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Optimal Design, Organisation and Powers of Competition Authorities – Note by BIAC

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/optimal-design-organisation-and-powers-of-competition-authorities.htm>.

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BIAC

1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to submit observations to this roundtable. From the perspective of business, a well-functioning agency is one that has both the competence and capacity to apply the law transparently and objectively, providing both certainty and predictability to economic actors.
2. Given that the roundtable focuses on the internal functioning of authorities, BIAC will provide a perspective from business, who act as subjects or “users” of the competition system, as the choices taken on internal function affects the effectiveness of the system.
3. In the context of the roundtable, BIAC offers the following observations:
 - Competitive neutrality principles should be championed by authorities through increased internal government advocacy efforts. Agencies should consider including competitive neutrality assessments in annual reports and flag breaches competitive neutrality norms.
 - Any change in competition law or policy should be based on cognizable concerns, proportionate rulemaking, clear and transparent enforcement prioritization, and legal certainty.
 - Domestic and international frameworks for procedural cooperation and coordination should be developed particularly where merger control and foreign investment reviews occur.
 - Authorities should clearly set out their prioritization principles and develop internal checks and balances to weed out inappropriate factors in decision-making.
 - Authorities should provide meaningful guidance to business where new powers have been granted or implemented to ensure common understanding and clarify the authority’s interpretation of the law.
 - Authorities should draw on existing government resources, notably to better understand what policy choices the legislature has taken in a given field.
 - Authorities should ensure that new tools align with due process and procedural fairness requirements.
 - Authorities should ensure that new forensic investigative tools minimize the cost and burden on companies, notably for companies that are not the targets of an investigation.

2. Contemporary Exogenous Challenges

4. Competition authorities have shown themselves to be largely resilient and able to adapt to unexpected exogenous shocks that periodically affect economies and markets, such as the COVID-19 pandemic. The OECD’s *Competition Policy Responses to COVID-19* recommended that competition authorities actively engage with government when these develop economic support measures, in order to minimize any anti-competitive distortions

or long-term harm to markets.¹ The report urges authorities to also advocate for pro-competitive alternatives to government interventions. In particular, the OECD suggested that authorities increase advocacy efforts towards government, provide input and advice, issue opinions/guidance; and co-operate with other jurisdictions to ensure a degree of international alignment.

5. However, given the increasing number of such exogenous economic shocks, “it must be recognized that state intervention in the market may well become more routine, rather than exceptional.”² Given that, authorities should consider creating permanent mechanisms to ensure that emergency measures are justified and, if implemented are proportionate, time-limited, and do not undermine benefits of competition policy. Competition policy should not be seen as a luxury to be reinstated by governments once the dust has settled on recovery efforts, but rather is a necessity to drive growth and investment, with enforcement potentially even more relevant in times of crisis. This will require authorities to devote focused resources to competitive neutrality advocacy and – importantly – the attention of senior authority staff.

3. Contemporary Policy Challenges

6. Commercial, technical, or socio-political developments may also require an equal evolution of the existing legal, analytical, or procedural competition policy frameworks. As BIAC has previously noted, specialist laws and regulators, rather than competition law and policy, are best placed to address notions of “‘fairness,’ ‘privacy,’ ‘inequality,’ ‘employment,’ and ‘preferential treatment of domestic firms in certain sectors.’”³ To the extent that non-competition factors are going to be considered as part of a competitive assessment, there should be clear legislative guidance on how these factors will weighed, particularly where there might be inherent tensions between competition and non-competition factors, or indeed tension between different non-competition factors.

7. BIAC reiterates that any change in competition law or policy should be based on cognizable concerns, proportionate rulemaking, clear and transparent enforcement prioritization, and legal certainty in order to provide effective guidance to business actors. This includes consideration of legislative solutions, including newer powers or expansion of existing powers.

8. One area of note is the proliferation of merger and acquisitions reviews, especially the interface of merger control and foreign investment reviews, notably in relation to national security considerations. Frameworks for procedural cooperation and coordination both at the domestic and international level should be considered, for example including recommendations for timelines pertaining to filings and information sharing, while respecting the independent mandates of the respective authorities. More clarity on timing and procedural steps will benefit both business and public sector bodies will bring more certainty of process.

