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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**ANNEX TO THE SUMMARY RECORD OF THE 122nd MEETING OF THE COMPETITION
COMMITTEE HELD ON 17-18 DECEMBER 2014**

-- Summary Record of the Roundtable on Changes in Institutional Design --

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm*

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SUMMARY OF THE DISCUSSION

by the Secretariat

The Committee **Chair**, Frédéric Jenny, launched the Roundtable on Changes in Institutional Design by recalling that during the last Committee session it was discussed whether Institutional Design could become one of the Committee's new strategic themes. The Committee decided it was best to postpone the decision and to hold a roundtable instead, with a possibility that it could potentially become an introduction to further work. The Chair also noted that the OECD is often asked for its wisdom on institutional design, particularly by non-members that are adopting a competition law and creating a new competition institution. This Roundtable could be an opportunity for the Committee to identify a set of issues worth considering when an Authority contemplates introducing changes in its design.

The Chair pointed to the high number of contributions (31 in total) and stressed that the concept of 'institutional change' has become a little loose as some of the contributions discussed changes that had taken place quite a while ago. The Chair then noted that on the positive side, countries seem to be pleased with their institutional designs. On the negative side, however, all seem to think that the resources they have are insufficient. Moreover, the contributions reveal that instead of completely overhauling their systems, countries tend to introduce small changes in their institutional designs, and that such changes are also relatively frequent. This indicates that there is a lot of experimenting with trying to find the best institutional design possible. The Chair then stressed that probably the most important aspect of the Roundtable concerns the fact there is no one-size-fits-all: as the optimal design very much depends on the local conditions, it will be important to explore what are the local circumstances that countries should consider when they plan to introduce changes in the institutional design of their authorities.

The Chair explained that the major issues to be discussed during the Roundtable concern: (i) the combination of different functions in a single authority; (ii) the notion of independence; and (iii) the internal governance of the authority. With respect to multi-function authorities, the first set of issues concerns the combination of competition and consumer protection functions, while the second the combination of competition and regulatory functions. Such combinations raise a number of questions, for example about the quality of decisions or the objectives of a multi-mandate authority. Overall, the contributions clearly convey a message that choices concerning institutional design raise a large number of trade-offs.

The Chair then introduced two expert panellists: Professor Allan Fels (University of Melbourne, Australia) who would present a paper on the combination of competition, consumer protection and sectoral regulation functions, and Professor William Kovacic (George Washington University, US) who would discuss the notion of independence.

1. Multi-function authorities

Professor Fels first indicated that competition authorities may indeed have multiple roles; they may be entrusted with competition, consumer protection and regulatory powers. But they may also have other functions, for example with respect to procurement or intellectual property. Professor Fels observed that there is a kind of a 'North Sea dumping' effect in the world of competition law, which means that

governments often resolve a given problem by delegating it to the competition authority. As a result, competition authorities are entrusted with a whole lot of different tasks.

Regarding the combination of competition and consumer protection functions, Professor Fels remarked that they can be either complementary or conflicting. Clearly, competition is the best form of consumer protection while consumer protection can likewise promote competition since an informed market is likely to work more competitively than one that is not informed. However, sometimes both policies can clash. To illustrate the problem Professor Fels referred to the paper he co-authored with Professor Henry Ergas¹ in which they discussed a few examples of previously regulated markets that were opened up to competition and in which they identified a number of instances where the opening has generated new challenges for consumer protection.

Professor Fels moved to highlight the rise of behavioural economics, which at first sight appears to suggest a case for more consumer protection as it emphasises the cognitive limitations and shortcoming of consumer choice. However, according to Professor Fels competitive markets will often come up with solutions to a given problem. Therefore, it is important to bear in mind that while behavioural economics focuses on the demand side, one has to look as well at supply responses, as in competitive markets these responses may address some of the concerns, thereby eliminating the need for government intervention. However, Professor Fels and Ergas have also observed that on the supply side firms that observe cognitive limitations on consumer behaviour and deficiencies in rational decision-making process may actually exploit them through advertising and other means.

Professor Fels indicated that his paper also discusses a number of new developments, such as internet marketing. According to Professor Fels, the biggest consumer protection problems arise for people who are vulnerable or disadvantaged in some sense. Therefore, consumer protection policies should give particular emphasis to problems in that area.

Professor Fels then went on to highlight some other recent developments, in particular (i) the expanding role of markets (i.e. discussions about introducing more competition in the area of professions) and (ii) the growing role of choice and competition in public markets (such as in the provision of social services in education, healthcare or aged-care). In these areas there are many special challenges that need to be addressed.

Turning back to the question of challenges in establishing optimal institutional design, Professor Fels referred to some of the benefits that the integration of various functions can offer. Remarking that in his paper he dealt separately with the combination of competition and consumer protection functions from regulation, he indicated that one of the big arguments usually advanced for integrating these two functions is that consumer protection is usually very popular with the public. Activities concerning consumer protection generate a kind of political capital for the competition authority that helps the authority when it takes unpopular and difficult-to-understand actions in the field of competition. It is also argued that it is best if consumer protection policies and laws are enforced by people with a market and pro-competition approach.

However, there are also costs of integrating competition and consumer protection functions. In particular, differences in substance and implementation can render integration difficult and limit its advantages. Also, consumer protection may be applied at many levels of government whereas competition

¹ Fels, A. and H. Ergas (2014), *Institutional Design of Competition Authorities*, paper drafted as a Background Note for the Competition Commission's session on Changes in Institutional Design, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)85&d_octlanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)85&d_octlanguage=en)

is usually a national matter. To illustrate problems posed by the integration, Professor Fels recalled the difficulties that the ACCC experienced when it was entrusted with consumer protection powers in the area of financial services. He then noted that merging competition and consumer protection functions can also impair finding a proper balance between various priorities. The same problem can arise when competition is merged with regulatory powers. As a matter of general and somewhat oversimplified principles, competition law proscribes while regulation prescribes certain behaviours, competition law applies *ex post* while regulation applies *ex ante*. Moreover, regulation may pose the problem of regulatory capture, although Professor Fels indicated that he was not convinced that regulatory authorities, in particular utility regulators, are actually captured. He then mentioned the choices concerning the scope of discretion that regulatory authorities are given and the degree of specialisation they are assigned. For example, one of the downsides of a too specialised regulator (i.e. the one responsible only for one sector) is the lack of economies of scope and potential inconsistencies in policy across different regulated sectors.

