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## **Global Forum on Competition**

### **INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES**

**Contribution from BIAC**

-- Session III --

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## INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- BIAC --

### 1. Introduction

1. The Business and Industry Advisory Committee (“BIAC”) of the Organization for Economic Cooperation and Development (“OECD”) is pleased to submit this paper on the important issue of the independence of competition authorities. This paper builds on BIAC’s prior contributions, including *BIAC Submission to OECD Roundtable on Changes in Institutional Design* (“Institutional Design”).<sup>1</sup>

2. Businesses contemplating pro-competitive transactions require substantive and procedural certainty and transparency in the merger review process, as do businesses developing commercial strategies and interacting with the competition authority in respect of their conduct. In BIAC's view, the independence of competition authorities is a critically important aspect of this certainty and transparency, and ultimately affects the legitimacy of a country’s competition law. Just as independence from government is important to an authority’s legitimacy, so too is an authority’s independence from specific business interests, as pointed out in the Secretariat’s background paper. The independence of competition authorities, in terms of their institutional design, accountability, decision-making and the substantive considerations they are required to apply by competition legislation, all play an important role in ensuring the independence of the authority and the legitimacy of its decisions.

3. In BIAC’s view, not only should competition agencies be designed so as to ensure their independence and legitimacy, but it is critical that they also implement best practices to ensure that they operate with an adequate degree of independence from government. As a corollary to independence, the institutional structure of agencies should include effective checks and balances to ensure objectivity in competition authorities’ practices and judicial oversight. Competition authorities must make consistent decisions based on their transparent review processes and established competition norms, avoiding extraneous non-competitive considerations. Such consistent application of competition law norms will ensure that independence from government is not only observed, but seen to be observed, in practice as well as design.

### 2. Independence in Institutional Design

4. In Institutional Design, BIAC featured independence from government political considerations as an important feature of the institutional design of competition agencies. Indeed, the importance of independence of competition authorities from the impact of political interference can hardly be overstated.

5. Independence from government politics “de-politicizes enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political term to the next”.<sup>2</sup> In addition, independence

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<sup>1</sup> Submitted June 2015. See also, Public Interest Considerations in Merger Control (“Public Interest”), submitted June 2016.

<sup>2</sup> Calvin S. Goldman & Navin Joneja, “The Institutional Design of the Canadian Competition Law: The Evolving Role of the Commissioner” (Paper delivered at the Loyola University Chicago School of Law

is critical for competition authorities to ensure a state of the rule of law in competition matters, providing legal certainty and guidance to corporate actors. Further, independence from government, or lack thereof, can have a considerable impact on market stability, the facilitation of investment, and the efficient operations of competitive agencies. Significantly, the relative independence of a competition agency can impact the extent to which government industrial policy is considered within the decision-making process, which, in turn, can impact incentives for investment and innovation.<sup>3</sup>

6. Independence is also important to avoid competition law being used to achieve political or industrial goals that have little to do with competition law. Unfortunately, the risk is present in many countries, including European ones, where politicians have in the past called on competition authorities to break up companies, such as banks in the UK, or to find an infringement in areas such as petrol or energy prices which have recently been investigated or regulated.

7. While there is no single model to guarantee independence of a competition authority, there are a variety of common safeguards that can be adopted to improve the degree of independence of competition authorities from government or other political interference.<sup>4</sup>

8. One such common safeguard involves the structural separation of the competition authority from the authority of the government and their ministries.<sup>5</sup> Institutional design in the U.S., for example, is motivated in part by a strong belief that merging government industrial policy and competition agency decision-making processes can lead to anti-competitive results.<sup>6</sup> The independence of the U.S. competition agencies from government helps maintain the separation between industrial policy and competition analysis.

9. The FTC is a formally independent agency. Although the FTC's commissioners are appointed by the President and Congress controls its budget,<sup>7</sup> the FTC conducts its own investigations and Commissioners cannot be removed from their position merely because the government disagrees with their decisions.<sup>8</sup> The executive branch exercises no control over the agency beyond the President's power to

Symposium, A Comparative Analysis of Antitrust Law Regimes: Designing Better Institutions for Deciding Antitrust Issues, 11 September 2009) at 7.