¹ OECD, OECD Competition Policy Responses to COVID-19 (Apr. 27, 2020), https://read.oecd-ilibrary.org/view/?ref=130_130807-eqngxniyo7u&title=OECD-competition-policy-responses-to-COVID-19.

² OECD, Subsidies, Competition and Trade – Contribution from BIAC, DAF/COMP/GF/WD(2022)65, ¶ 10 (Nov., 23 2022), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2022\)65/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2022)65/en/pdf).

³ OECD, The Role of Competition Policy in Promoting Economic Recovery – Note by BIAC, DAF/COMP/WD(2020)88, ¶ 6 (Nov. 16, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)88/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)88/en/pdf).

4. Regionalization, Decoupling, Economic Sovereignty, and Strategic Autonomy

9. The Chair’s Call for Contributions seeks views on state subsidies and on government intervention in international trade. Government intervention in markets is a perennial challenge for competition authorities and appears to be increasing. Authorities should consider what structural changes may be needed to address these challenges. Probably the most important principle relevant to this debate is that of competitive neutrality, enshrined in the OECD *Recommendation of the Council on Competitive Neutrality*.⁴ The Recommendation “calls on Adherents to preserve competitive neutrality” and avoid discriminatory measures that enhance an enterprise’s market performance over others and thus distort competition.⁵ As BIAC noted in 2021:

*It is well understood that one of the core advocacy function of competition authorities is to avoid the creation of barriers to competition when policymakers consider adopting regulations.*⁶

*Competition authorities should increase their advocacy initiatives to ensure that broader government involvement is predicated on principles of competitive neutrality and to minimize any government inclination to engage in discriminatory policies.*⁷

10. Competition authorities should therefore actively champion the principles of competitive neutrality and be role-models in its application. Fulfilling these roles may be difficult at times, particularly given that competition authorities must take care to avoid appearing political but placing competitive neutrality at the core of authorities’ policies is of utmost importance especially as the incentives for government to intervene in markets continues to grow.

11. This requires authorities to display the fortitude to robustly promote competitive neutrality in order to underpin core competition principles and minimize governments’ inclination to engage in discriminatory or distortive policies. This could be enacted in a variety of ways, such as including competitive neutrality assessment in the authority’s annual report and a scoreboard objectively assessing government interventions to flag breaches competitive neutrality norms to government. Authorities can share their experiences in the implementation and best practices for collective benefit. As BIAC has previously noted:

*OECD has an important role to play, in giving effect to its 2021 Recommendation of the Council on Competitive Neutrality, including establishing implementation guidance, best practices and scoreboards. Importantly, the OECD Competition Committee should continue to promote the independence of its members and transparency in authorities’ decision-making to reduce the dangers of state intervention in the competition process.*⁸

⁴ OECD, Recommendation of the Council on Competitive Neutrality, [OECD/LEGAL/0462](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462) (May 30, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

⁵ *Id.*

⁶ OECD, The Promotion of Competitive Neutrality by Competition Authorities – Contribution from BIAC, DAF/COMP/GF/WD(2021)37, ¶ 17 (Nov. 25, 2021), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)37/en/pdf).

⁷ *Id.* ¶ 22.

⁸ *Id.* ¶ 3.

5. Transparency in Prioritization and Decision Making

12. As governments expect competition authorities to be responsive to political or industrial policy priorities, it will be increasingly important for authorities to develop mechanisms to minimize the likelihood or perception that authorities are involved in “picking winners” or pursuing pre-determined outcomes. This is particularly important where new tools, for example the ability to impose remedies after a market study to increase that sector’s competitiveness, may place the authority in the invidious position of straying into industrial policy that would more naturally sit with governments. To address this, authorities should consider clearly setting out their prioritization principles and engaging in a transparent process as to how these principles will be applied.⁹

13. As noted above, BIAC is also mindful that policy makers may look to the competition law system to provide solutions to broader societal or industrial policy concerns beyond the promotion of competition and enhancing consumer welfare. To minimize pressure on competition authorities’ freedom of action, internal checks and balances, such as peer review panels,¹⁰ can help to weed out inappropriate elements from decision-making, thereby increasing the predictability and credibility of the competition system. In that context, authorities should continually strive to ensure that their decision-making processes are transparent, so that users of the system have a high level of certainty as to how competition policy proceedings may affect them. This could include the use of soft law instruments that set out decision making and prioritization, as well as consultations and dialogue.

