation, the transition costs of structural modifications and the economic and public benefits of vertical integration, based on the economic characteristics of the industry in the country under review.”