

## Discussion Points

### **Are Competition and Democracy Symbiotic? Presented by the Business and Industry Advisory Committee (BIAC) to the Global Forum on Competition December 2017**

#### **A. Introduction**

1. The Business and Industry Advisory Committee ("**BIAC**") of the OECD is pleased to contribute to the OECD Competition Committee's Global Forum on Competition for its discussion on competition and democracy. The ability for economic entities to compete freely is a key pillar of free and open markets. Open market competition is not only a theoretical underpinning of democracy; it is a barometer of how solid the foundations of democracy are. Indeed, a transparent, predictable, objective and effective competition regime is a litmus test for a democratic state, as such a regime reflects respect for economic and other basic rights.
2. Economic activities engage a whole host of fundamental rights and freedoms that require respect, non-interference and protection by the state. These include the respect for property, including intangible property rights; that also includes non-interference (absent judicial authority) in the rights of economic actors to conduct a business and choose business partners; freedom of association; freedom of expression; the right to privacy; and, of course, the right to a fair trial, in the context of administrative and judicial proceedings. These rights are many of the core rights that well-functioning democratic societies need to uphold.
3. Therefore, where competition mandates are created and competition policies are enacted, it should be clear that their effective functioning – according to political, economic and social rights norms – should be seen to be supporting the democratic system within the country in question.
4. The essential connection between competition and democracy has several additional aspects. A key connection is the importance of the goal of promoting efficiency in ensuring socially-desirable outcomes. BIAC would emphasise<sup>1</sup> the role of competition policy may have in furthering the broader public interest goals in emerging economies, and achieving sustainable development objectives, such as poverty alleviation, job creation and economic growth. There is

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<sup>1</sup> See also the Summary of Discussion Points Presented by the Business and Industry Advisory Committee to the OECD Competition Committee Working Party No. 3 on Co-operation and Enforcement, "Public Interest Considerations in Merger Control", June 2016 ("Public Interest").

often a close link between such public interest goals and the need to support young democracies. Indeed, in developing and least developed countries the overarching competition policy priority may be socio-economic development itself and support for competition authorities in such countries may depend on how they are seen as contributing to such sustainable development objectives, that are critical conditions for democracy to take hold.<sup>1</sup>

5. Another equally critical link between competition and democracy for consideration is the importance of the institutional design of competition authorities. This paper therefore recalls earlier work of BIAC in this area: Independence of Competition Authorities – From Design to Practice (“Independence”).<sup>2</sup> The design of agencies should focus on ensuring the most pro-competitive outcomes possible; but it must do so in a manner that will maintain the confidence of businesses and citizens alike, without which the enforcement of competition laws will ultimately lack not only legal and economic legitimacy, but also political legitimacy. Ensuring competition agencies maintain their political, legal and economic legitimacy reinforces the link between competition and democracy. In that context, competition authorities function within a broader constellation of democratic organs, including the legislature and courts. In their function, authorities should be willing to exercise ‘regulatory humility’ in the face of other critical organs of a democratic state.
6. A third connection between competition and democracy consistently focused on by BIAC and its members is the role of competition law and enforcement in fighting corruption, through measures against bid-rigging and bribery in public sector procurement.<sup>3</sup> Criminal activity of this nature undermines not only the competitive process but the institutions that underpin democratic systems. The International Competition Network has also been active in promoting greater enforcement in this area, to support democracy.<sup>4</sup> Effective competition built on the principles of independence and accountability, transparency of the process and normative substantive principles, will all have an effect on the fight against corruption, which can act as a major impediment to both democratic and economic development.

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<sup>1</sup> See ‘Prioritisation in Antitrust Enforcement – a Finger in Many Pies’, Hilary Jennings, ‘Competition Enforcement in a Multi-Polar World; Issues in Institutional Design and Practice’, *Competition Law International Special Edition* 2015.