Professor Fels concluded by noting that it is difficult to draw universal conclusions as to whether competition should be integrated or not with consumer protection and/or regulatory powers. However, in his view the case for integrating competition and consumer protection appears to be a bit stronger than for integrating competition and regulation. Still, history, size and circumstances of a given country are highly relevant for finding the optimal institutional design for a given country.

The integration of competition and consumer protection functions

The **Chair** thanked Professor Fels for his presentation and suggested that the discussion start with the examination of issues raised by the integration of competition and consumer protection functions. In light of the submitted contributions it appears that seven jurisdictions have merged these two functions, three have separated them, while four – that considered integration – have in the end decided not to proceed with it. The Chair then turned to Finland that merged its competition and consumer protection authorities in 2013, and that considered this merger to be more complex than had been initially envisaged.

The delegate from **Finland** affirmed that during the planning process there had been a suspicion that after the merger competition matters would dominate consumer protection matters. Partly because of this concern, the legislation prescribed a specific organisational structure. The Council of State appoints the Director General of the authority and two senior directors responsible for competition and consumer protection areas. The director of consumer affairs acts also as the Consumer Ombudsman. The legislation has also further strengthened the status of consumer protection issues by not allowing the Director General of the authority to rule on issues coming under the supervision of the Ombudsman. The emphasis in the organisational structure is therefore on the separation of competition and consumer protection functions. The delegate added that the law in question requires the independence of monitoring and control functions in both policy sectors.

The delegate then remarked that instead of experiencing the problem of domination of one policy area over the other, other problems have arisen. For example, there is a ‘Chinese wall’ between both areas, which means that powers given to the authority in one area are not used to fulfil its functions in the other area. To illustrate the problem, the delegate referred to cartels and explained that the Consumer Ombudsman cannot be given information about any leniency documents submitted to the authority by a participant of a cartel, even though this kind of information is of critical importance if the Ombudsman simultaneously instigates a class action against the participants of the cartel. In that sense, separation of the two functions does not actually promote the achievement of competition and consumer policies’ common cause. Therefore, to create synergies that the merger of the two authorities can offer, the new authority has made a proposal to improve the powers of the Consumer Ombudsman.

The delegate then referred to the differences in the range of instruments for intervention: whereas substantial sanctions can be used in competition enforcement, in the area of consumer protection, the authority typically applies before the court for an injunction which can be then reinforced by the court with a conditional fine. According to the delegate, while conflicts between competition and consumer protection may arise, they should not be over-emphasised. To date, the authority has been able to resolve that kind of situations in a fairly satisfactory manner.

The **Chair** noted that Ireland has also faced challenges in the process of merging its competition and consumer authorities. In particular, Ireland's contribution to the Roundtable noted that such amalgamations can raise internal concerns that either the new institution, "will be dominated by pointy-headed economists who speak in impenetrable jargon or that it will pay more attention to issues which resonate with consumers than to harder to explain competition cases". The Chair asked how Ireland had chosen to approach these concerns.

The delegate from **Ireland** indicated that the Competition and Consumer Protection Commission came into existence after a long period of gestation on 31st October 2014. The plan to merge two authorities was announced in October 2008, at a time of economic recession when there was a general trend towards reducing the number of public sector bodies. One of the issues concerned the differences in qualifications of the staff working in the competition and consumer protection authorities and resulting impact on salaries and grades.

As for the new Commission's structure, it adopted the structure previously pertaining to the Competition Authority: a collegiate decision-making body with a chairperson and between two to four members who are also full-time executives. The fact that three of the four members of the new body came from the competition side led to some difficulties in the perception of the new authority and how it would balance its work. The delegate then stressed that both the competition and consumer protection sides had their own set of concerns. Competition staff were concerned that consumer protection issues are easier to explain and that they better resonate with the public. Consumer protection staff feared that competition issues would dominate the work of the Commission.

The delegate explained that due to limited resources on both sides, the new Commission had to focus from the start on prioritisation. Thinking about what it could not do, as well as what it could do, in terms of strategy has actually helped the Commission to bring the two sides of the organisation together. Also, it was decided that the Commission would have a very integrated structure. Putting together people who do enforcement, economic analysis or communications has really helped by allowing the staff to understand each other's contribution. The delegate then referred to two important pieces of the Commission's work where the legacy organisations' skills had proved to be complementary. One of them was a survey on consumer detriment, and it naturally came from the consumer protection side. The document identified the nature and extent of financial detriment experienced by consumers due to unsatisfactory purchases, and in general it has received a lot of coverage. The second document that concerned competition was guidance for consortium bidding for small and medium enterprises. While this document did not receive as much mainstream coverage, the communications expertise of the consumer protection staff allowed the authority to obtain a greater online coverage in the specialised and targeted forums. The delegate concluded by stating that having as integrated structures as possible and discussing together various issues upfront helps each side of the authority to see the benefits brought by the other side.

The **Chair** noted that Denmark was also extremely positive about the benefits of integrating consumer protection and competition functions. In its view such integration allows the authority to better understand the market, which in turn allows it to improve the quality of its decisions. However, the Chair asked the delegate how this benefit can be achieved if case handlers working on competition cases do not have much

professional contact with case handlers working on consumer cases, as mentioned in the Danish contribution.

The delegate from **Denmark** explained that the merging of competition and consumer protection authorities has produced two effects that can be described as the ‘tracking-boot’ effect and the ‘high-heel’ effect. The first one is essentially about the effectiveness of the authority. In particular, it refers to the fact that analysis is now carried out by people who are experts in competition and in consumer protection issues. This allows the authority to make better recommendations to politicians as it now has a better understanding of both the supply and the demand side of the market. The ‘boot-tracking effect’ also refers to lower operational costs of the merged authority. The ‘high-heel’ effect, on the other hand, means that it is much easier now for the authority to get attention from journalists, politicians or consumers, irrespective of whether it does something in the area of consumer protection or competition, as it has the same name in the press. Another important benefit of the merger is the creation of a workplace that is more attractive for the staff since employees can now move between two areas.

The **Chair** asked the delegate whether there was still the division between the competition and consumer protection economists during the investigation process, and if so, whether such division is desirable.

The delegate from **Denmark** replied that this was a tricky question. In the delegate’s view, the authority would most certainly benefit from having teams with staff from both sides. At the moment employees can move between the two areas, however it would definitely be beneficial to have more flexibility in that regard.

The **Chair** subsequently gave the floor to the US, which presented another argument in favour of integrating competition and consumer protection functions.

