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Assessing the Impact of Competition Authorities' Activities – Note by BIAC

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1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to make this written contribution to the roundtable on Assessing the Impact of Competition Authorities' Activities. *Business at OECD* supports the OECD's initiative to update its previous Guide, issued in 2014, to help competition authorities assess the expected impact of their activities.¹ This initiative enhances previous OECD discussions on this topic, as well as the work of the International Competition Network's Advocacy Effectiveness Working Group.² *Business at OECD* supports the development of common standards to assess national competition authorities' activities that will also allow for better comparisons across jurisdictions and recognition of best practices. Regular initiatives taken by competition authorities to evaluate their interventions ex ante should facilitate better assessment and communication of the impact of competition authorities' activities and enhance the efficiency and effectiveness of agency operations.

2. Criteria for Good Performance

2. To assess the impact of competition agencies' proposed activities, it is essential to establish clear criteria for good performance. Good agency performance should be judged by both substantive results and process improvements that includes the various perspectives of groups affected by the agency's actions.

2.1. Substantive Goals

3. Competition agencies need to develop a structure of goals through prioritization mechanisms, for competition assessment and enforcement that reflect the agency's mandate. These need to be directly responsive to social needs and can be effectively applied by the enforcement agency and judiciary. Proposed activities can be assessed by numerous measures, but ultimately effective agency performance should be measured by its ability to

¹ OECD, Guide For Assessing the Impact of Competition Authorities' Activities (Apr. 2014), available at https://www.oecd.org/en/publications/guide-for-assessing-the-impact-of-competition-authorities-activities_c92c2cd0-en.html.

² OECD, Factsheet on Competition and Macro-Economic Outcomes (Oct. 2014), available at https://www.oecd.org/en/publications/factsheet-on-competition-and-macro-economic-outcomes_660b93ab-en.html; OECD, Reference Guide on Ex-post Evaluation of Competition Agencies' Enforcement Decisions (Apr. 2016), available at https://www.oecd.org/en/publications/reference-guide-on-ex-post-evaluation-of-competition-agencies-enforcement-decisions_262476ff-en.html; OECD, Competition Assessment Toolkit, Vol ³: Operational Manual (Jan. 2019) (Version 4.0), available at https://www.oecd.org/en/publications/competition-assessment-toolkit-principles-version-4-0-volume-3_1f253011-en.html; OECD, Developments in Competition Impact Assessment Since 2014 – Issues Note, DAF/COMP/WP2(2023)3 (May 17, 2023), [https://one.oecd.org/document/DAF/COMP/WP2\(2023\)3/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2023)3/en/pdf); ICN Agency Effectiveness Working Group Project on Planning, Monitoring and Measuring Effectiveness, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2024/06/AEWG-Annual-Work-Plan-2024_2025.pdf.

protect competition including measures of price, quality, and innovation.³ To ensure effective assessment, the agency needs to frame its mandate, communicate it effectively, and develop processes to legitimize and enhance the effectiveness of its antitrust framework.

2.2. Processes

4. The methods by which agencies achieve substantive results are equally important. In particular, an agency should show its work. Meaningful agency disclosure and transparency is the foundation of good process. Excellent agency performance involves using superior administrative techniques, establishing effective internal quality control mechanisms, adopting transparency and accountability tools, and committing to continuous improvement. Agencies should continuously strive to improve their operations and substantive programs.

5. Set out below are key elements in assessing performance that can be factored into the preparation of an agency's strategy, priorities, and programs in formulating its assessment of its activities.⁴

- *Transparency*: Transparency of agency operations and approaches is essential. This includes setting out a clear and cogent theory of harm, communicating justifications

³ U.K. Competition & Mkts. Auth., *Competing Fairly in Business: At-A-Glance Guide* (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/477569/SME_Compliance_At-A-Glance.pdf (“Competition encourages businesses to improve and innovate, for the benefit of their customers. Competition law make sure businesses are competing on a level playing field and are protected from others acting unfairly.”); U.S. Fed. Trade Comm’n, *Competition Counts: How Consumers Win When Businesses Compete 2* (May 2015), https://www.ftc.gov/system/files/attachments/competition-counts/pdf-0116_competition-counts.pdf (“By enforcing antitrust laws, the Federal Trade Commission helps to ensure that our markets are open and free. The FTC promotes free and open competition and challenges anticompetitive business practices to make sure that consumers have access to quality goods and services at competitive prices, and that businesses can compete on the merits of their work. The FTC does not choose winners and losers – you, as the consumer, do that. Rather, our job is to make sure that businesses are competing fairly within a set of rules.”); Competition Comm’n of Singapore, *10 Years of Championing Growth and Choice 21* (2015), https://www.ccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/10-years-of-championing-growth-and-choice/ccs_10years_website.pdf (“When businesses compete for customers, they offer better prices to gain market share. To do this, they think of strategies to lower the cost of production and find the most efficient ways to produce their goods and services. As a result, businesses that are efficient and have the highest productivity will survive and thrive.”).