<sup>2</sup> See Summary of Discussion Points Presented by the Business and Industry Advisory Committee to the OECD Competition Committee Global Forum on Competition “Independence of Competition Authorities – From Design to Practice”, 2 December 2016.

<sup>3</sup> See Summary of Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the Global Forum on Competition Roundtable on Fighting Corruption and Promoting Competition, February 2014 (“Fighting Corruption”).

<sup>4</sup> See, for example, the ICN Cartel Working Group’s work in the area of fighting bid-rigging in public procurement. See also the OECD’s Recommendation on Fighting Bid-rigging in Public Procurement, dated July 17, 2012.

## **B. The Vital Link between Competition and Democracy**

7. In Public Interest, BIAC noted the goals of competition law as including not only the efficient allocation of resources in free market economies, but also the broader public interest in democracy.
8. The OECD has noted there exists a “general consensus that the basic objective of competition law is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources in free market economies”. A survey of competition law by the International Competition Network in 2007 found a majority of competition authorities around the world pursue the goal of consumer welfare and promotion of a free market economy through efficiency.
9. Without going into a detailed discussion of the appropriate welfare standard, it is fair to say that many economists generally favour a total welfare standard. After all, it is not only common sense but most economists agree that investment, innovation and more generally dynamic efficiencies are of significant importance for the development of a sustainable economy. The promotion of this important objective of dynamic efficiency signals the role of competition law in driving invention, development and the diffusion of new products, with a concomitant increase in social wealth as a whole.
10. BIAC believes that these core competition law goals are an important aspect of what may be interpreted as the broader public interest in democracy. As the OECD has noted, a “solid competition policy framework may help in itself achieve sustainable development objectives, such as poverty alleviation, job creation and economic growth”<sup>5</sup>. Indeed, public interest benefits are already inherent within an established competition regime.
11. For example, maintaining a competitive market contributes to the non-efficiency goal of decentralizing economic and political power key pillars of democracy. In fact, antitrust scholars have emphasized competition law’s beneficial impact on the public interest from as early as the 1970s.
12. An effective competition regime promoting maximum efficiency can lead to the enhancement of social and political policy by providing a neutral marketplace, i.e., “an even playing field”. In his 1977 article, Kenneth Elzinga found that “efficiency and equity are not mutually exclusive domains”<sup>6</sup>. While Elzinga recognized that antitrust laws will not tackle issues such as income redistribution head-on, he argued that a well-implemented competition regime can contribute positively to wealth redistribution by leading to less accumulation of concentrated wealth from

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<sup>5</sup> See Background Paper at para 12, p 5.

<sup>6</sup> Kenneth G. Elzinga, “The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?” (1977) 125 U PA L Rev 1191 at 1193.

capitalized monopoly positions<sup>7</sup>. Therefore, equity goals such as redistribution of income are “indirectly and costlessly promoted by a direct attack on inefficient, anti-competitive market structures and practices”<sup>8</sup>.

13. Similarly, Joseph Brodley noted that there exists a unity between what appear to be “purely” economic goals of competition and the social and political foundations of the law: “the pursuit of the correctly defined economic goals of antitrust will generally advance the social and political objectives of the law as well”<sup>9</sup>. William Baxter, who was one of the drafters of the United States 1968 Merger Guidelines commented: “[f]requently, the antitrust laws’ concern for protecting and improving economic efficiency also serves to further social and political goals”<sup>10</sup>.
14. It is notable that, under Article 21(4) of the the European Merger Regulation, member state governments are permitted to intervene in mergers in albeit restrictive circumstances; two that relate to economic or political stability (prudential supervision and public security) and media plurality - that are all critical to a well-functioning democratic society.
15. The role of competition in promoting the broad benefits of innovation should also be considered. Innovation has a remarkable capacity to propel economic growth and job creation. The future prosperity of an economy is intractably linked to its promotion of research and development (“**R&D**”).<sup>11</sup> In 2007, the OECD concluded that innovation has been the primary driver of the increases in material standards of living that have occurred since the industrial revolution.<sup>12</sup> Though economists disagree over the precise impact of R&D spending on economic growth,<sup>13</sup> there is a general consensus that the benefits of innovation are significant.<sup>14</sup>
16. In the context of competition policy, the interplay between innovation, job creation and mergers is complex. While some mergers may have the potential to lessen innovation (by reducing the incentives to innovate), many increase innovation by combining R&D resources and

