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Competition Enforcement and Regulatory Alternatives – Note by BIAC

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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Business at OECD (BIAC)

1. Business at OECD (BIAC) is pleased to have the opportunity to comment on the intersection between competition enforcement and regulatory alternatives.

1. Introduction

2. Competition law and regulatory regimes pursue different albeit often complementary goals. Competition enforcement traditionally focuses on correcting marketplace abuses after the fact, while economic regulation typically imposes governmental control over aspects of market activity to reflect particular policy priorities that may or may not be in tension with free competition. The healthy tension between these two different regimes is best met through the coordination of the work of competition authorities and regulators, rather than using competition enforcement as a catch-all for pursuing non-competition public policy goals. Confusing the objectives of competition laws by pursuing non-competition objectives, however, can have the effect of undermining credibility in competition enforcement.

3. The OECD Competition Committee has regularly considered the inter-relationship between competition authorities and sector regulators, including independent sector regulators,[1] multi-functioning competition authorities, regulators with concurrent competition functions in relation to institutional design,[2] and the relationship between competition authorities and regulators.[3] BIAC does not propose to restate its contributions to those discussions but rather to set out a series of points for the OECD Competition Committee to consider.

4. Fairness, legal certainty, and predictability of enforcement are vital to business. Pursuing the enforcement of specific non-competition regulatory objectives and laws through competition enforcement, or imposing conflicting or inconsistent standards on business through a mix of competition enforcement and regulatory means, creates an untenable situation that would chill both investment and innovation. Thus, reconciling competition and non-competition objectives and ensuring a consistent non-selective approach should be a fundamental governmental objective.

2. Competition Policy and Regulatory Policy

5. The OECD Competition Committee WP2 roundtable on competition enforcement and regulatory alternatives is timely. The recent move away from multilateralism and the economic impact of COVID-19 have seen many governments taking a more interventionist

[1] *See* OECD, Independent Sector Regulators—Note by BIAC, DAF/COMP/WP2/WD(2019)34 (Nov. 22, 2019), *available at* https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)34/en/pdf.

[2] *See* OECD, Roundtable on Changes in Institutional Design of Competition Authorities—Note by BIAC, DAF/COMP/WD(2014)126 (Dec. 10, 2014), *available at* https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)126&doclanguage=en.

[3] *See* OECD, The Relationship between Competition Authorities and Sectoral Regulators—Contribution from BIAC, DAF/COMP/GF/WD(2005)28 (Jan. 21, 2005), *available at* https://www.oecd.org/daf/competition/prosecutionandlawenforcement/34340025.pdf.

approach in markets, ostensibly to ensure basic services and security of supply, and to ensure technological sovereignty and strategic autonomy. Competition authorities have been expected to play their part in this shift.[4]

6. In the past, "competition authorities have sometimes been felt to ignore broader social objectives apart from increasing competition and to lack adequate technical knowledge about highly complex sectors."[5] Competition authorities are being increasingly called on to consider societal objectives, such as the impact of commercial activity on environmental protection, income inequality or freedom of speech. Such societal issues often lay outside the ambit of the authority granted to competition enforcers or were seen as an exception to competition law rules. For example, the European Merger Control Regulation permits Member States to seek a derogation from the application of the Regulation for questions of public security, plurality of media, and prudential rules.[6]

7. Different jurisdictions will perceive the role of competition differently, partly based on their legal traditions, state of economic development, political economy, and understanding of the role of market regulation. When categories of the objectives pursued are left open-ended or ill-defined, this may well result in considerable uncertainty, not only as between enforcers and regulators, but also between and across jurisdictions that may well pursue inconsistent or even conflicting policies.

8. Yet, the question—to what extent should societal objectives be the goal of competition enforcement, rather than the exemption?—appears to be back on the table. The consensus that sound competition enforcement should be grounded on long-run economically-founded consumer welfare principles is being challenged. While there are a number of competition authorities who possess an element of regulatory oversight or concurrent powers, and there exist sectoral regulators with antitrust powers, there is also a growing trend seeking to treat a broad range of social or political policy imperatives as competition issues. Such an approach may appear attractive to governments, who consider the agility of competition enforcement and the broad nature of its remedies to be a convenient means of addressing political imperatives.[7] However, granting competition enforcement authorities a mandate going beyond consumer welfare can risk fundamentally changing the nature of competition law. Such a shift should not be undertaken lightly, as it may well prove to be irreversible. Moreover, without sound economic underpinnings to tie competition enforcement to consumer welfare principles, there is a danger that such laws are developed without a limiting principle and subject to uneven enforcement.