⁴ See Mathew Heim & Penny Giosa, *Competition for Competition: What Practitioners Expect from a Leading Competition Authority*, Report from the GWU Competition & Innovation Centre (forthcoming 2025). These key elements also reflect the International Competition Network’s work in this area, especially its Advocacy Working Group and Agency Effectiveness Working Group. See e.g., Int’l Competition Network, *ICN Advocacy Handbook, Approaches to Identify Policies for Competition Assessment*, <https://internationalcompetitionnetwork.org/wp-content/uploads/2020/08/AWG-Handbook-Approaches-to-Identify-Policies-for-Competition-Assessment.pdf>; Int’l Competition Network, *Lessons to Be Learnt from the Experience of Young Competition Agencies: An Update to the 2006 Report* (2019), https://internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf; Int’l Competition Network, *ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf.

for departures from settled law, providing guidelines on novel developments, and avoiding inhibiting investment and innovation.

- *Procedural Fairness*: Often linked to transparency, procedural fairness and respect for due process are prerequisites for effective, high-quality competition policy and enforcement.
- *Independence*: Institutional independence, including adequate resources and the nomination of agency heads based on technical merit, is crucial for agencies to stand up to vested interests, even when politically unpopular.
- *Legal Certainty*: Authorities must ensure predictability and consistency in enforcement to provide legal and commercial certainty, adhering to legal principles and methodologies within the confines of the law.
- *Analytical Rigor*: The quality and rigor of enforcement analysis itself are critical, with thoughtful, well-reasoned decisions that correspond to theory and practice.
- *Efficiency*: The timeliness of processes and efficient decision-making are also important.
- *Priority Setting*: Effective prioritization requires strategic thinking, considering the evolution and long-term consequences of competition policy actions and balancing focus on strategic sectors while being responsive to real-time market conditions.
- *Impact of Competition Laws*: Effective, consumer-focused, and structurally oriented results are important, including generating deterrence through enforcement. Agencies must demonstrate the impact of their work.
- *Professionalism of Staff*: High standards in analytical rigor and efficiency require highly qualified, skilled personnel with interdisciplinary capabilities and technical expertise. A healthy and respectful work environment that fosters growth and team building is essential, as well as ongoing training and maintenance of staff and case handlers.
- *Flexibility, Novelty, and Innovation*: Leading authorities should be flexible to adapt to changing market circumstances, investing in capacity-building to identify innovative solutions to new situations and leading in the analysis of cutting-edge topics.
- *Competition Advocacy*: Effective engagement initiatives towards an agency's constituents are key to leadership. Agencies should ensure understanding of sound competition principles, engage meaningfully with market players and the antitrust bar, and promote a competition culture.
- *International Relations and Influence*: Promoting international cooperation and maintaining good relations with other agencies is essential, through active engagement in regional and international competition networks, and prioritizing meaningful international engagement.

3. Challenges in Assessing Performance

6. Evaluating the performance of competition agencies is a complex task that involves various challenges. *Business at OECD* would argue that a central focus in evaluating performance should be assessing the agency's activities in preserving and protecting

competition with the accompanying positive impacts on economic welfare. Another key consideration is the extent to which the agency has achieved its stated goals.