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<sup>7</sup> *Ibid*. Elzinga concedes that competition law may only make a “modest or unmeasurable contribution” to non-efficiency objectives such as public interest, but other areas of law and policy (such as corporate tax) can supplement such modest contribution to achieve the desired social goal, at 1200.

<sup>8</sup> *Ibid* at 1202.

<sup>9</sup> Brodley, *supra* note 6 at 1021.

<sup>10</sup> William F. Baxter, “Responding to the Reaction: The Draftsman’s View” (1983) 71:2 Cal L Rev 618 at 619.

<sup>11</sup> J. Brodly, “Proof of Efficiencies in Mergers and Joint Ventures” (1996) 64 Antitrust Law Journal 575. Also worth noting that in his seminal research into the determinants of economic growth, Robert M. Solow determined that approximately four-fifths of growth in U.S. output per worker during the first half of the 20<sup>th</sup> century was attributable to technical progress. See: Robert M Solow, *Technical Change and Aggregate Production Function*, (1957) 39 Rev. Econ. & Stat. 312.

<sup>12</sup> OECD, “Innovation and Growth: Rationale for an Innovation Strategy” (Paris: OECD, 2007) at page 6.

<sup>13</sup> Some economists have challenged Solow’s quantitative analysis.

<sup>14</sup> Edwin Mansfield et al., “Social and Private Rates of Return from Industrial Innovations”, (1997) 91 The Quarterly Journal of Economics 221. This article suggests that R&D displays a very high marginal social return.

streamlining product innovation. Yet other mergers may enhance the productivity of the merged entities, thereby ensuring longer term goals of employment and economic development. These innovation and productivity-enhancing mergers may, in turn, generate new, high-paying jobs within their respective jurisdictions.<sup>15</sup>

17. Echoing the sentiments above, the Australian National Competition Policy Review of 1993 found that “the promotion of competition will often be consistent with a range of other social goals”<sup>16</sup>.

### **C. Legitimacy and Accountability in the Institutional Design of Competition Agencies**

18. 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 individual or joint conduct. In BIAC's view, the institutional design of an agency should very much mirror the basic design of democratic institutions; independence, neutrality, transparency, political and judicial accountability, and respect for separation of powers. 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 in the eyes of both business and its citizenry, thereby supporting democratic ideals.
19. 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.
20. Just as independence from government is important to an authority's legitimacy, so too is an authority's independence from specific business interests. 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.

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<sup>15</sup> The links between innovation and job creation are well-established. See, e.g., Greg Linden, Jason Dedrick and Kenneth L. Kraemer, “Innovation and Job Creation in a Global Economy: The Case of Apples’s iPod”, (2008) 3:1 *Journal of International Commerce and Economics*; Michael E. Porter and Mark R. Kramer, “Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth,” *Harvard Business Review* (January February 2011). See Summary of Discussion Points, “Does Competition Kill or Create Jobs?” presented by the Business and Industry Advisory Committee to the Global Forum on Competition, 29 October 2015.

<sup>16</sup> Frederick Hilmer, Mark Rayner and Geoff Tapewell, “National Competition Policy Review” (1993) Australian Government Print Services, Canberra, Australia at p 5.

