France

Comments from BIAC

GCR's interview with Frédéric Jenny was arranged through the OECD's Business and Industry Advisory Committee (BIAC). Here, BIAC's Competition Committee chair Lynda Martin Alegi, of Baker & McKenzie, and special adviser Calvin S Goldman QC, of Blake Cassels Greydon, say a few words on the important role Jenny has played at the OECD.

Lynda Martin Alegi: Fred plays an invaluable role in maintaining the OECD competition committee as a forum in which all stakeholders are properly represented and at which there is critical analysis of competition policies, strategies and measures within a positive environment. The universal respect for Fred ensures that the debates he organises are taken seriously by all. BIAC appreciate the unique role Fred plays in promoting consensus in its understanding of the issues which are clearly important for the business community.

Calvin S Goldman QC: As someone who has had the pleasure of working with Fred both when I participated as vice chair of the OECD competition committee when I was head of the Canadian Competition Bureau, and subsequently on behalf of BIAC since the mid-1990s, I'd like to add a few points that illustrate in specific terms the kind of forward-thinking initiatives that Fred has brought to the OECD. In my view and the view of my colleagues, these are clearly beneficial and important for the business community, as Lynda's statement reflects.

By way of illustration, first, Fred led the OECD competition committee work in the area of best practices for merger review procedures. That work began in the early 2000s and involved extensive consultation with BIAC and the ICC. BIAC actually spearheaded that work. Jim Rill and I were very much involved along with Peter Plompen and other BIAC leaders, and it gave rise to the first set of OECD recommendations for international merger review process that came out in 2005.

BIAC and the ICC provided a detailed set of proposed considerations for the OECD committee. That was done in October 2001 and the work continued right through to the OECD's recommendations in 2005. It was a four-year working project with a great deal of involvement by members of the OECD committee and BIAC together, all directed towards the objective of reducing unnecessary transaction costs in mergers and improving, by way of consensus, the nexus for notifications, the timing of notifications and trying to bring about more norms directed toward procedural fairness in the merger review process.

All of this was work that received further impetus and attention following the quite visible conflict that occurred in the GE Honeywell decision-making – between the US Antitrust Division and the Canadian Competition Bureau on the one hand, which had cleared the proposed merger, and the European Commission, which then blocked it. That came to a head coincidentally in the first Global Forum here at the OECD in October 2001. It was a catalyst to move forward the work that had started through the OECD competition committee's mandate in the year 2000.

As Fred has said, those recommendations, coupled with the great efforts by many nations to see more convergence, have so far led to no conflict similar to GE Honeywell. Hopefully we won't see one again.

A second area in which the competition committee has been quite active and has sought BIAC's significant involvement has been in the ongoing fight against hard core cartels. That has led to various projects and recommendations. A key example is the earlier set of recommendations of March 1998, again a project that Fred Jenny spearheaded. There have been derivative projects of some significance since then, including the issues that were the subject of significant debate at the OECD in 2002 pertaining to information sharing among competition authorities in cartel cases.

There was a roundtable in 2002, for example, which involved considerable discussion about recommendations and factors for consideration in this area with BIAC playing a very direct role in that process. BIAC's concerns, which reflected the ongoing concerns of the business and private sector legal community, pertained to the divergence in domestic competition authorities' legislation between those that provided significant protection for information seized or otherwise provided in the context of cartel investigations, and those that did not have the same protections. These discussions and the related projects were directed toward looking at ways and means to achieve appropriate safeguards for the protection of commercially-sensitive business information. There were indeed recommendations made by the OECD competition committee in that area in 2005, and the work continues to this day.

A third area is the work done in relation to abuse of dominance cases. Under Fred's leadership there were projects that were the subject of the committee's focus, such as looking at what evidentiary thresholds are appropriate in abuse of dominance cases. BIAC once more played what we think is a significant role, as it provided to the committee the perspective of the international business community on a number of the topical issues in these cases.

A fourth and very important area is the interface between competition authorities and other mandates of governments, especially those that oversee other regulated sectors. This has been a focus of the OECD for some years and was one that Fred led from 2005. It became a rather significant area of work, especially in the context of the financial crisis of 2008.

Fred had begun looking at the area before the financial crisis, again reflecting his forward thinking about the need to clarify the role of competition authorities and other regulated sector
authorities in domestic governments and internationally. One of the objectives was to see if there were principles or a consensus that could be attained about the proper role of competition authorities when interfacing with other government authorities, for example in concurrent merger reviews. That work became much more focused in the context of the financial crisis; Fred, in his own usual modest way, didn’t refer in the interview to the remarkable panel that he put together in February 2009.

It was during the financial crisis, while the proposed merger between Lloyds and HBOS was being debated, that Fred organised a set of panel discussions at the competition committee among leaders of both the competition community and leaders of the financial regulatory community, which led to some very interesting and constructive discussions. That also was around the time of the proposed mergers of Bear Stearns with JP Morgan and of Merrill Lynch with Bank of America. Fred also invited participation by representatives of the private sector, including BIAC. There was a very real degree of consensus, which reflected an informal understanding that when firms are failing in the financial sector, especially in difficult and challenging economic times, the competition authorities must work very closely with their financial sector regulators. In that regard, they must appreciate that financial sector regulators have a primary role to maintain financial prudence and to protect the integrity of the financial system, and that the competition authorities, while not in any material way abandoning or deferring their role, need to apply their mandate in a realistic framework that recognises the vital importance of financial prudence. A case in point is the decision by Neelie Kroes of the European Commission to shorten the competition review period in the interests of financial prudence in the case of the BNP Paribas/Fortis merger.

Fred should take considerable credit for having led those comparatively delicate discussions, especially in the midst of the financial crisis. BIAC was right in the middle of all of that, with a number of us actively participating in the discussion at the committee; BIAC’s paper on the topic was subsequently published.

Fred is viewed by the business community as an exceptionally insightful and forward-thinking leader in this field. He has been very inclusive of views from the business community at all material times. He has generated an atmosphere of consultation directed toward increased cooperation. I think the results speak for themselves.

Fred also has set a standard of preparation for the OECD competition committee meetings that goes well beyond anything that many of us saw in prior years. Unless one has participated in these meetings, one can’t really appreciate this last comment. When Fred walks into a competition committee meeting, he doesn’t just conduct a round table asking delegates for their summaries of key positions. He has prepared a set of questions with comments that reflect many, many hours of his own preparation for that round table. The questions, comments and debate that he generates are at the highest level of analytical insight, which is indeed a reflection of the exceptional capabilities that Fred brings to the table. BIAC is very pleased that he’s there and we hope he continues to be at the helm of the committee for many years to come.