<sup>3</sup> Note there is also some support in competition circles for increasing the dependence of government on competition bureaus by placing high-ranking officials of competition agencies within Cabinet so as to allow these individuals to drive legislation based on competitive concerns, rather than vice versa. See: Calvin S. Goldman, Robert E. Kwinter & Crystal L. Witterick, Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change (Remarks delivered at The Law and Economics Programme, University of Toronto Institute for Policy Analysis, University of Toronto, 13 December 2002) at 11.

<sup>4</sup> Sofie Alves, Jeroen Capieu & Ailsa Sinclair, "Principles for the Independence of Competition Authorities", Competition Law International, Vol. 11 No 1 – April (2015), European Commission, Brussels, at 15.

<sup>5</sup> *Ibid* at 16.

<sup>6</sup> Bill Baer, "International Antitrust Enforcement: Progress Made; Work To Be Done" (Remarks delivered at the 41st Annual Conference on International Antitrust Law and Policy, Fordham University School of Law, 12 September 2014) at 7.

<sup>7</sup> Thomas Rosch, "Thoughts on the FTC's Relationship (Constitutional and Otherwise) to the Legislative, Executive and Judicial Branches" (Remarks delivered at the Berlin Forum for EU-US Legal-Economic Affairs, 19 September, 2009) at 1.

<sup>8</sup> Sheila F. Anthony, "Remarks" (delivered at the Columbia University International Journalists Seminar, 21 March 2000), online: <http://www.ftc.gov/public-statements/2000/03/remarks>. The FTC has also demonstrated a reluctance to render decisions based on government policy rather than competition

appoint commissioners.<sup>9</sup> Furthermore, the Congressional appropriations committee that sets the FTC's budget typically does not concern itself with the "wisdom or utility of agency programs" but merely responds on budget increase requests and uses prior year budgets as guidelines.<sup>10</sup>

10. In contrast to the FTC, the Antitrust Division of the DOJ is not formally independent from government: it is part of the executive branch and is responsible for representing the U.S. in court proceedings.<sup>11</sup> Further, both the head of the DOJ and its specific Antitrust Division are appointed by the President.<sup>12</sup> Nevertheless, the Antitrust Division of the DOJ is considered to "exercise its powers largely independently of the executive branch to which it belongs".<sup>13</sup>

11. While the independence from political interference of the FTC and DOJ is ensured through different methods, the role played by the federal court ensures objectivity in their actions.

12. In Canada, the Commissioner of Competition (the head of the Competition Bureau) is appointed by the Governor in Council (ie. Cabinet) and reports on a limited basis to the Minister of Innovation, Science and Economic Development. The Bureau is nonetheless an independent law enforcement authority. The Bureau's affiliation with the Minister, while not affecting its independence in respect of substantive matters, may nonetheless have an effect on the timing of its decisions.<sup>14</sup>

13. In other jurisdictions, there is concern over institutional design allowing seepage of government industrial policy into competition authorities' decision-making processes. In the U.K., for example, there

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considerations. For example, in 2013, when Motorola Mobility breached its commitment to license certain patents, the FTC responded by prohibiting the subsequent owner of the patents (Google) from disregarding the commitment: Edith Ramirez, "Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective", (Speech delivered at the 8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center, 10 September, 2014) at 6.

<sup>9</sup> Peter C. Ward, *Federal Trade Commission: Law, Practice and Procedure* (Law Journal Press, 1986) at §2.07[1], 2-23.

<sup>10</sup> *Ibid* at §2.07[6], 2-23. However, there have been instances where both the FTC and DOJ have withdrawn proposals to share work between them for fear that their respective budgets would be cut. See: Giorgio Monti, "Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network" (2014) EUI Working Paper No. 201/1, at 5, citing W.E. Kovacic, "Competition Agencies, Independence, and the Political Process" in J. Drexler, W. Kerber and R. Podszun, eds., *Competition Policy and the Economic Approach* (Edward Elgar, 2011), at 292.

<sup>11</sup> Harry First, Eleanor M. Fox & Daniel E. Hemli, "Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System" (2012) New York University Law and Economics Working Papers, at 9.

<sup>12</sup> *Ibid.*

<sup>13</sup> Monti, *supra* note 10 at 4.