21. In Institutional Design, BIAC stressed independence from government political considerations as an important feature of the institutional design of competition agencies. Of course, to preserve an appropriate democratic balance, independence must be balanced with accountability.
22. Independence from government politics "de-politicizes enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political term to the next". These outcomes are significant features of a properly functioning democracy, governed by the rule of law. Such independence from government can also have a considerable impact on market stability and the facilitation of investment, each of which support an open economy.
23. Independence is important to avoid competition law being used to achieve political or industrial goals that have little to do with the broader goals of efficiency referenced above. 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.
24. While there is no single model to guarantee independence of a competition authority, in Institutional Design BIAC outlined a number of common safeguards that can be adopted to improve the degree of independence of competition authorities from unprincipled government or other political interference, such as structural separation of the competition authority from the authority of the government and its ministries.
25. Ultimately, competition agencies' ability to resist political interference 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.
26. 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 efficiency. Yet the ways that an agency may be accountable to government can represent significant barriers to competition authorities by affecting their actual, practical independence. 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".
27. Government or political pressure can take the form of budgetary pressure on a competition authority. 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. 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.

28. 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. To ensure fair and neutral decision-making, competition authorities must be free from any direct or indirect influence from market participants and must ground their decisions in their transparent processes. Just as independence from government is important to an authority's legitimacy, so too is an authority's independence from specific business interests.
29. Greater transparency, too, 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 priorities, then political and government intervention becomes less likely and more difficult to justify.
30. The question arises of whether incorporating public interest criteria in competition law may be legitimate to the extent they respond to public concerns and hence may appear to contribute to political democracy. In BIAC's view, where broader public interest factors can be taken into account under competition legislation, defining these clearly with a complete and exhaustive listing of such factors is desirable and allows for predictability in the process. Moreover, a well-defined set of factors to which the competition authority may refer in its decision-making diminishes the ability of government and politicians to attempt to use competition as a means of achieving ulterior industrial or political goals.
31. Another 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.
32. Finally, separation of competition authorities from governments should not amount to absolute disengagement. 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. Complete insulation from the political process denies competition agencies the ability to effectively advocate for competition in the political arena.

33. In a democratic society competition authorities are created to carry out a specific function, under a specific mandate. This mandate, usually created through the democratic process, would be frustrated if authorities took decisions that promoted interests – whether political or business related - that are not set out in its mandate. This is not only a concern for entities seeking legal certainty but is a very direct undermining of the function of competition policy in a democratic society.

#### **D. Anti-Corruption**

34. In *Fighting Corruption*, BIAC emphasized the three pistons of effective competition – the independence and accountability of the decision maker, the transparency of the process and the application of normative substantive principles. BIAC there highlighted how the issues of corruption, bribery and bid-rigging had become major topics of discussion both in developed and developing countries. A consensus had been established that corruption served as a deterrent to both investment and economic growth, as business investors are reluctant to invest in unpredictable and unsecure environments.
35. Business has just as strong an incentive to fight corruption, of which business is often the victim, as groups fighting corruption as a way to advocate good government. The fight against corruption is indispensable to economic development. In addition to minimizing costs associated with corrupt markets, an increase in government accountability and transparency boosts investor confidence and maximizes anticipated returns, thereby encouraging foreign investment. The value that international investors place on transparency when selecting where to invest is well-documented. The preference for transparent governance is not surprising, given that investment decisions depend heavily on the predictability and fair application of rules. Business investors abhor unpredictability and are more willing to invest where there is increased transparency and government accountability. Accordingly, the role of competition authorities in the fight against corruption and through it, the realization of economic goals such as investment, development and growth is an important contribution to democracy.

#### **E. Conclusion**

36. In BIAC's view, competition and democracy are indeed symbiotic. Competition is a key pillar of free and open markets, which in turn are an essential foundation of democracy. Effective competition regimes support democratic goals and mirror key principles that underpin modern, open democracies. By ensuring efficient and socially-desirable outcomes a country's competition regime is essential to ensuring free market outcomes, including broad participation in economic activity, as well as to the regime's very legitimacy as a democratic institution. By applying a framework that achieves sustainable development objectives and economic growth while combatting corruption, all in a transparent and predictable manner that is independent

from politics, a competition regime can simultaneously maintain the confidence of businesses and citizens alike, thereby promoting democracy.