OECD internal consultation

Trade Union Comments on Competitive Neutrality

Paris 17 February 2012

In partnership with the European Federation of Public Services (EPSU), the International Trade Union Confederation (ITUC) and Public Services International (PSI), the TUAC welcomes the opportunity to submit written comments on the draft report on "National Best Practices in Competitive Neutrality" prepared by the OECD Working Party on Privatisation Practices and the OECD Competition Committee and circulated on 17 January 2012 (hereafter "the draft").

Our comments also refer to two OECD supporting documents that have been circulated together with the draft: "National Practices Concerning Competitive Neutrality" DAF/CA/SOPP(2011)9/REV1 (hereafter "document n°9") and "A Compendium of OECD Recommendations, Guidelines and Best Practices Bearing on Competitive Neutrality DAF/CA/SOPP(2011)10/REV1 (hereafter "document n°10").

General comments

We believe that the OECD should refrain from developing guidance on competitive neutrality due to the:

- undefined scope, diverse national interpretations and lack of ownership by OECD member states;
- failure to consider the public interest as an overarching public policy objective;
- un-critical stance towards private sector corporate governance and competition;
- lack of consideration of public sector disadvantages; and
- Serious uncertainty around the use of the term 'OECD consensus'.

Undefined scope and definitions

Neither the concept of competitive neutrality nor key terms such as "government businesses" and "commercial activities" are defined in an acceptable manner in the draft. This means that various interpretations of the project's scope and objective can be made. For some countries, competitive neutrality is limited to state-owned enterprises (SOEs) delivering commercial goods or services; for others it goes further and includes any public entity. As shown in document n°9, definitions of competitive neutrality differ among member states (#6 & #8). In fact only five member states (out of 34) have an explicit policy framework on competitive neutrality (#16 document n°9).

Failure to consider the public interest as an overarching public policy objective

The draft gives the impression of an OECD project orientated entirely towards protecting and promoting the interests of private sector employers, without due regard for other constituencies. Apart from three references to individual country experiences, the term

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'consumer' dose not appear in the draft's 147 paragraphs. Employees are similarly neglected other than as a 'pension liability' that needs to be 'treated' (#10, #42, #44, #53). References to the public interest are limited to the sections on the costing of public services (#42-57). Not-for-profit operators are excluded from the scope of the draft report (#11) despite their playing a major role in delivering public services in several countries for many years.

Un-critical stance towards private sector corporate governance and competition

The draft does not mention the current context of the majority of OECD economies experiencing the worst economic and social crisis since the 1930s. It fails to bring on board the policy lessons arising from the massive corporate governance failures in the private sector, which have been exposed by the crisis (including failure of transparency, reporting and risk management). The draft also ignores current debates concerning rising corporate short termism and threats to fair and transparent competition through excessive corporate concentration, despite recent evidence provided by the OECD itself[1].

More fundamentally there should be some recognition in the text that increased competition is not a guarantee *per se* of better outcomes at the same or lower prices. The draft states the theory (#12) without any qualification in terms of what happens in practice. A statement about the potential benefits of competition to efficiency, productivity and innovation might be a more balanced way to put the argument along with some concession to research that suggests that neither competition nor private sector provision can guarantee cheaper and better public services. Two major studies published in the second half of 2011 have a bearing on this debate and challenge the effects of competition in the public services[2].

Lack of consideration of public sector "disadvantages"

The draft focuses on a discussion of the provision of counterbalances to what are seen as public sector "advantages", without seeking to assess the sector's "disadvantages". A working paper from the Office for Fair Trading in the UK has pointed out that competitive neutrality is just as applicable to these disadvantages: "greater accountability obligations, requirement to provide universal service obligations, reduced managerial autonomy, requirements to comply with Government wages, employment and industrial relations polices and higher superannuation costs"[3]. The OFT working paper adds: "These conditions and obligations are generally imposed by Government in the interests of achieving wider policy aims, and it is for Government to balance those aims against any potential for distortion of the market in question." This would be a useful principle to include in any framework for competitive neutrality along with an acknowledgement that determining whether competitive neutrality exists in practice is not an exact science. Again the OFT working paper concedes that: "In any particular case it is likely to be difficult to determine whether the public body enjoys a net advantage or disadvantage".