3. Developments in Europe

9. There have been a series of developments across different European jurisdictions to address the challenges posed in digital markets, which have resulted in different substantive approaches and institutional models. For example:

- The reform of German antitrust law on January 18, 2021, allows the Federal Cartel Office (FCO) to designate certain companies of "paramount significance for

[4] *See, e.g.*, Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What are we Actually Debating?*, 83 ANTITRUST L.J. 393 (2020).
[5] OECD, The Relationship between Competition Authorities and Sectoral Regulators—Issues Paper, Session II, DAF/COMP/GF(2005)2, ¶ 1 (Feb. 2, 2005), *available at* https://www.oecd.org/competition/globalforum/GlobalForum-February2005.pdf.
[6] **Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation),** art. 21**, 2004** *O.J. (L 24) 1*.
[7] *See, e.g.*, Greenfield, Lange & Callan, *supra* note 4.

competition across markets" and thereby impose obligations and liabilities ex ante.[8] The amended law specifically seeks to address digital platforms or ecosystems and to regulate terms of access to such platforms or their entry into new markets. Analysing these issues is a complex undertaking and raises questions related to the underlying technology, platform dynamics, technology evolution, and remedy design. The FCO has a specific internet economy division, but no guidance has yet been forthcoming on how the new provision would be applied in regulating designated digital players.

- The European Union, on the other hand, has taken an industrial policy approach whereby a regulation, the draft Digital Markets Act (DMA) presented on December 15, 2020,[9] would prohibit ex ante certain practices of companies deemed to be "gatekeepers" were they meet the quantitative thresholds in the provision of the listed core platform services, rather than as a result of the application of traditional effects-based competition law enforcement. In addition, there is no clarity, as yet, on what entity would be tasked with enforcing the DMA or what role European competition authorities might have under the regulation. Whatever model is ultimately adopted, it is important to be clear about the delineation between regulation on one hand and competition enforcement on the other.[10]
- The United Kingdom (UK) is considering a system of codes of conduct under competition law principles that would apply to entities designated with "significant market status" by the Competition and Markets Authority (CMA). Although a draft law has not yet been tabled, the UK government recently announced on April 7, 2021 the creation by the UK Government of a separate regulator, the Digital Markets Unit (DMU), to oversee this approach.[11] The DMU should have the "extensive, ongoing knowledge of the technical aspects of the products and services that are regulated."[12] The DMU will be based within the CMA and can be expected to take a more traditional effects-based approach to market analysis[13] although the

[8] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz) [10th amendment to the German Competition Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions (GWB Digitization Act)], Jan. 18, 2021, BGB I at 1, https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s0002.pdf%27%5D__1619488926229.

[9] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final (Dec. 15, 2020), https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN.

[10] AmCham EU, Consultation Response: Ex-ante regulatory instrument of very large online platforms acting as gatekeepers (Digital Markets Act) (May 5, 2021), *available at* https://www.amchameu.eu/system/files/position_papers/aeu_response_digital_markets_act_consultation.pdf.

[11] Press Release, Competition & Mkts. Auth., New Watchdog to Boost Online Competition Launches (Apr. 7, 2021), *available at* https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches--3.

[12] OECD, The Relationship between Competition Authorities and Sectoral Regulators—Issues Paper, *supra* note 5, ¶ 12.

[13] *See e.g.*, Andrea Coscelli, Digital Markets: Using Our Existing Tools and Emerging Thoughts On A New Regime, Remarks Before the Fordham Competition Law Institute (Oct. 9, 2020), *available at* https://www.gov.uk/government/speeches/digital-markets-using-our-existing-tools-and-emerging-thoughts-on-a-new-regime ("Similarly, the existing case law around anti-competitive practices will still be important in guiding future consideration as to the effects of actions, such as self-preferencing, which we recognise, in some circumstances may have pro-competitive benefits.").

UK Government has also instructed the DMU to work closely with the UK communications regulator, Ofcom, on matters that touch on Ofcom's competences.

10. Three important European jurisdictions are now seeking to create new rights and obligations, through ex ante rules, that aim to regulate digital players or ecosystems based on different substantive and institutional approaches.[14] While this ex ante approach has not traditionally been the core function of enforcement authorities in dynamic markets, it is partly a reaction to the view that issues in digital markets cannot be effectively addressed by competition law.[15] The question of whether digital markets, or markets that are digitising, merit specific regulation or regulatory regimes is complex, requiring a deeper investigation and understanding of different business models and commensurate application of expertise to ensure predictability, legal certainty and proportionality in the imposition of such regimes.

4. General Observations

11. Encouraging competition authorities to depart from effects-based competitive assessments can create a risk that competition authorities are expected to act as de facto regulators and pursue broader goals which they may not be best placed to do. A closer examination is therefore required of whether competition enforcers should engage in ex ante regulation of particular industries or companies.