<sup>14</sup> For example, when the Minister of Industry issued an interim rejection, under the Investment Canada Act, of BHP Billiton's \$40 billion hostile bid to acquire Potash Corporation of Saskatchewan in 2010, the Competition Bureau responded shortly after by announcing that it would not block the proposed merger. The timing of this announcement suggests that the Bureau, despite its independence, may nonetheless have been reluctant in that case to be perceived as getting out ahead of the Minister. Calvin S. Goldman & Michael S. Koch, "The Interface between Competition Law and Foreign Investment Merger Reviews: Flying Blind or with Radar?" (Paper delivered at Foreign Investment Controls and Competition Law, Fordham University School of Law, 11 September 2014) at 18. Contrast this with Australia and ADM's bid for Australian GrainCorp, where Australia's Foreign Investment Review Board recommended and the Treasurer then rejected the bid after the Australian Competition and Consumer Commission had announced it would not block the merger.

are questions regarding the CMA's independence from government. When the CMA was formed, the government outlined a non-binding ministerial statement of strategic priorities for the CMA, or a "steer", which essentially outlined how the government thought the new body would fit within its broader economic policies.<sup>15</sup> Further, the CMA possesses broad new investigative powers regarding issues of 'public interest', such as national security, and the government recently called upon it to intervene in the energy and financial services sectors.<sup>16</sup> While the CMA has emphatically stated that it will make its own decisions on which markets to investigate, there were questions regarding its independence from government as ministers suggested that they could direct the CMA.<sup>17</sup>

14. The European Commission has been described as a "political and administrative hybrid", because its Commissioners are commonly politicians and its members are proposed by Member States. These structural characteristics have caused certain commentators to question the Commission's independence. However, much of the Commission's work is considered "reasonably well insulated from politics and private interests", although internationally has from time to time been concern that this may be tested.<sup>18</sup>

15. Under E.U. law, there are currently no minimum standards or requirements for the independence of national competition authorities ("NCAs"): member states have complete freedom in designing the institutional structure, but there are discussions underway regarding the means to guarantee that NCAs are independent<sup>19</sup> and sufficiently resourced. Important aspects of independence are seen to include separate budget with budgetary autonomy, clear and transparent appointment procedures on the basis of merit, guarantees ensuring that dismissals can only take place on objective grounds and rules on conflicts of interest for the management/board.

16. Ultimately, competition agencies' ability to resist political interference, including the integration of government industrial policy in their decision-making, will depend on the relative level of independence afforded to these agencies in both their design and operation. The manner in which agency members are appointed or elected, budgetary systems, and decision-making power all play important roles in an agency's independence. These elements, discussed further in the next section, require consideration if competition agencies are to achieve the goal of promoting competition without political interference.

### 3. Accountability and Consistency

17. It has been said that there can be no independence of competition authorities without accountability.<sup>20</sup> While an authority should be free from day-to-day scrutiny or interference, there must be some form of accountability with respect to its objectives, appointments, allocation of public resources and

<sup>15</sup> Samantha Mobley & Farin Harrison, "UK Competition Regime: New Measures in Force", PLC Magazine (June 2014) 27, at 29.

<sup>16</sup> *Ibid.*

<sup>17</sup> For clear statements from the CMA dismissing these concerns, see for example the speech by Alex Chisholm, CEO of the CMA: "CMA Update: Changes to the UK Competition Regime"; 26 September 2013 available at <https://www.gov.uk/speeches/cma-update-changes-to-the-uk-competition-regime> and the speech by Lord David Currie, Chairman of the CMA: "The new CMA: how will it promote competition?"; 7 November 2013 Beesley Lectures available at <https://www.gov.uk/speeches/the-new-competition-and-markets-authority-how-will-it-promote-competition>.

<sup>18</sup> For example by the 27 November 2014 vote of the European Parliament concerning online search.

<sup>19</sup> EU rules applicable to the independence of telecoms regulators were interpreted by the European Court in its judgment of 19 October 2016 in Case C-424/15 (not yet reported).

<sup>20</sup> Frederic Jenny, "The Institutional Design of Competition Authorities: Debates and Trends" (2016) *Legal and Economic Aspects*, pp 1-57, at 30.

efficiency.<sup>21</sup> Yet the ways that an agency may be accountable to government can represent significant barriers to competition authorities by affecting their actual, practical independence. In addition to accountability, the actual decision-making process is a critical element of the practical independence of a competition authority. Adequate funding and consistent, professional application of competition norms with due regard for procedural fairness to third parties as well as those directly involved will ensure not only consistency and transparency, but important political and economic legitimacy of an authority's enforcement decisions.