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[1] "Bank competition and financial stability", OECD, August 2011. http://www.oecd.org/dataoecd/14/49/48501035.pdf & "Corporate Governance and the Financial Crisis - Conclusions and emerging good practices to enhance implementation of the Principles", Directorate for Financial and Enterprise Affairs, OECD Steering Group on Corporate Governance, OECD, February 2010 http://www.oecd.org/dataoecd/53/62/44679170.pdf

[2] See "Konkurrensens konsekvenser. Vad händer med svensk välfärd?" (The consequences of competition. What has happened to the Swedish welfare system?), Hartman L. et al, SNS, September 2011 http://www.sns.se/forlag/konkurrensens-konsekvenser-vad-hander-med-svensk-valfard; & Effects of contracting out public sector tasks - a research-based review of Danish and international studies from 2000–2011, Petersen O.H. et al. http://www.akf.dk/udgivelser_en/2011/5111_ohp_udliciteringsrapport/

[3] Competition in mixed markets: ensuring competitive neutrality, Office of Fair Trading, Working Paper, July 2010 http://www.oft.gov.uk/shared_oft/economic_research/oft1242.pdf

Uncertainty around the use of the term 'OECD Consensus'

Central to the draft's arguments is the so-called 'OECD consensus' – which is also developed at length in document n°10. This 'consensus' is built on a disparate selection of past OECD work on competition, regulatory quality and public sector reform. Some of these references represent official OECD Guidance documents, which have been approved by all OECD member states and indeed may be presented as consensual text. But others are not, including analytical reports or summary reports of meetings the key findings of which are the responsibility of the Secretariat alone. That is the case for the report "Regulating Market Activities by the Public Sector" (2004), which appears recurrently in the document as an 'OECD consensus'. Also, some of the OECD references are well over a decade old and have not been reviewed since (e.g., the "Best Practices for Contracting Out Government Services" were drafted in 1997). Their relevance in today's context is questionable.

Specific comments

We have the following observations to share regarding the "building blocks" of competitive neutrality that are suggested for future OECD policy guidance (#25, and Part B).

1. "Streamlining the operational form of government business"

Corporatisation of all "government business activities" is considered a desirable outcome by the draft (page 14). It argues that there is an 'OECD consensus' on this issue and that the OECD SOE Guidelines "recommend corporatiing commercial and, if feasible, non-commercial units to the greatest extent possible, to maximise transparency and accountability" (#33).

We strongly contest this assertion. The SOE Guidelines call for "governments to strive to simplify and streamline the operational practices and legal form under which SOE operate" (Guideline I.B), but they do not call for corporatisation of SOEs (i.e., bringing their legal forms in line with corporate law). This option is only mentioned – among other options – in the 4th paragraph of the annotations to the SOE Guideline and is restricted to SOEs "having a commercial activity and operating in competitive, open markets" (5th paragraph). To state that the SOE Guidelines recommend corporatisation, and that there is an 'OECD consensus' on this issue, is in our view inaccurate and misleading.

Corporatisation and alignment with corporate law do not always lead to enhanced transparency and accountability. Confidentiality clauses are used extensively under a corporate law regime and constitute a formidable barrier to public transparency and accountability. Furthermore, such an assertion is made as if democratic control and accountability through national parliaments, municipalities and other public bodies of legal entities regulated by public administration law (or equivalent) either did not exist or were ineffective.

3."Achieving a commercial rate of return"

We oppose the recommendation of imposing a "commercial" rate of return on investments at "market consistent rates" to all government business entities (page 26-27). Imposing such a rate could make sense for SOEs that are regulated by corporate law and operate in a purely commercial and competitive environment; but it is inappropriate to request such a financial benchmark from all government businesses – irrespective of their legal status and whether they are provider of public services or not. The draft also fails to acknowledge the possibility that larger private sector companies, and particularly multinational corporations, may be

willing and able to absorb lower than average rates of return when first entering a market if this might provide them with a foot in the door.

5. "Tax neutrality"

Tax neutrality needs to work both ways and the tax position of private sector companies warrants serious and detailed scrutiny if they are competing to provide public services. The draft fails to acknowledge this despite the voluminous work of the OECD in this field. Transparency on their tax position should be required as well as rules to remove any advantages enjoyed by companies that are registered in or exploit the position of subsidiary companies that are registered in tax havens.

7. "Debt neutrality and outright subsidies"

Debt neutrality is a particularly thorny issue and one that raises questions about the comparability of public sector options with public-private partnerships. The public sector does have the benefit of generally being able to borrow at a lower cost than the private sector. The argument then goes that there is a need to counterbalance this basic characteristic of the public sector in order to provide a level-playing field. In the debate around public-private partnerships (PPP) the formulation of a "public sector comparator" to see if the PPP provides "value for money" has often been controversial, with claims that the comparator fails to take account of the benefit of lower borrowing costs in the public sector.

8. "Public procurement"

In this case the idea of competitive neutrality focuses on the potential advantages enjoyed by an incumbent SOE that might be in, what is seen as, a better position than competing companies that are trying to break into the sector. This suggests that the concept of competitive neutrality is going beyond trying to ensure a level playing field in an existing market to trying to open up completely new competitive markets.

Public procurement can be an important way to ensure a level playing field by taking account of, in particular, social and environmental issues. Social clauses that set out to protect the pay and conditions of public sector workers are seen by the trade union movement as one of the most important ways of underpinning fair competition. If the private sector has to provide broadly comparable pay and conditions then it has to compete in other ways – on the basis of its managerial skills and competence, for example – rather than on the basis of low pay and more precarious employment conditions.