12. There is also an important question regarding the institutional design of agencies. Competition authorities are typically generalist agencies that are expert in and staffed to investigate, analyse and, if necessary, remedy markets and abuses across the entire economy, based on established standards. Regulation often requires not only greater sector-specific expertise but also the application of different legal standards and procedures, as well as specific remedies. Given these differences, it will be important to clarify the respective roles for regulators, on the one hand, and competition enforcers, on the other, when it comes to addressing concerns associated with digital platforms.

13. BIAC reiterates that legal and commercial certainty is fundamental to the business community in order to encourage long-term investment in a predictable environment. In its 2020 *General Principles and Policy Suggestions to Regulatory Approaches in Times of Technological Change*, BIAC underscored that:

> *Governments and civil society rely on companies to build and operate complex digital infrastructure. Governments play a critical role in regulating the delivery of digital services and protecting the interests of consumers. Regulators should adopt a principles-based, technology-neutral approach, benefiting both industry and consumers. The goal should be to design regulatory approaches that allows for technological innovation and prevents technologies from becoming stuck in*

[14] *See* OECD, Independent Sector Regulators—Note by BIAC, *supra* note 1 (for differences in the roles played by competition authorities and sector regulators).
[15] *See, e.g.*, Stigler Committee on Digital Platforms Final Report (2019), *available le at* https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; The EU Digital Markets Act: A Report from a Panel of Economic Experts (2021), *available at* https://ec.europa.eu/jrc/en/publication/eu-digital-markets-act; A New Competition Framework for the Digital Economy: Report by the Commission 'Competition Law 4.0,' (Sept. 2019), *available at* https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3.

> *inapt regulatory processes and from being subject to regulatory based competitive disadvantage.*[16]

5. The Legal Dimension

14. There is an important legal dimension to the relationship between competition enforcement and regulation that can have an impact on legal certainty and basic norms of fairness. Notably, conflicting or duplicative remedies imposed by competition enforcement agencies and regulatory bodies can have a significant chilling effect on competitive behaviour and innovation. To address this risk, it is important to ensure that there is clarity regarding the respective responsibilities of each authority. The rule against the principle of *ne bis in idem* is meant to avoid a defendant facing multiple prosecutions for what is essentially the same infraction; nonetheless the same actions of a defendant may be characterised as a breach under both a regulatory regime and as anti-competitive.

15. It is also important to clarify how the substantive requirements of applicable regulations will interact with the substantive requirements of competition law and vice versa. Businesses must understand in advance whether violations of a given regulation will form the basis for competition law violations. Overlapping decisions by competition and regulatory authorities that place businesses at risk of duplicate sanctions for the same conduct should be avoided. This scenario has recently garnered increased attention, particularly in the European Union, where regulatory breaches have grounded recent competition enforcement action.

16. The principle against *ne bis in idem* "undoubtedly constitutes one of the cornerstones of any legal system based on the rule of law" and its "rationale lies in ensuring legal certainty and equality."[17] The European Court of Justice recently re-stated the general principle of *ne bis in idem* in the *Slovak Telekom* case:

> *[T]he application of the 'idem' condition is, in turn, subject to the threefold sub-condition that the facts must be the same, the offender the same and the legal interest protected the same (see, to that effect, judgment of 14 February 2012, Toshiba Corporation and Others, C 17/10, EU:C:2012:72, paragraph 97). Under the principle ne bis in idem, the same person cannot therefore be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset (judgment of 7 January 2004, Aalborg Portland and Others v Commission, C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 P, EU:C:2004:6, paragraph 338).*[18]

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[16] Business at OECD (BIAC), Regulatory Approaches in Times of Technological Change: General Principles and Specific Policy Suggestions 2 (July 2020), *available at* https://biac.org/wp-content/uploads/2020/07/Regulatory-Approaches-in-Times-of-Technological-Change-6.pdf.

[17] Alfonso Lamadrid & Pablo Ibáñez Colomo, *The Prohibition of Double Jeopardy. Case Law in Need of a Revamp (By Rafael Allendesalazar)*, CHILLIN' COMPETITION (Mar. 11, 2021), *available at* https://chillingcompetition.com/2021/03/11/.

