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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: EU's adherence to OECD Council Recommendations in the area of
Competition Policy – OECD Recommendation of 31 May 2021 on
Competitive Neutrality

Delegations will find attached a note from the Commission on the above-mentioned subject with a view to the meeting of the Working Party on Competition on 10 April 2025.

The OECD gathers 38 countries as Members, 22 of which are EU Member States¹. The European Union has a Participant status, which allows it to engage, participate and contribute to the work of the OECD on an equal footing with OECD Members, except for voting rights.

The OECD has developed over the years a comprehensive set of standards in the area of Competition Policy, reflected in a number of Recommendations adopted by the OECD Council.

EU Member States that are OECD Members have already expressed their political support for the OECD Recommendations at the OECD Ministerial Council meetings where the Recommendations have been discussed. Furthermore, when an EU Member State has become an OECD Member after the date of adoption of an OECD Recommendation, its political support has been expressed in the process of its accession to the OECD.

As the European Union is not a member of the OECD, it is not automatically committed to the provisions of a Recommendation adopted by the OECD Council. However, non-Members may adhere to OECD Recommendations. Adherence to an OECD Recommendation represents a political commitment by the Adherent to the principles and policy recommendations set out in the legal instrument. It does not constitute a certification of the implementation of the provisions of the Recommendation.

To date, the European Union has adhered to two OECD Recommendations in the area of Competition Policy, namely the Recommendation on Fighting Bid Rigging in Public Procurement of 17 December 2012, as amended on 8 June 2023 [[OECD/LEGAL/0396](#)], and the Recommendation on Intellectual Property Rights and Competition of 8 June 2023 [[OECD/LEGAL/0495](#)]. There are other OECD Recommendations in the area of Competition Policy that are in force and for which the Commission did not seek adherence by the EU at the time of their adoption by the OECD Council. The Commission has now screened those Recommendations and considers that the European Union should also adhere, inter alia, to the Recommendation of the Council on Competitive Neutrality of 31 May 2021 [[OECD/LEGAL/0462](#)].

This Recommendation was adopted by the OECD Council on 31 May 2021 on the proposal of the Competition Committee, which gathers delegates of OECD Members including representatives of the respective competition authorities. The Recommendation calls for Adherents to ensure a level-

¹ Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. Bulgaria, Croatia and Romania are currently candidates for accession to the OECD.

playing field both between state-owned and privately-owned enterprises, and between different privately-owned enterprises. It provides that Adherents should ensure that rules applied to enterprises within their markets are neutral, so that competing enterprises are subject to equivalent rules, irrespective of their ownership, location or legal form. In addition, Adherents should ensure that competing activities are subject to the same regulatory environment and that enterprises are not responsible for regulating the markets in which they compete. The Recommendation also calls on Adherents to preserve competitive neutrality when designing measures that may enhance an enterprise's market performance and distort competition. For example, Adherents should avoid offering undue advantages that distort competition and selectively benefit some enterprises over others.

The European Union, represented by the Commission, has actively participated in the drafting of this Recommendation in close coordination with the EU Member States that were members of the OECD at the time it was adopted. The Recommendation, which does not create rights or obligations under international or domestic law, is highly relevant for the EU competition policy. Adherence to this Recommendation strengthens the EU's position to continue influencing the development of global competition standards by demonstrating its commitment to fair market conditions, promoting convergence toward best practices, and facilitates cooperation with other jurisdictions

Moreover, in practice, the European Union already observes the key principles and guidance outlined in this Recommendation, including:

Avoid offering undue advantages: EU State aid laws, specifically Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), prohibit any form of State aid that distorts or threatens to distort competition by providing selective economic advantages to certain enterprises or sectors. This includes financial support such as loans, grants, tax breaks, or guarantees offered on terms more favourable than those available in the market.

Exceptions for Public Policy Objectives: EU law allows exceptions to the State aid prohibition under Articles 107(2) and 107(3) TFEU when aid serves public policy goals, such as regional development, environmental protection, or research and innovation. However, strict conditions apply, and this framework ensures that exceptions are justified, controlled, and regularly scrutinized.