18. Ideally, agencies will be both autonomous from political pressures with respect to their investigations and simultaneously accountable “for the exercise of its powers and expenditure of public resources”.<sup>22</sup> The means to ensure accountability are broad and at times can conflict with the criteria for independence. Such mechanisms can include subjecting budgetary appropriations to government approval, the involvement of the executive branch or Parliament in the appointment of agency members and agency-published enforcement guidelines.<sup>23</sup> Often, accountability is measured or assessed by requiring a competition authority to report its decisions and enforcement through an annual plan, or in some cases, before a parliamentary committee.<sup>24</sup>

19. The World Bank suggests that, in order to ensure sufficient independence, members of competition agencies should not be appointed directly by the head of state, and the competition agency should be separate from a government ministry and have its own budget.<sup>25</sup>

20. Government or political pressure on regulatory authorities can take the form of budgetary pressure on a competition authority.<sup>26</sup> It is accepted that funding should not influence a competition authority's regulatory decisions, rather, it should enable them to remain impartial and efficient in achieving their objectives.<sup>27</sup> Further, while a government should be able to review a competition authority's funding scheme from time to time, there should be adequate certainty and assurance that a government will base funding decisions transparently, on a neutral set of considerations, and not have broad discretion to impose budgetary constraints in an arbitrary manner.

21. In Canada, for example, the Bureau's reliance on the Department of Innovation, Science and Economic Development for budgetary direction has raised questions regarding the Bureau's efficacy, particularly when a lack of funding has, at times, resulted in insufficient enforcement resources.<sup>28</sup> Some

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<sup>21</sup> Michael J. Trebilcock & Edward M. Iacobucci, “Designing Competition Law Institutions” (2002) 25(3) *World Comp.* 361 at 457.

<sup>22</sup> William E. Kovacic & David A. Hyman, “Competition Agency Design: What's on the Menu” (2012) *GW Laws Faculty Publications & Other Works*, Paper 628, at 5.

<sup>23</sup> *Ibid.*

<sup>24</sup> European Commission Staff Working Document, “Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues” Accompanying the Communication: “Ten Years of Antitrust Enforcement Under Regulation 1/2003: Achievements and Future Perspectives” (2014), at 6.

<sup>25</sup> *Ibid.*, at 365.

<sup>26</sup> William E. Kovacic & Mario Mariniello, “Competition Agency Design in Globalized Markets”, E15 Expert Group on Competition Policy and the Trade System, at 2.

<sup>27</sup> OECD, “Best Practice Principles for Regulatory Policy: The Governance of Regulators” (2014), at 98.

<sup>28</sup> Calvin S. Goldman, Robert E. Kwinter & Crystal L. Witterick, “Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change” (Paper delivered at The Law and

have suggested that the Bureau adopt a self-funded model (similar to other Canadian agencies such as the Ontario Securities Commission) in which it would obtain revenues from merger notifications, filing fees, and fines from criminal prosecutions.<sup>29</sup>

22. A critical aspect of accountability is effective judicial review of competition decisions, whether by way of a right of appeal against decisions of the authority or by a prosecutorial model, which requires the competition authority to persuade a court that a competition breach has occurred. Either way, judicial involvement should require competition authorities to provide transparent, reasoned arguments that are supported by an evidentiary record.

23. In fostering transparency and legitimacy of competition authorities, management appointments must be made objectively and appropriately in order to avoid conflicts of interest.<sup>30</sup> This safeguard can be implemented by ensuring there are adequate rules on conflicts of interests, appointments and dismissals.<sup>31</sup> Accordingly, appointments should be made based on a transparent set of hiring procedures and dismissals should be made only on clear objective grounds.<sup>32</sup>

24. Finally, the desirable amount or extent of a competition authority's independence in practice is also a factor to consider. Separation of competition authorities from governments should not amount to absolute disengagement.<sup>33</sup> While a competition authority should remain independent and impartial, it should also be in a position to influence legislators and regulators to address problems in competition law and its legislation.<sup>34</sup> Complete insulation from the political process denies competition agencies the ability to effectively advocate for competition in the political arena.<sup>35</sup>

25. Ultimately, these commonly used safeguards, and others, play crucial roles in ensuring at the very least, a degree of independence. These safeguards should be implemented in order to provide competition authorities with the ability to independently promote pro-competitive practices and outcomes. While formal independence is crucial to independence, it does not guarantee that a competition authority will actually act independently in practice.<sup>36</sup> It will however, at the very least, reduce the risk of government and political interference.<sup>37</sup>

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Economics Programme, University of Toronto Institute for Policy Analysis, University of Toronto, 13 December 2002) at 7.