[18] Case C-857/19, Slovak Telekom v. Protimonopolný úrad Slovenskej republiky, ECLI:EU:C:2021:139, ¶ 43 (Feb. 25, 2021). The Court of Justice of the European Union (CJEU) took a strict interpretation of the *ne bis in idem* principle as relates to dual *competition* enforcement in its *Slovak Telecom* decision. The CJEU reaffirmed that the principle of *ne bis in idem* is not infringed where both the national competition agency (NCA) and the Commission initiated proceedings relating to the same undertaking, geographical market and timeframe, but where different product markets were involved. However, where *different* areas of regulation are involved, Members of the CJEU have been clear, per Advocate General Wahl:

17. The Supreme Court of Canada has described the development of *res judicata* at common law as follows:

> *The common law developed two doctrines to deal with problems of unfair relitigation, consistency of result and finality. Both come out of the broad concept known as res judicata. The first branch of res judicata is sometimes called . . . double jeopardy in the criminal context. . . . In criminal law, the double jeopardy principle finds expression in the pleas of autrefois acquit and autrefois convict. The second branch of res judicata is issue estoppel. Issue estoppel is concerned not with whether the cause of action in two proceedings is the same, but with whether an issue to be decided in proving the current action is the same as an issue decided in a previous proceeding. The causes of action may be (and typically are) different. Issue estoppel in Canada has historically applied to both civil and criminal law.*[19]

18. Where an authority has both regulatory and competition law powers that could potentially apply to the same situation, it is important for legal certainty to understand how the authority will determine under which conditions it will use which rules. Some commentators have raised the issue in the context of the EU's draft DMA, given that some prohibitions under the draft regulation mirror existing prohibitions under competition enforcement decisions.[20]

19. For example, the interplay between competition enforcement and the EU's General Data Protection Regulation (GDPR) is at issue on judicial review of the FCO's Facebook decision of February 2019. In March 2021, the Higher Regional Court in Dusseldorf sought clarification from the Court of Justice of the European Union on whether Facebook abuses competition law because it collects and uses the data of its users in violation of the GDPR.[21]

I would tend to agree with Advocate General Kokott that the principle of *ne bis in idem*, as enshrined in Article 50 of the Charter, *should be interpreted uniformly in all areas of EU law*, having due regard to the requirements of the case-law of the ECtHR. Simply because competition law does not belong to the 'core' of criminal law, or because sanctions in competition law should have a sufficiently deterrent effect so as to ensure effective protection of competition, do not for me constitute sufficient reasons to limit the protection afforded by the Charter in the field of competition law.

C-617/17, Opinion of Advocate General Wahl, Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów, ECLI:EU:C:2018:976, ¶ 46.

[19] R. v. Mahalingan, [2008] 3 S.C.R. 316, 329.

[20] AmCham EU, *supra* note 10, at 3 ("Where both the DMA and existing EU competition law could potentially apply, it is important for legal certainty to know how the European Commission will determine whether to address potential concerns under the DMA or EU competition rules. Will the Commission conduct a preliminary analysis to determine which tool is the most appropriate (for example, a market investigation into new services or practices under the DMA or an Article 102 TFEU investigation)?"). Although Art 1(7) of the draft DMA states that national authorities shall not take decisions which would run counter to a decision adopted by the European Commission under the DMA, concerns have been expressed that this is not a sufficiently well-developed mechanism to avoid parallel investigations or discrepancies on the substantive analysis of market conditions, given that both the DMA and competition rules could cover the same set of facts. *See* Cani Fernández, *A New Kid on the Block: How Will Competition Law Get along with the DMA?*, 12 J. COMPETITION L. & PRAC. 271, 272 (2021).

[21] *See* Press Release, Facebook gegen Bundeskartellamt: Ergebnisse des Verhandlungstermins (Mar, 24, 2021), *available (in German) at* https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210324_PM_Facebook2/index.php and published questions, *available (in German) at* https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html.

The CJEU decision may provide important guidance on whether an alleged regulatory violation sustains a competition law remedy.

20. Competition and regulatory authorities also should guard against conflicting decisions that place businesses in an untenable position where compliance with one regime could violate the other due to an operational conflict. Such a situation places competition enforcers in the unenviable position of having to decide which system of law is to be valued over another, when the decision about the hierarchy of norms should fall to the legislature and ultimately the courts. The state-action doctrine—in some jurisdictions referred to as the regulated conduct defence—provides important protection against actual inconsistencies between the dictates of regulation and the requirements competition law.[22]

6. Conclusion

21. Competition enforcement aims to objectively ensure that competition on the market yields long-run consumer welfare. This requires neutrality towards the nationality of the firms in question, objectivity in assessment, and administrability of remedies. For businesses that are or may become subject to sector-specific or policy-driven regulations and competition enforcement, it is critical to have clarity regarding the scope of the regulation and the potential interaction between the two bodies of law. Clarity and predictability are essential to fostering continued investment and innovation.

[22] Parker v. Brown, 317 U.S. 341 (1943). The doctrine often includes a jurisdictional or constitutional element as well, for example, guarding against a scenario under which competition laws might conflict with those of a sovereign state or another level of government in a federal system.