Limit compensation for any public service obligation: EU State aid laws address compensation for Services of General Economic Interest (SGEI), akin to public service obligations, through the so

called “Altmark criteria” as well as the SGEI Framework. If such criteria are not met, compensation may still be permissible under Article 106(2) TFEU, but it must be approved by the Commission, ensuring it remains proportionate and does not unduly distort competition.

EU competition law is impartial and applies equally to all companies, regardless of nationality or ownership structure (private or public): DG Competition enforces its rules uniformly, including when dealing with state-owned enterprises (SOEs). This approach ensures a level playing field for both private entities and SOEs. State control plays a crucial role in merger assessments, particularly in determining whether the Commission has jurisdiction over a transaction. According to the European Union Merger Regulation (EUMR), the Commission must assess the turnover of all "undertakings making up an economic unit with an independent power of decision." If an SOE is not independent from the state or from other SOEs, the Commission treats these SOEs as a single economic unit and aggregates their turnover to determine its jurisdiction.

Against this background, the Commission intends to declare the adherence of the European Union to this Recommendation. To that end, the Commission seeks the prior Council endorsement of that declaration of adherence.

ANNEX

Recommendation of the Council on Competitive Neutrality

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Recommendation of the Council concerning Structural Separation in Regulated Industries [[OECD/LEGAL/0310](#)]; the Recommendation of the Council on Regulatory Policy and Governance [[OECD/LEGAL/0390](#)]; the Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises [[OECD/LEGAL/0414](#)] (hereafter “SOE Guidelines”); and the Recommendation of the Council on Competition Assessment [[OECD/LEGAL/0455](#)];

HAVING REGARD to the 2017 Ministerial Council Statement recognising “the need to address market failures and prevent government policies and business practices that distort competition, including state aids and subsidies” [[C/MIN\(2017\)9/FINAL](#)];

RECOGNISING that competition promotes efficiency, helping to ensure that goods or services offered to consumers more closely match consumer preferences, producing benefits such as lower prices, greater choice, improved quality, increased innovation, and higher productivity;

RECOGNISING that government actions may distort competition in the market;

RECOGNISING that achieving public policy objectives will in certain circumstances require exceptions to competitive neutrality;

RECOGNISING that undue restrictions on competition can occur unintentionally even when the public policies in question are not intended to affect competition in any way, and that public policies may often be reformed in a way that promotes competition while achieving their objectives;

CONSIDERING that, other things being equal, public policies with lesser harm to competition should be preferred over those with greater harm to competition, provided they achieve the identified objectives;

CONSIDERING that governments are increasingly developing tools to address distortions related to competitive neutrality;

On the proposal of the Competition Committee, in consultation with the Corporate Governance Committee:

I. AGREES that, for the purposes of the present Recommendation, the following definitions are used:

- **Competitive Neutrality:** a principle according to which all Enterprises are provided a level playing field with respect to a state’s (including central, regional, federal, provincial, county, or municipal levels of the state) ownership, regulation or activity in the market.
- **Enterprise:** any entity engaged in offering goods or services on a market, irrespective of its legal form.
- **State-Owned Enterprise:** Countries differ with respect to the range of institutions that they consider as state-owned enterprises. Consistent with the SOE Guidelines, any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership or control, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature.
- **Ownership and control:** in relation to State-Owned Enterprises, the Recommendation applies to enterprises that are under the control of the state, either by the state being the ultimate beneficial owner of the majority of voting shares or otherwise exercising an equivalent degree of control. Examples of an equivalent degree of control would include, for instance, cases where legal stipulations or corporate articles of association ensure continued state control over an enterprise or its board of directors in which it holds a minority stake. Some borderline cases need to be addressed on a case-by-case basis, as provided by the SOE Guidelines.
- **Public Policy Objectives:** objectives benefitting the public interest within the jurisdiction concerned.