<sup>29</sup> *Ibid* at 8.

<sup>30</sup> Alves, Capieu & Sinclair, *supra* note 5 at 26.

<sup>31</sup> European Commission Staff Working Document, "Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues" Accompanying the Communication: "Ten Years of Antitrust Enforcement Under Regulation 1/2003: Achievements and Future Perspectives" at 6.

<sup>32</sup> Alexander Italianer, EC (2014a), "The Independence of National Competition Authorities" Competition Conference, Best Practise in Investigations, Vienna, 12 December, 2014.

<sup>33</sup> Philip Lowe, "The Design of Competition Policy Institutions for the 21<sup>st</sup> Century: the Experience of the European Commission and the DG Competition", at 1.

<sup>34</sup> *Ibid*.

<sup>35</sup> William Kovacic & Mark Winerman, "The Federal Trade Commission as an Independent Agency -- Autonomy, Legitimacy and Effectiveness" (2015), at 2107.

<sup>36</sup> Alves, Capieu & Sinclair, *supra* note 4 at 16.

<sup>37</sup> Jenny, *supra* note 19 at 28.

26. In order to promote independence in practice, competition authorities should pursue the related objectives of administrative efficiency, credibility, consistency and transparency in decision-making. Decisions made by competition authorities should be consistent with their objectives, laws and widely accepted competition law principles. The legitimacy derived from such decision-making based on sound economic and legal analysis will provide competition authorities with greater independence, thereby reinforcing the quality and consistency of these decisions. Conversely, extraneous considerations will more likely be imported into the authority's decisions if the government intervenes in order to address what may be perceived to be administrative inefficiency or inconsistency in an agency's decision-making.

27. In US agencies, there is a strong focus on decision-making based on competitive factors rather than government policy goals. Commentators have stressed the need to "commit to making enforcement decisions based solely on competitive effects and consumer benefits" lest these organizations "risk losing the trust and confidence of business".<sup>38</sup> Indeed, decision-making based on competitive factors, following investigations that fulfill recognized due process requirements, and that are supported by an evidentiary record, do not undermine effective enforcement, but rather prevent inappropriate enforcement thereby avoiding criticism and calls for political intervention.

28. The very nature of competition cases suggest authorities will, from time to time, be faced with demands to pursue commercial or other interests that may not be in line with competition law principles.<sup>39</sup> To ensure fair and neutral decision-making, competition authorities must be free from any direct or indirect influence from market participants and capable of grounding their decisions in their transparent processes.<sup>40</sup> Just as independence from government is important to an authority's legitimacy, so too is an authority's independence from specific business interests, as pointed out in the Secretariat's background paper.

29. Greater transparency increases a competition authority's perceived legitimacy, acting as a strong shield to political demands and intervention. If a competition authority can develop a regime that is perceived by the public and business to be transparent, founded on widely accepted competition law principles and economic arguments and can clearly communicate its enforcement intentions, then political and government intervention becomes less likely and more difficult to justify.<sup>41</sup> At the most basic level, this can be achieved by clearly defining the role of a competition authority as a regulatory body through policy statements and legislation. To that end, the extent of the authority's power, the ends to be achieved and the expected outcomes should each be clearly stated and transparent.<sup>42</sup> In turn, a competition authority's actual activities should be transparently related to its objectives through the practice of open, transparent, and accountable processes.<sup>43</sup> Through these measures, a competition authority can best ensure that it is both formally and practically independent from unwanted political interference.

#### **4. Substantive Legislation**

30. Although the independence of competition authorities is most typically viewed through either an institutional or procedural lens, the substantive content of competition legislation, too, can greatly affect the independence of competition authorities from political interference. For example, the inclusion of

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<sup>38</sup> Baer, *supra* note 6 at 5.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Kovacic & Winerman, *supra* note 35 at 2109.

<sup>42</sup> OECD, *supra* note 27 at 32.

<sup>43</sup> *Ibid.*

broad public interest considerations in the provisions of competition legislation related to merger review can invite political considerations.