The delegate from the **US** (the FTC) indicated that the FTC was founded in 1914 as an antitrust agency. While its mandate was to prevent unfair methods of competition, the FTC from the outset experienced a very clear overlap between antitrust and consumer protection issues. Until the 1930’s when the Supreme Court laid down fairly stringent requirements for proving injury to competition, the FTC dealt with complaints concerning false claims as cases of unfair methods of competition. Following the Supreme Court’s jurisprudence, the organic statute of the FTC was amended. The Commission was entrusted with a separate authority to prosecute unfair and deceptive acts or practices, thereby acquiring an explicit authority to deal with consumer protection issues.

Competition and consumer protection are, however, lodged in separate bureaus. There are, however, some mechanisms that facilitate the integration of the missions. First, the FTC’s commissioners’ responsibilities encompass the agency’s competition and consumer protection missions, including prosecuting and adjudicating both types of cases. Second, the competition and consumer protection bureaus both work with the Commission’s Bureau of Economics. Third, three of the FTC’s seven regional offices and some other Commission offices handle both competition and consumer protection matters and in these offices many lawyers work in both areas. According to the delegate the fact that the same authority handles both antitrust and consumer protection cases and that both missions serve the same ultimate consumer welfare goal facilitates an integrated approach and avoids a bureaucratic competition that could exist if the two functions were handled by separate authorities.

The delegate observed that occasionally both competition and consumer causes of action are pled in the same case. For example, a recent case against Intel was predominantly an antitrust monopolisation case. However, it also concerned deceptive claims about the performance of Intel’s and its competitors’ chips. Also, recently the FTC has looked at the competitive effects of patent assertion entities. In one case

a company was buying up patents and telling small businesses that those patents were being infringed and that others have paid damages, and if they do not pay they will be sued. It turned out that none of those claims were true, so the FTC brought a case under its consumer protection powers to stop the practices in question. Another area of potential synergy involves the intersection of competition and data privacy issues. For example, in the context of Facebook's acquisition of WhatsApp, pursuant to the relevant statute and case law the FTC looked only at the competition implications of the merger, but separately and simultaneously the FTC's consumer protection bureau looked at privacy implications, and sent a letter to the parties admonishing them of the need to continue to uphold their privacy commitments. The delegate noted that some new theories suggest that the acquisition and control over large amounts of consumer data can confer market power and have anti-competitive effects, and therefore there may be a benefit to integrating powers in the areas of antitrust and data privacy.

The **Chair** noted that the American model with two authorities entrusted with antitrust powers, and one – the DOJ – with none over consumer protection, shows that different structures can be successful: one size does not fit all.

At the invitation of the Chair, the delegate from the **UK** presented the recent fairly major institutional changes introduced in the UK. First, the Office of Fair Trading (the OFT) and the Competition Commission were merged to form the CMA. Second, the "concurrency regime" was enhanced by strengthening the arrangements for co-operation between the CMA and the sector regulators that have concurrent competition law powers. Lastly, in the area of consumer protection, the system had been adjusted prior to the creation of the CMA.

Referring to the argument made earlier by Prof. Fels, the delegate explained that the UK competition authority had essentially always shared enforcement responsibilities in the area of consumer protection. According to the delegate the point, however, is not about whether the competition authority has consumer protection powers or not, but rather what the relative balance between authorities entrusted with competition and consumer protection powers is. The delegate noted that in the consumer protection area the CMA is now focused on cases that point to systemic market failures. Trading Standards Services' (TSS) role has been strengthened and TSS has taken on a new national enforcement role with Citizens Advice leading on consumer advice, education and advocacy. The delegate concluded by noting that the system still requires co-operation between various authorities in the area of consumer protection.

The **Chair** referred to the Korean contribution and noted that while in many countries there was a political decision to merge consumer protection with competition, in the case of Korea it was actually the KFTC that actively sought and succeeded in getting consumer protection responsibilities. The Chair asked why did the KFTC want to acquire these powers and what has changed since these powers had been granted to the KFTC.

The delegate from **Korea** explained that in 2008 the KFTC took over the consumer protection agency from the ministry of finance. This means that there has been a fundamental change in the implementation of consumer protection policy. Thanks to the newly acquired power allowing the KFTC to set up a master plan for the national consumer policy, the authority implemented many consumer-orientated policies. For example, in 2010 the KFTC established a consumer-counselling centre. Then, in 2012 it launched a website called 'smart consumer system' which allows users to compare information on quality, price and safety. The KFTC also enforces various policies that connect competition and consumer policies.

The **Chair** moved to Poland and asked why in its view it may be particularly useful for transition economies to have consumer protection and competition powers merged.

The delegate from **Poland** first remarked that Poland believes in the general case for combining competition and consumer protection authorities. Consumer enforcement tends to be seen as just an additional tool in the competition authority's toolbox.

The delegate mentioned that the Polish contribution identifies some specific aspects that are particularly relevant for transition economies. For example, there can be a trade-off between attracting investment during the initial phases of the transition, when very often monopolies are being sold off to external investors, and the desire to maintain some of the monopolistic power as compensation for the investor's risk. As a result, there have been examples where consumer choice remained limited and the benefits of privatisation were confined to management improvement or capital formation, with little immediate impact on consumer welfare. Thus, unless consumer protection perspective forms part of the liberalisation policy of a monopolised market, the benefit to consumers from competition can be substantially delayed. A single authority with merged competition and consumer protection powers can therefore offer sector regulators and governments a balanced view on how to pursue liberalisation without jeopardising consumer benefits.

Moreover, in less developed monopolised economies, delays in liberalisation subject consumers to abusive behaviour by incumbents, new entrants as well as free riders. For example, whenever a market had been liberalised in Poland, there had been an explosion of mis-selling, most recently in the residential electricity market. It turns out that new entrants often claim they offer benefits that actually do not exist or that put consumers in a worse position as they end up with a more expensive service. The delegate explained that in pursuing cases of collective consumer interest, the authority also seeks to ultimately promote fair competition. The delegate argued that while liberalisation is usually done through a regulatory policy, any impact assessment accompanying such regulatory decision would benefit from taking into consideration even a short-term impact on consumers. An authority with both powers seems to be well-suited to perform such a function.

The **Chair** turned to Iceland which considers that the move from a multi-function to a single authority nine years ago has enhanced the effectiveness of the Icelandic authorities.

The delegate from **Iceland** noted that from 1993 until 2005, the Icelandic competition authority was responsible for both competition and consumer protection issues. However, in 2005 it was decided that the authority should focus only on competition while consumer protection should be moved somewhere else. In 2005, a special committee investigated the effectiveness of the authority and concluded that it had been too slow and not effective enough. Consequently, it proposed to strengthen the authority by enabling it to focus exclusively on competition policy. Therefore, the reason behind the separation concerned the effectiveness of the authority rather than any incompatibility between the two areas.