6. Agency Resources

14. Competition authorities around the world are being granted a range of new priorities or powers, such as digital or sustainability issues. These may require authorities to redirect significant resources and/or technical expertise in order to give effect to the new priorities or powers. Authorities should have the institutional flexibility to allocate the resources where needed; while this may seem an obvious point to make, it is not always the case. For example, the European Commission’s new foreign subsidies regulation, which entered into force in January 2023, sets up a system to screen aid from non-EU countries and assess harm to competition in the European Union.¹¹ However, despite the fact that the European Commission initially asked for a taskforce of 145 staff, recent press reports suggest that the taskforce numbers “as few as five” staff.¹² The legislator’s ambitions must also ensure effective resourcing.

⁹ See, e.g., Or Brook & Kati Cseres, Policy Report: Priority Setting in EU and National Competition Law Enforcement (Sept. 28, 2021), <https://ssrn.com/abstract=3930189>.

¹⁰ The European Commission notes that its *ex ante* controls, which includes peer review panels, aim to “ensure that the Commission’s competition policy enforcement is of sufficiently high quality to withstand the scrutiny of the EU courts. This contributes to deterrent effect of competition policy enforcement and avoids undermining the Commission as an enforcer of EU competition policy, by avoiding reputational damage or claims for damages.” See Eur. Comm’n, DG Competition, Annual Activity Report 2021, at 52 (Apr. 28, 2022), https://commission.europa.eu/system/files/2022-05/annual-activity-report-2021-competition_en.pdf.

¹¹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, 2022 O.J. (L 330) 1 (EC).

¹² Varg Folkman, *EU Strapped for Staff to Combat Chinese Subsidies*, POLITICO, (Oct. 5, 2023), <https://www.politico.eu/article/european-union-commission-foreign-subsidies-regulation-unit-strapped-staff/>.

15. In any event, there tends to be a period of some uncertainty while new regimes “settle in,” before authorities’ prioritization and practices are made clear. During that time, meaningful guidance to business is critical in order to ensure common understanding and to clarify an authority’s interpretation of the law; whether through formal guidance or soft law measures.

7. Agency Expertise

16. BIAC agrees that authorities should be able to access non-legal technical expertise that may be needed to effectively analyze new market developments, technologies, or business models. Authorities should reflect on what these different skills bring to the investigative process, what weight to give to different experts’ analysis, and what authority their arguments may have in any competitive assessments.

17. In doing so, authorities should seek to draw on existing government resources or bodies, notably to better understand what policy choices the legislature has taken and what regulatory philosophies underpin particular sectors, especially where sector regulators do not have concurrent competition powers. Developing formal mechanisms for dialogue, exchanges of information and sharing personnel can also be helpful in providing expertise in specific areas. New competition challenges increasingly arise within the context of established legal frameworks which traditional competition law analysis must have due regard to. One example would be the interplay between competition law and intellectual property rights, which may grant the rights holder the ability to exclude competitors. In that context, engaging with patent offices can place it into a broader context, ensure delineations of regulatory competency and help promote an understanding competition policy.¹³

8. Enforcement Powers

18. Authorities are seeking broad powers that can then flexibly be applied to new challenges, e.g., rulemaking authority or new market inquiry interventions. BIAC urges authorities to ensure that new tools align with due process and procedural fairness requirements; obviously, the broader the powers the more important it is to have meaningful checks and balances, notably effective judicial oversight. As the OECD Competition Committee has pointed out, “Fairness and transparency are essential for the success of antitrust enforcement, and regardless of the substantive outcome of a government investigation it is fundamental that the parties involved know that the process used to reach a competition decision was just.”¹⁴

19. While new powers are often adopted to address a situation that existing powers cannot tackle, BIAC deems it important that there is analytical consistency across various powers, analytical tools, and theories of harm. It is important that authorities swiftly issue guidance on how new powers will be applied and what the authority’s prioritization approach will be. In particular where new powers are closely linked to industrial policies (or affect them, such as the review of foreign investment or broad sector inquiry powers),

¹³ OECD, Interactions Between Competition Authorities and Sector Regulators – Contribution from BIAC, DAF/COMP/GF/WD(2022)64 (Nov. 18, 2022), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2022\)64/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2022)64/en/pdf).