II. RECOMMENDS that Members and non-Members having adhered to this Recommendation (hereafter the “Adherents”) ensure Competitive Neutrality by, to the maximum extent practicable and unless overriding Public Policy Objectives require otherwise:

1. Ensuring that the legal framework applicable to markets in which Enterprises currently or potentially compete is neutral and competition is not unduly prevented, restricted or distorted. To this effect, Adherents should:

a) Adopt or maintain, as appropriate, a competitively neutral competition law that addresses anti-competitive conduct and includes merger control.

b) Maintain Competitive Neutrality in the enforcement of competition and bankruptcy law, so that competing Enterprises are subject to equivalent competition and bankruptcy rules, irrespective of their ownership, location or legal form, and that the enforcement of those laws does not discriminate between State-Owned Enterprises and their private competitors, or between different types of privately owned Enterprises. However, the above would not rule out measures aimed at safeguarding competitive neutrality.

c) Maintain Competitive Neutrality in the regulatory environment. In particular, Adherents should:

i. Subject competing activities to the same regulatory environment and enforce regulations with equal rigour, appropriate deadlines and equivalent transparency with regard to all current or potential market participants;

ii. Ensure that Enterprises, regardless of their ownership, location or legal form, are not ultimately responsible for regulating the market(s) in which they currently or potentially compete (especially regarding entry or expansion of existing players); and

iii. Carry out competition assessments that identify and revise existing or proposed regulations that unduly restrict competition.

d) Establish open, fair, non-discriminatory, and transparent conditions of competition in government procurement processes in order to ensure that no Enterprise, regardless of its ownership, nationality, or legal form is granted any undue advantage.

2. Preserving Competitive Neutrality when designing measures that may enhance an Enterprise's market performance and distort competition. To this effect, Adherents should:

a) Avoid offering undue advantages that distort competition and selectively benefit some Enterprises over others. Such advantages would for example include loans, loan guarantees and state investment in capital, at conditions not in line with market principles, as well as favourable tax treatment, grants and goods or services provided by governments at favourable prices. Where

achieving an overriding Public Policy Objective requires an exception, this should be transparent to all, proportionate and periodically reviewed. It is recognised that State-Owned Enterprises may be subject to more stringent specific rules which limit the provision of government support to such entities.

b) Limit compensation for any public service obligation placed upon an Enterprise so that it is appropriate and proportionate to the value of the services. In particular, Adherents should:

i. Transparently and specifically identify any public service obligation placed upon an Enterprise;

ii. Impose high standards of transparency, account separation and disclosure on Enterprises with public service obligations around their cost and revenue structures to ensure that compensation provided to Enterprises for fulfilling public service obligations is not used to cross-subsidise the offering of goods or services on another market; and

iii. Establish or maintain independent oversight and monitoring to ensure that remuneration for public service obligations is calculated based on clear targets and objectives and based on efficiently incurred costs, including capital costs.

c) Adopt structure and governance rules for State-Owned Enterprises that do not provide them with an undue advantage that distorts competition. In particular, Adherents should seek to align their policies with the Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises [[OECD/LEGAL/0414](#)] and the Recommendation of the Council concerning Structural Separation in Regulated Industries [[OECD/LEGAL/0310](#)].

3. Taking steps to put in place suitable accountability mechanisms to support and monitor the implementation of the principles set forth in this Recommendation.

III. INVITES the Secretary-General and Adherents to disseminate this Recommendation, in particular amongst regulators, the wider competition community, and other relevant policy communities.

IV. INVITES non-Adherents to take due account of, and adhere to, this Recommendation.

V. INSTRUCTS the Competition Committee, in consultation with the Corporate Governance Committee, to:

a) Develop a toolkit to support Adherents' implementation of the Recommendation;

b) Serve as a forum for sharing experience under this Recommendation; and

c) Monitor the implementation of this Recommendation and report thereon to the Council no later than five years following its adoption and at least every ten years thereafter.