In light of the experience with both organisational designs, the delegate concluded that the changes proposed by the special committee turned out to be right, as they have enabled the authority to become much more goal-oriented and that goal orientation has in turn facilitated prioritisation of the operations and tasks of the authority. Moreover, the clear focus has enhanced the quality of decisions and shortened procedures. Overall, the authority has become better known among the public.

The delegate also stressed that the authority has proven to be flexible in light of the changes occurring in the economy. In his view, the authority would have been much less equipped to face competition issues that emerged when Iceland experienced the collapse of the banking sector in 2008 if it had also been responsible for consumer issues, let alone sector regulation. Moreover, the separation of consumer protection and competition powers has allowed the authority to realise that competition policy is multi-dimensional, i.e. that in addition to protecting consumers, in particular by ensuring lower prices, competition should also increase productivity and enhance growth of the economy. Also, in the aftermath

of the separation the authority has become more independent, in a sense that the clearer focus brought a certain level of self-confidence that in turn strengthened its independence.

The delegate concluded by noting that there is always a danger that institutional changes may be used to reduce the authority's independence. This is where the OECD could play an important role, for example by admonishing the governments not to make institutional changes that could interfere with the activities of competition authorities.

The **Chair** turned to Japan and noted that in 2009 the Consumer Affairs Agency was created and that many of the consumer functions, which have been exercised by various ministries and by the JFTC, were aggregated under this new institution. The Chair wished to know whether there had been a debate about whether the new function should belong to the JFTC as opposed to a separate agency and whether the JFTC feels more goal-oriented now that it no longer has consumer protection powers.

The delegate from **Japan** confirmed that in 2009 the government established the Consumer Affairs Agency. Before that the JFTC had powers to fight misleading labelling, excessive advertising and other misleading representations under the Act against Unjustifiable Premiums and Misleading Representations while several other powers related to consumer protection fell under various ministries. As a result, it was sometimes very difficult to co-ordinate between different ministries and the boundaries between their respective roles and jurisdictions were sometimes unclear. For example, when the consumption of certain defective food products led to some serious medical problems to consumers, there was a delay in responding to the problem in light of a disagreement over which ministry actually had jurisdiction. It was consequently concluded that it is very important to have a special agency that would provide a one-stop place for consumers, and this is why the Consumer Affairs Agency was created. In that sense, the JFTC is now more focused on competition issues. However, it still maintains a close relationship with the Consumer Affairs Agency. First, the JFTC seconded some staff to the Agency. Second, the JFTC can collaborate with the Consumer Affairs Agency during the latter's investigations. Third, regional offices of the JFTC collaborate with the Consumer Affairs Agency during various phases as the latter does not have its own regional offices.

The **Chair** noted that it is clear that there is a trade-off between the desire to have a more integrated policy that enables the authority to look at both the supply and the demand side, and the risk of losing focus on consumer welfare. The Chair also noted that the Japanese intervention indicates that there may be a third option with respect to institutional design: in addition to either merging or separating competition and consumer protection functions, there may be an intermediate mechanism under which two separate authorities co-operate.

The integration of competition and regulatory functions

The Chair then moved the discussion to the integration of competition and regulatory functions and noted that Spain has recently integrated six different sector regulators with its competition authority. The Chair asked the delegate how much interaction there is within the authority given that it has separate competition and regulatory chambers.

The delegate from **Spain** first asserted that the combination of competition and sectoral regulation is a natural response to the development of competition in regulated sectors, where the process of fostering competition cannot be completed due to natural monopoly considerations. There is wide scope for exploiting synergies between competition and regulation within a single national authority, and such integration can offer legal certainty to market players. As for the internal working of the authority, there are working groups between the regulation and the competition staff. Each week there is one meeting for

the competition chamber and another meeting for the regulatory chamber. If it is considered necessary, all the members of the board meet to deal together with a given problem.

The **Chair** switched to the Netherlands that had also underwent some important institutional changes in 2013 when competition, consumer protection and some regulatory functions were integrated within one authority. He asked the delegate to elaborate on the issue raised in the Dutch contribution about the focus of a multi-function authority.

The delegate from the **Netherlands** first commented on Prof. Fels' contribution, noting that it focused on a pairwise analysis of competition and consumer protection, and competition and sector regulation functions, respectively, but did not consider the merits of having *all three* functions together. The delegate asserted that there is in fact a big overlap between consumer protection and regulation that also has an impact on competition. For example, in Europe many of the legal provisions in the energy and telecommunications regulations are devoted to the protection of consumers. Also, the main reason these sectors are regulated is due to the fact that competition is restricted by the very nature of these sectors, and because of their enormous importance to consumers. In that respect, there are certain synergies between empowering consumers in these sectors by encouraging them to switch between suppliers, and sharpening competition between suppliers. In that sense, a multifunction authority is, for example, in a position to focus on regulated sectors by launching campaigns that will sharpen competition. A successful campaign aimed at encouraging consumer switching in the energy sector is a case in point. Therefore, there are synergies that can arise from a holistic approach encompassing the three functions of competition, consumer protection and regulation.

Turning back to the Chair's question about the focus of a multifunction authority, the delegate agreed that putting different functions together creates a risk of fuzziness and that the question of how to stay focused is an important one. While the Dutch competition authority has only had multifunction powers for the last 18 months, there are a number of things that have been done to ensure that the authority stays focused. Most importantly, the authority developed one common strategy for all its tasks with one overarching goal: increasing consumer welfare. In its enforcement, the authority aims for tailor-made interventions based on a thorough analysis of market problems. Often during the analysis, the authority finds both competition and consumer or competition and regulatory aspects. Thus, multi-functionality allows the authority to customise the intervention to the problem at hand. In that sense, multi-functionality may be seen as leading to more focused interventions; not focused on particular functions but on market problems, and this is what ultimately matters. Second, the authority tried to strike a balance between function-focus and cross-functional synergies by structuring the authority on a functional basis. This means that there are competition, consumer and regulatory departments that work in connection with cross-functional networks. Also, there is a three-weekly meeting between the boards of all the directors to discuss strategic issues across all functions. Although there are still some unresolved challenges, according to the delegate the benefits of integrating competition and regulatory functions certainly outnumber the challenges.

The **Chair** switched to New Zealand remarking that it adopted a slightly different approach. First, instead of choosing integration, New Zealand opted for one of the intermediate ways that had been mentioned earlier in the discussion. Also, in its contribution New Zealand made an important point that each jurisdiction must consider a range of factors in the design of its institutions. The Chair wished to know how one should go about choosing the institutional design and how New Zealand in particular has decided to resolve the problem of co-ordination between competition and regulatory policies.