¹⁴ OECD, Procedural Fairness and Transparency: Key Points 23 (2012), <https://www.oecd.org/daf/competition/mergers/50235955.pdf>.

such guidance should provide greater certainty and help to limit the impact of political influence.

9. Investigative Tools and Processes

20. The increased use of digital forensics software or advanced technology tools in investigations raises a particular concern for business as relates to information gathering. Authorities' Requests for Information (RFI) may be overly broad and advanced tools may identify a large number of internal documents as relevant. Voluminous information requests can place a significant burden on business, including companies that are not the targets of an investigation, who need to have the time to meaningfully review internal documents and assess their nature and content, whether they are subject to legal professional privilege or contain business confidential information.

21. This exercise – critical to ensure that an authority properly understands documents (especially where specific documents require contextualization) and to the protect rights of businesses – can also impose significant cost and create tremendous distraction or disruption of day-to-day business, notably where RFIs require continued input from custodians, whose main role is running a business. Newer investigative tools should therefore be used proportionately in a manner that balances the effective application of competition law, on the one hand, with the likelihood that a respondent holds relevant information, along with the cost and burden on companies of complying with requests for internal documents, on the other hand. BIAC urges authorities to set out in greater detail how such a balancing exercise will be undertaken in the context of new tools. The increased RFI burden that companies are facing, particularly those not the targets of competition proceedings, has led the International Chamber of Commerce to publish a report and recommendations based on transparency and dialogue.¹⁵ BIAC urges the OECD Competition Committee members to draw from these principles.

22. In particular, the issue of legal privilege becomes more pointed where authorities seek documents generated and/or held in another jurisdiction that protects legal privilege. BIAC urges the OECD to develop guardrails to avoid new investigative tools seeking access to protected documents and to set up mechanisms to ensure that well-established comity principles are not infringed. These could include best practices, such as authorities committing not to seek blanket discovery of documents that are covered by legal privilege.

10. Cooperation and Information-Sharing

23. Cooperation between domestic or international authorities is a topic that the OECD has debated in detail. It is clear that where the legal framework and/or facts are closer, the easier it is to cooperate and share information. Where laws and/or facts diverge, cooperation should be seen in the context of avoiding decisions and remedies that have extraterritorial impact.

24. Conditions and limits around information sharing should not be mutated on an issue-specific basis, as this would breach principles of non-discrimination and procedural fairness. It may be, of course, that increased sharing of approaches and experiences

¹⁵ Int'l Chamber of Commerce, Report and Recommendations on the Effective and Efficient use of Requests for Information in Competition Investigation and Studies (Oct. 2023), <https://iccwbo.org/wp-content/uploads/sites/3/2023/10/2023-ICC-Report-and-recommendations-on-Requests-for-Information-in-competition-investigation.pdf>.

(including capacity building) based on decisional experience will help to increase competence and avoid excessive inconsistencies, so long as these respect the rights of the parties.¹⁶

25. It is also true that there are legal limits to the sharing of information gathered during proceedings or covered by privacy and data protection rules. There will, however, be tensions where authorities are implementing new tools that do not fit strictly into the classic enforcement context, e.g., *ex ante* regulation or market inquiry interventions, or where authorities seek information held in other jurisdictions (and maybe covered by specific rules). The OECD has an important role to play to ensure that comity principles have meaning and substance and that market participants can have recourse in them, if need be. BIAC would encourage the OECD to develop best practice guidance for its members and further afield.

¹⁶ See OECD, Note by BIAC – Proposal to Change the Recommendation of the Council Concerning International Enforcement Co-operation on Competition Investigations and Proceedings ([OECD/LEGAL/0408](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)27/en/pdf)) into a Decision-Recommendation, DAF/COMP/WP3/WD(2023)27 (June 13, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)27/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)27/en/pdf).