7. One of the primary challenges is measuring the economic welfare effects of competition policy. It can be difficult to trace the immediate economic impact of specific matters and gauge the larger impact on firms' willingness to comply with the law. Agencies need to develop methodologies to assess these effects accurately. In particular, agencies need to adopt methodologies that avoid so-called false positives (also known as Type 1 errors), i.e., the finding of antitrust violations when the conduct did not harm competition. False negatives or Type 2 errors are generally of less concern as the impact of false negatives can be mitigated through later market behaviors. However, as the U.S. Supreme Court has warned about false positives, "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"⁵

8. There is a lack of widely accepted, consistently applied standards for assessing the quality of agency performance. This has been a major impediment to achieving consensus on what competition authorities ought to do. Establishing clear and widely accepted standards is crucial for meaningful performance assessment. Accordingly, *Business at OECD* is highly supportive of this initiative to revise the OECD's 2014 guidance on helping competition authorities assess the expected impact of their activities.

9. The independence of an agency from political power is a crucial aspect of an effective competition regime. As observed by the OECD Secretariat, it is "a prerequisite for the effective enforcement of competition rules."⁶ While jurisdictions may allow for the attainment of independence through various means, certain principles continue to serve as indicators of this independence. In particular, transparent and independent reporting of competition agency activities is essential for not only the assessment of but also the assurance of an agency's effectiveness.

10. Relying on activity-based measures, such as case numbers, as indicators of agency performance is problematic. These measures often equate activity with accomplishment and overlook the significance of smaller cases and non-litigation activities. Activity-based measures do not provide a reliable assessment of an agency's impact on economic performance and social welfare.

4. Importance of Long-Term Investments

11. Long-term investments in institutional design and capability enhancement are crucial for the sustained success of competition agencies. Competition agencies should make long-term investments in institutional design and capability enhancement. High quality competition policy and enforcement can only come with highly qualified well-trained staff. These investments provide the foundation for successful programs and are essential for continuous improvement. Agencies should focus on building their capacity to address future challenges effectively.

⁵ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

⁶ OECD, *Independent of Competition Authorities—From Designs to Practices – Background Paper by the Secretariat*, DAF/COMP/GF(2016)5, ¶ 1 (Nov. 21, 2016), https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/10/independence-of-competition-authorities-from-design-to-practice_c5d776dc/ea9749e1-en.pdf.

4.1. Sustained Contributions

12. Good agency performance involves continuous improvement and the establishment of effective internal quality control mechanisms. Agencies should invest in activities that improve their capacity over the long term. This includes developing expertise, enhancing administrative processes, and fostering a culture of continuous learning and improvement.

5. Recommendations

13. There is a series of criteria and considerations for assessing competition agencies' activities that are important, but there are certain core principles that should guide the overall process. In particular, *Business at OECD* recommends that competition agencies bear in mind the following in the development and implementation of their assessments.

- *Develop Clear Standards:* The OECD should work with competition agencies and stakeholders to develop clear, widely accepted standards for assessing competition agencies' performance. These standards should focus on both substantive results and process improvements.
- *Adopt a Balanced Approach:* Performance assessment should adopt a balanced approach that considers both litigation and non-litigation (including advocacy) activities. Agencies should evaluate their success in preserving competition, along with the related impact on economic performance and consumer welfare, rather than solely on activity-based measures that may, for example, emphasize number of cases brought during a particular administration.
- *Consider the Agency's Constituents:* Performance assessments should consider the perspectives of the constituents affected by competition policy and enforcement. Just as agencies need to account for their expenditures to audit committees, authorities should also consider the usability of the system, in terms of procedures, engagement with constituents and clear communications to them.
- *Promote Transparency, Accountability, and Independence:* Competition agencies should adopt transparency and accountability tools to increase public understanding of their activities, developed independently of undue political influence. This will help build trust and confidence in their work and ensure that agencies are held accountable for their performance.
- *Invest in Long-Term Capability:* Competition agencies should make long-term investments in institutional design and capability enhancement. These investments are essential for achieving sustainable improvements in agency performance and addressing future challenges effectively.

6. Conclusion

14. Evaluating the impact of competition agencies' activities is a multifaceted endeavor that requires a balanced approach, considering both substantive outcomes and process improvements. It is essential to move beyond activity-based measures and focus on generating tangible benefits for consumers and the economy. Emphasizing transparency, accountability, and independence will foster trust in competition policy and agency performance. Long-term investments in institutional design and capability enhancement are crucial for ensuring that agencies can adapt to evolving challenges and continue to

contribute positively to economic performance and social welfare. By adopting clear standards and promoting continuous improvement, competition authorities can achieve sustained success and better serve consumers and society. *Business at OECD* remains committed to collaborating with the OECD and other stakeholders to advance effective competition policy and enhance agency performance.