The delegate from **New Zealand** first noted that New Zealand as a small country faces unique challenges in designing its competition institutions. As for its institutional arrangements, the delegate explained that they have simply evolved over time and did not result from a deliberate decision to put

together different authorities. In 1986, the authority had competition and consumer powers while regulatory functions have been added over time. For example, in 2001 the authority was empowered to enforce regulation in the dairy and telecommunications markets. More recently, it has acquired price regulation powers with respect to gas and electricity lines and pipelines.

The delegate explained that in New Zealand there is a general consensus about the synergies arising from the combination of consumer protection and competition functions, and also the combination of regulation of different industries. It is considered that the latter combination increases the coherence of regulation between different industries and allows the achievement of economies of scope. There are also significant operational benefits in that there are different peaks of activity for different industries and this allows the authority to allocate staff across the different sectoral regulation areas. It is, however, also fair to say that the combination of economic regulation with competition and consumer protection functions have been more controversial and has been discussed from time to time in New Zealand. In particular, the debate used to focus on two competing arguments: on the one hand, the differences in regulation and competition cultures that would make the integration inappropriate, and on the other, efficiencies resulting from the combination that arise from economies of scale and scope. The opponents of a combined agency generally argued that competition enforcement undermines the approach that should be used towards regulated entities, in particular that it would undermine incentives for investment that is needed to promote the long-term interests of consumers in regulated sectors. The delegate remarked that the authority does not agree with these concerns, however, it is aware of the challenges that the combined agency may face. For example, the fact that commissioners must make decisions across both competition and regulatory issues is certainly challenging.

The delegate noted that the government has been sceptical about the sustainability of setting up a stand-alone economic regulator in New Zealand, mainly because having a staff of approximately 60 to 70 has not been considered feasible. The delegate then briefly referred to some other benefits of integrating competition and regulation and concluded by stating that the operational benefits for a small economy are important. This means that a country has a larger organisation with more resources, more interesting work opportunities, which in turn allows the authority to attract more qualified people.

The **Chair** thanked New Zealand and observed that its contribution provides an interesting account of the various dimensions that a country should take into account when considering institutional design.

Turning to countries that either have separate competition and regulatory authorities or that consider that these two functions should be kept separate, the Chair referred to the Italian contribution, which states that: “in Italy, the separation between the Italian competition authority and sector regulators currently in place is proving to be very effective. By contrast, possible forms of merger between these two different types of institutions would raise several complex issues and risk to undermine the effectiveness of the system”.

The delegate from **Italy** affirmed that from his country’s perspective, separate institutions are key to ensure both the highest level of antitrust enforcement and effective regulation. The role of competition and regulatory authorities are different in nature. On the one hand, the Italian competition authority is requested to be highly neutral and independent as it acts as an adjudicator, i.e. it exercises powers similar to judicial powers. It must be also highly independent from the government. On the other hand, regulators that are rule-making entities often act in close co-operation with the government. According to the delegate the merging of both functions under the same institution could create a conflict of interest and it may not necessarily entail significant efficiencies. Also, the internal organisation of a merged authority would necessarily be more complex, which could hamper efficient decision-making process.

However, the delegate clarified that it does not mean that competition authorities should not have other functions. For example, there is a great deal of complementarity between competition and consumer protection. Also, the fact that the Italian competition authority has been entrusted with powers to deal with some other areas, such as the abuse of economic dependence, the conflict of interest or the attribution of legality ratings to companies, is an acknowledgment of the authority's independence and its role in ensuring fairness and compliance with the relevant provisions.

The **Chair** then turned to Mexico and asked why it had recently decided to transfer some of the powers from the competition authority to a new regulator for broadcasting and telecommunications, and whether this decision had been preceded by a debate.

The delegate from **Mexico** stressed that the Mexican telecom and broadcasting sector continues to be the most concentrated one in the world: the main telecom company has more than 65 per cent of the mobile, fixed and internet market, while the leading broadcasting company has a market share exceeding 60 per cent on both free-to-air and cable TV markets. The delegate explained that before the reform had taken place, the competition authority had many times declared that the companies in question had significant market power, thereby enabling the telecom regulator to impose on those firms some type of asymmetric regulation. However, this has never happened. In accordance with the recommendations of many parties, including the OECD, the new government decided that the telecom regulator should be entrusted with powers to carry out market reviews, declare that a given firm or firms have significant market power and impose appropriate remedies on such firms. The reform, however, has gone beyond the recommendations as the new telecom regulator is now in the position not only to declare dominance, but it is also responsible for investigating and sanctioning anticompetitive practices and for reviewing mergers.

The **Chair** subsequently referred to the debate taking place in Australia about whether there really are synergies between competition enforcement and the access pricing regime or whether those functions should be separated, and also whether competition advocacy should be separated from competition.

The delegate from **Australia** pointed that for the last two decades the ACCC has had all three functions; i.e. competition, consumer protection and regulation. At the moment, however, Australia is in the middle of a major review of competition law and policy, known as the Harper Review, which so far has resulted in a draft report. As for whether access regulation should be kept together with competition enforcement or whether it should be separated, the draft report not only favours the idea of separating it, but it actually also considers that over time the state government regulatory functions should be given to a single national access regulator. The main argument behind the support for separation is linked to the belief that regulation and competition enforcement have different cultures. There is also a concern that competition decisions, in particular concerning mergers, may be 'infected' by the regulatory view of the ideal industry structure. The delegate stressed, however, that this risk has not materialised so far. Therefore, the ACCC, which believes that there are many benefits from having three functions together, does not support this particular recommendation.

According to the ACCC, having one single objective and competition culture actually makes regulation better, including deregulation in sectors where competition has already emerged. The delegate explained that access regulation, at least in Australia, is not just about price regulation – it is about promoting competition in vertically-related markets. Recalling the distinction made by Prof. Fels, according to which competition enforcement prescribes and regulation proscribes specific behaviours, the delegate noted that access regulation actually does both: while price regulation is about what firms should do, non-discrimination is about what firms should not do. In fact, cases concerning non-discriminatory access often involve a lot of overlap. For example, a few years ago the ACCC had a case that started off as a competition case, but ended up being run under access provisions, while also consumer protection provisions came into play.

To conclude, the delegate indicated that the draft report of the Harper Review had recommended the creation of a new body – the Australian Council for Competition Policy, which would have various roles. These would include overseeing a regulatory reform program, conducting competition advocacy and carrying out a market studies function.

The **Chair** then invited the UK to elaborate on its system of having sector regulators with concurrent competition law powers, and the recent enhancements to that regime.