31. In some emerging economies, there are fears that competition agencies may have the authority to intervene in cases based on industrial policy and not competition grounds. These countries' relatively young anti-monopoly laws may formally leave the door open to industrial policy considerations by including public interest as an element to be considered when assessing the impact of a merger or an antitrust case.<sup>44</sup> The phenomenon of introducing broader public interest considerations into merger control is not unique to either developed or developing economies, however. The UK model provides an example of state intervention creating uncertainty in merger review. In the UK, even though the role of the public interest has been much reduced, the *Enterprise Act* still allows the Secretary of State to prohibit, conditionally approve or authorize mergers on specific defined public interest grounds.<sup>45</sup>

32. Similar to the European Commission, the DOJ sees the potential for national interest considerations to undermine an agency's decision-making as particularly relevant in the area of intellectual property, where monopolistic market power can sometimes be confused with a breach of antitrust laws.<sup>46</sup> Baer notes the importance of ensuring that "antitrust enforcement involving intellectual property, for example, should not be used to implement domestic or industrial policies" as this approach "undermines the integrity and credibility of an agency's decisions".<sup>47</sup>

33. Canada's Competition Bureau has similarly taken a strong stance on the role of government industrial policy in competition agency decision-making. Canada's approach to this issue is similar to that in the United States and the European Union: it continues to promote "the important principle that competition policy should be an independent voice to assure welfare is maximized."<sup>48</sup> As observed by Commissioner John Pecman, focus on industrial policy by a competition agency can lead to "sub-optimal outcomes".<sup>49</sup>

34. The ability of a competition authority to refer to a well-defined set of factors to consider in its decision-making process diminishes the ability of government and politicians to attempt to use competition as a means of achieving ulterior industrial or political goals.<sup>50</sup> For example, where "public interest factors" can be taken into account under competition legislation, defining these clearly with complete and exhaustive listing of such factors allows for predictability in the process. Conversely, open-ended provisions will lead to uncertainty in competition law and its review process, opening the door to government and political interference.

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<sup>44</sup> See, for example: Mario Mariniello, "The Dragon Awakes: Is Chinese Competition Policy A Cause For Concern?", Bruegel Policy Contribution (October, 2013) at 5.

<sup>45</sup> Allison Jones & John Davies, "Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2015-12 at 11.

<sup>46</sup> *Ibid* at 6: It is the position of the DOJ that "the exercise of monopoly power, including the charging of monopoly prices, through the exercise of lawfully gained monopoly position will not run afoul of the anti-trust law.

<sup>47</sup> *Ibid* at 7.

<sup>48</sup> *Ibid*.

<sup>49</sup> John Pecman, "Remarks by John Pecman, Commissioner of Competition" (delivered at George Mason University Pharma Conference, 23 September 2014) at 3 [unpublished].

<sup>50</sup> Alves, Capieu & Sinclair, *supra* note 4 at 15.

35. As discussed in greater detail in Public Interest, in BIAC's view, governments should not have broad discretionary powers under the banner of "public interest" to overrule the competition authority's merger review decisions. The risk of undue political pressure may be even more pronounced for developing countries that are still establishing their competition regimes and need to inject their competition authorities with legitimacy or to accomplish wider development goals.<sup>51</sup>

## 5. Conclusion

36. BIAC is of the view that governments should not have the ability to interfere with the competition authority's decision-making process. The conflicting interests of governments and their ability to take into account extraneous non-competitive considerations and goals would significantly hinder a competition authority's independence. This would significantly reduce predictability, particularly in the merger-review process, and could in turn have a chilling effect on incentives for investment and innovation.<sup>52</sup>

37. No single model or structure, practices or legislative scheme can guarantee the independence of a competition authority. Although there is no one-size-fits-all model, it has been widely accepted that there are minimum measures that can be taken to protect an authority's independence and with it, the legitimacy of a country's competition laws. BIAC believes that implementing a multi-faceted approach focusing on institutional design, appropriate accountability measures, consistency and transparency in decision-making and process and an appropriate substantive legislative framework will practically diminish the likelihood of government or other political interference, with attendant benefits for the consistency, transparency and economic benefits of a pro-competitive legal and regulatory framework.

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<sup>51</sup> Diane R. Hazel, "Competition in Context: The Limitation of Using Competition Law as a Vehicle for Social Policy in the Developing World" (2015) 37 *Houston Journal of International Law*, Vol. 37:2 at 344. As noted by BIAC in Public Interest, if a governmental authority in either a developed or developing country conducts a public interest review, it should be done by a separate institution in a transparent proceeding. In addition, the outcome of the proceeding entailing a weighing of public interest considerations against the restraints of competition established by the competition agency should be subject to a legal review by a competent court.

<sup>52</sup> Anthony, *supra* note 8.