

Meeting of the Council at Ministerial Level, 31 May-1 June 2021**RECOMMENDATION OF THE COUNCIL ON COMPETITIVE
NEUTRALITY****(Adopted by the Council at Ministerial Level on 31 May 2021)****JT03477315**

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.