The delegate from the **UK** explained that historically sectoral regulators have had competition powers concurrently with the Office of Fair Trading. The financial, airport and health regulators exceptionally did not have those powers. However, they have all acquired them in concurrent arrangements or are about to acquire such powers. The past record shows that the OFT had not intervened often in the regulated sectors. It had been observed that historically the sector regulators did not apply competition law on a frequent basis. Accordingly, one of the objectives of the reforms was to ensure that competition powers are exercised more frequently in the regulated sectors, which account for 25 per cent of the British economy. To achieve this objective, the concurrency arrangements have been strengthened. For example, under the new regime, the CMA has to produce an annual report on how competition law is applied in the regulated sectors. There is also enhanced co-operation and information sharing on cases between the CMA and the sector regulators, and the UK has created a competition network (the UK Competition Network (UKCN)) that brings the CMA together with the sectoral regulators on a regular basis. These developments have been generally received well by the sectoral regulators. The delegate remarked that these changes are too recent to assess their effectiveness; however the level of co-operation to date is certainly encouraging. The delegate concluded by stating that the greater level of co-operation is expected to produce two outcomes: on the one hand, more competition cases in the regulated sectors, on the other the use of regulatory powers in a way that promotes competition more effectively than it has in the past.

The **Chair** remarked that besides sectoral regulation, competition authorities often acquire other responsibilities that are more or less consistent with their original mandate. For example, the Belgian contribution describes the responsibility of the new Belgian competition authority to impose interim relief measures for a duration of six months in case the price observatory of the ministry suggests that intervention is justified in terms of pricing developments or market failure. The Chair asked the delegate whether the competition authority considers it beneficial to have this new power.

The delegate from **Belgium** explained that the power described by the Chair is a very limited one and that it does not turn the competition authority into a price regulator. The idea behind this measure is simply to give the government the time it needs to verify whether a real measure should be taken or not. As this power has not been used so far it is difficult to say whether it is good that the competition authority has it.

The **Chair** indicated that the Russian competition authority, the FAS, has a very wide range of policy functions and asked whether the accumulation of such diverse functions is likely to dilute the focus of the competition authority.

The delegate from **Russia** remarked that the Federal Antimonopoly Service (the FAS) as a truly multi-function authority with a wide range of functions differs from the competencies of classical competition authorities in other jurisdictions. In his view, the focus of the authority is not diluted and there is a synergy effect since all the functions of the FAS are concentrated on its core business - the development of competition in the Russian economy. However, the wide range of functions allows the authority to quickly address anti-competitive practices in every sector of the economy and in different areas of business activity. The delegate highlighted that the role of the authority is not limited to controlling and supervising compliance of firms with the relevant provisions, but that the authority is also

an active player and participant in the development of growth strategies for different sectors and some functional policies that promote competition.

The delegate concluded quoting the head of the FAS, Mr Igor Artemyev, who said that “for Russia and for the major part of countries in transition from socialist methods to market economy, it is necessary to have a powerful integrated authority which could face the attacks of conservative structures that do not want competition”.

The **Chair** observed that the remarks made by the delegate from Russia point to the importance of the local characteristics in the design of the institutions. The Chair then concluded the discussion on multi-function authorities and asked Professor Kovacic to discuss the notion of independence.

2. Competition authorities and independence

Professor William Kovacic introduced his presentation which will first review some traditional assumptions about independence and autonomy, then, discuss how the modern political science literature has caused the reassessment of these assumptions and last address some implications about agency design and behaviour.

First, according to the traditional view about regulation, authorities should pursue independence as a first and foremost objective because detachment from the political process is considered to be a highly desirable institutional characteristic.² Another assumption is that a great deal of insulation from the political process is a sign of institutional maturity. Professor Kovacic then stressed that the real question is not whether competition authorities are under pressure or not, but rather how they should cope with it and how they could deflect it when it is destructive. Given the position of the competition authority, it is inevitable that elected officials are interested in what competition authorities do. However, if the authority is weak and impotent, political officials will not care about what it does. Therefore, if the work of the competition authority elicits no interest in the political world, it is probably a bad sign.

A second element of the reassessment is that complete autonomy, understood as isolation from politics, is both unattainable and undesirable. It is unattainable because any authority has to ask every year for a budget. This means that an authority cannot be completely independent as it is necessary to have some engagement with that process to persuade a legislative body that a budget allocation of a generous amount is appropriate. Professor Kovacic added that in his view also complete autonomy is undesirable. In order to reform a number of functions important to what the authority does, it is extremely important to have a connection with the political process that enables the authority to go and ask, for example, for more power or more resources. Also, to perform the widely accepted function of a competition policy advocate, the authority needs to be able to approach the elected officials who in turn need to understand what the authority does. It is therefore essential to have a relationship that allows for that kind of interaction. Complete autonomy and isolation would render policy advocacy extremely difficult before those bodies. Also, complete autonomy and isolation creates the danger that the authority could simply become irrelevant and its work and efforts bypassed in the process of policy making. Last but not least, discussions that focus single-mindedly on autonomy miss a key countervailing value, namely that of accountability and legitimacy. In order to be seen as legitimate, the competition authority has to have some connection to

² Kovacic, W. (2014), Competition Agencies, Independence, and the Political Process, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)86&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)86&doclanguage=en). This paper was submitted as background material for the Roundtable on Changes in Institutional Design of Competition Authorities. It is an extract from ‘*Competition Policy and the Economic Approach*’, edited by Josef Drexler, Wolfgang Kerber and Rupprecht Podszun, Edward Elgar (2011).

elected officials by which they account for larger policy choices that they make in the exercise of their authority.

Professor Kovacic explained that according to the political science literature as an authority's powers increase and as it becomes more powerful (i.e. it has the ability to impose greater sanctions and have a deeper imprint on the economic system), the demands for accountability increase in a corresponding amount. In his view, autonomy does not mean insulation from engagement with the political and larger audiences. It rather means resisting efforts to intervene in the most intimate and important function: the decision about who gets investigated, who will be sued, who will be sanctioned. This is the inner core that the authority has to protect at all costs.

As for how this can be accomplished through the institutional design, Professor Kovacic explained that while there are various techniques that can be used, each of them has some side effects. For example, the authority can be given greater autonomy over its budget, and in fact some of the authorities are allowed to collect fees that eliminate or reduce the need to ask the national legislature or government to give them more resources. However, the more complete the insulation this creates, the more it can create the equilibrating tendency on the part of courts or the legislature to seek to limit the capacity of the authority to act freely through other means. This is because in general, governments tend not to give out large sums of money without asking the recipients to account for how it is being spent.

Professor Kovacic then elaborated on what competition authorities can do to reconcile the tension between the need for autonomy and the need to be accountable in order to be legitimate. One crucial tool is what can be called meaningful disclosure. First of all, competition authorities must realise that there is always a suspicion about whether they are effective in carrying out their duties. To overcome this concern, authorities should clearly state their goals with great clarity, engage routinely in public consultation to discuss the choice of programs and to defend their priorities, and to regularly assess their own outcomes. By submitting themselves to examination, the authorities can increase confidence on the part of outsiders in their legitimacy and the fact that they have good quality control mechanisms in place. When there is a broad perception that the competition authority is not using its powers responsibly, elected officials are likely to be tempted to either take these powers away or dictate how they should be used.

Professor Kovacic explained that according to the modern political science literature, autonomy has a specific life cycle. It means that relatively new authorities are generally not trusted by their governments, and consequently the governments tend to keep such authorities closer to themselves. Over time, however, the degree of control is attenuated as the authority demonstrates its capacity to operate effectively and responsibly.

According to Professor Kovacic, competition authorities should see themselves at any time as having a political account in which they have political capital. With each action the authority is either spending or accumulating that capital. What the authority cannot do is to run massive capital deficits over time as otherwise it may be pushed into 'political bankruptcy' when political officials will come to seize control over the authority. To conclude, Professor Kovacic stated that in his view the ideal competition official has to be attuned to the ecology and rhythm of the political system inside his/her own jurisdiction as only such a person is able to deal with the crucial dimension of policy making.

The **Chair** turned to the EU contribution, which states that competition authorities enjoy various degrees of independence and that this in turn can impact their ability to effectively enforce relevant laws and policies. Challenges that arise concern, for example, the autonomy of competition authorities from governments in terms of appointment and dismissals of competition authorities' management and decision makers or ensuring that authorities have sufficient resources to perform their functions effectively. The Chair stressed that it is rather remarkable that according to the EU there are varying degrees of

independence in Europe, while none of the European competition authorities present at the Roundtable acknowledged that it is not fully independent. The Chair asked the delegate about the role of the provision of minimum guarantees in ensuring the independence of competition authorities.

The delegate from the **EU** explained that in the paper that the Commission published in July 2014³, the Commission had acknowledged that a lot of improvement had been done and that competition authorities had been working hard to improve their autonomy vis-à-vis governments and stakeholders. However, there is further room for improvement. In the EU, national competition authorities co-enforce EU competition rules directly with the European Commission. While a wider application of the EU rules has been a success to date, there is room for improvement in terms of institutional design. Unlike in other areas of EU law, such as telecoms, energy or rail, there are no specific provisions requiring competition authorities to be independent and have sufficient resources. The EU's communication, therefore, specified that all the authorities have the minimum guarantees of independence and sufficient resources. This means, in particular, that competition authorities should have a separate budget and budgetary autonomy, clear appointment and dismissal procedures for the heads and senior management, rules for conflict of interest and incompatibilities. Time has now come to have more convergence and put in place minimum guarantees of independence at EU level. In its communications, the EU has therefore committed to further assess the issue of independence. Accordingly, it will carry out a stock-taking exercise in the framework of the European Competition Network in order to assess specific hurdles to autonomy of the competition authorities, to identify the best possible alternatives and to determine whether there is a need for EU legislation.

The **Chair** remarked that in its new law Mexico also stressed the need to ensure that the competition authority is as independent as possible.

The delegate from **Mexico** indicated that the new authority has a legal personality, full independence in the decision-making process as well as a budgetary autonomy (in the sense that the authority now goes directly to the Congress rather than to the Ministry of Finance or any other part of the executive branch). It also has the important power to enact rules regarding its own administrative organisation or to file a constitutional complaint before the Supreme Court of Justice in case an act of the State violates Article 28 of the Constitution that mandates competition in the Mexican market. The delegate added that with new autonomy, certain checks and balances have been introduced. For example, the authority has to submit an annual work program. The Commissioner President must attend a hearing before the Senate at least once a year. Commissioners can be removed, but only in specifically prescribed instances. The resolutions made by Commissioners must be made public. Commissioners' meetings must be public while regulations that the authority enacts must be preceded by public consultations. Finally, the Internal Comptroller of the Commission is appointed by 2/3 of the Chamber of Deputies, thereby ensuring an important link with elected authorities in terms of accountability.

The **Chair** invited the delegate from the US FTC to comment on the issue of accountability.

The delegate from the **US** (the FTC) first noted that the FTC is independent in many aspects. The Commission is not housed in any of the three branches of the US government. The Commissioners serve seven-year terms, which overlap presidential administrations. Moreover, the Commissioners' terms are staggered, meaning that they do not end their terms all at once. Also, no more than three of the five commissioners can be from the same political party. The Commissioners can be removed only for good cause. However, this has never happened. The political branches have no authority to initiate a case or to

³ European Commission Staff Working Document (2014), 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues'. Available at: http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf

close it. There are also many indicia of accountability, which are not viewed as a burden, but rather as mechanisms that facilitate a healthy alignment of the FTC's agenda with national priorities as well as ensuring political and public support.

The **Chair** remarked that according to the delegate from the US, the independence actually comes with maturity or experience acquired over time and that this is at least as important as the legal structure of the institution. The Chair asked the delegate whether the authority has gained independence by establishing a good track record and whether this is partly independent of the legal constitution of the institution.

The delegate from the **US** (FTC) replied that every authority has to continue to earn its independence. For example, the FTC had some episodes in the past when it was perceived as deviating from the case law and public will and it lost a lot of respect and political support; many of its decisions were overturned by courts. Consequently, there were repercussions, such as a substantial budget cut and cutbacks of the FTC's statutory authority.

The **Chair** turned to BIAC's and its contribution which referred to the World Bank's criteria for independent institutions. According to BIAC many authorities, such as the US FTC, the US Department of Justice, or the European Commission, do not actually meet the criteria laid down by the World Bank. However, BIAC seems to have a lot of confidence in the independence of these institutions. The Chair therefore asked BIAC whether in its view it is useful to have a list of criteria that are used to determine independence of the authority.

BIAC remarked that the degree of independence varies considerably across jurisdictions. In its view, independence is extremely important because it detaches the competition authority from politics, it reduces the risk of perceived bias and provides consistency between political terms. BIAC added that it is extremely important that business has confidence that the authority prosecutes, selects sectors and investigates and decides cases in an independent way, based on competition law and not political influence.

BIAC asserted that issues concerning independence come up constantly during the existence of the authority; at the moment when the authority is established, during the discussions about competition law and powers that the authority should have, but also when the authority struggles to find and maintain a satisfactory place towards governments, the public and other authorities. Given the importance of the issue, it is therefore not surprising that many organisations have examined this topic, including the World Bank in 2002, the OECD and the UNCTAD in 2008.

BIAC then remarked that typically three criteria are very important: (i) the head of the competition authority should be appointed by a committee of parliament, rather than by the President or Prime Minister; (ii) the competition authority should be independent from the government; and (iii) it should have its own budget. However, there are many different shades in which these criteria can be implemented and implementation can make a big difference as to how independent the authority will actually turn out to be.

The **Chair** concluded that there are a lot of nuances and it is quite difficult to map out the heart of the issue. He then invited the UK, Portugal and Australia to discuss the relationship between the "strategic steer" they get from government and their level of independence in their respective jurisdictions.

The delegate from the **UK** stated that the strategic steer helps the CMA's independence. As it is inevitable that there is a dialogue between elected ministers and an authority like the CMA, the advantage of the steer is that it brings this dialogue into an open space. The Steer was open to a public consultation process. It is important to make clear the CMA is not obliged to follow the Steer.

The delegate from **Portugal** remarked that the Portuguese competition authority was created in 2003 as a single-function authority and that between 2012-2014 it underwent profound changes in terms of its

legal and institutional framework. The main objective of the reform was to strengthen the enforcement of competition law, to reinforce the independence of the competition authority and to enhance the competitiveness of the Portuguese economy.

The delegate explained that under the previous law the government could issue guidelines on competition policy and the competition authority had to take these guidelines into account to some extent. Also, certain acts of the authority could be legally subjected to ministerial supervision. However, these powers have been removed as they could be seen as limiting the independence of the competition authority. The delegate stressed, however, the government had never used these powers between 2003 and 2013.

The delegate from **Australia** explained that although the relevant Minister has power to give the ACCC directions connected with the performance of its functions or the exercise of its powers it is uncommon and many matters are excluded (such as those relating to restrictive trade practices). The ACCC is an independent statutory authority. In practice, the directions powers have been used to confer additional responsibilities on the ACCC, and this has resulted in the grant of additional resources. For example, when Australia introduced a carbon tax, the ACCC was given responsibility for ensuring there was no harm to consumers from exploiting the tax in prices charged to consumers. The ACCC was also given additional funding to cover the new responsibility. The same happened when the carbon tax was eventually repealed.

A broad strategic steer is also delivered by the government through a statement of expectations to which the ACCC responds with a statement of intent. For example, the latest statement of expectations details how the government would like the ACCC to focus on the deregulatory agenda, to reduce red tape and compliance costs for business. The ACCC replied in its statement of intent with specific commitments outlining how it would do so. The delegate explained that the steering process is very transparent. The statement of expectations as well as the statement of intent are published on the internet.

The **Chair** drew the conclusion that it is better to have a transparent steer rather than a secret one. However he also stressed that the question remains whether a transparent steer is better than no steer. The Chair then gave the floor to a representative from the OECD's Directorate for Public Governance and Territorial Development (GOV) who wished to react to the previous interventions and to briefly discuss GOV's work on regulatory independence.⁴

Mr. Nick Malyshev from **GOV** informed that he is part of the Regulatory Policy Division and that the Network of Economic Regulators is a subsidiary body of the Regulatory Policy Committee. Although the Network was established about a year ago, GOV had been working on the governance of regulators already for quite some time. As a result, it has come up with some soft law principles about how regulators should be governed externally and how they should organise themselves.

Mr. Malyshev remarked that independence is one of the issues that GOV has looked at. However, as it is rather tricky, GOV could not come up with a set of normative criteria for independence. Instead, it has produced a checklist that is used to carry out a survey. In a survey carried out in 2013, one of the questions was whether the authority takes instructions from government on long-term strategy, the authority's work program, individual cases and appeals. The data showed that across six network regulators, most of them provide strategic steer on their long term strategy, however most of them operate with a high degree of

⁴ See Best Practice Principles for the Governance of Regulators, Presentation by Nick Malyshev, OECD Regulatory Policy Division, available at: <http://www.slideshare.net/OECD-DAF/principles-goveranceregulatorsoecdgov18-dec2014>.

independence on individual cases and appeals. It appears that there is more independence and less instruction-taking in electricity, gas and telecoms sectors than in railways, airports and ports.

Concerning the appointment and the removal of the head of the board, the first question that GOV asked was whether there were any employment restrictions for the appointment of the head or the members of the board of network regulators. About a third of jurisdictions have some kind of restrictions. Also, the vast majority responded that a board member or head cannot be part of another government body or a member of a board industry. With respect to post-employment opportunities in regulated industries, almost 40 per cent of jurisdictions allow the revolving door between the regulatory authorities and regulated entities.

Mr. Malyshev agreed with the comments that had been previously made about the strong link between independence and accountability. GOV asked to whom the authorities were accountable to: to parliaments, governments, the executive, other parties or to regulated industries? In the vast majority the regulators that GOV has worked with are accountable to the executive. Only in the gas sector are more regulators, accountable to Parliament.

Mr. Malyshev concluded by referring to the review that GOV had done of the Colombian communications regulator and informed that GOV is also planning to look more carefully at independence and the links to accountability. This work should be presented to the Network in November.

The **Chair** pointed out that with respect to steering, it appears that there should be a considerable difference between a general policy steer, as in the case of Australia, and steering that could affect case handling by the competition authority since a general policy steer is much less threatening for the independence than a steer on individual cases. The Chair noted that despite some interesting remarks made in the contributions he would skip the parts concerning the internal working of competition authorities in order to focus briefly on the issue of the budgetary independence. He then turned to Portugal and asked the delegate to explain whether the fact that part of the authority's budget comes from the fines imposed on the undertakings creates any problems and whether competition authorities should advocate for their own budget.

The delegate from **Portugal** first explained the Portuguese funding model. Most of the authority's budget comes from the transfers from sectoral regulators, which seems to be a rather innovative and original model, at least among European countries. The authority also receives fees, mainly from notifications, as well as 40 per cent of fines (the remaining 60 per cent goes to the State). The State budget is used as a last resort. However, in practice it has never been used as a source of financing the authority's functioning.

Among all the sources, transfers from sector regulators are by far the most important as they account on average for around 80 per cent of the authority's total budget. Concerning the right to 40 per cent of the fines that the authority collects, it is actually a common rule for all administrative authorities in Portugal. Thus, according to the delegate it does not affect the authority's legitimacy with respect to how it is handling its sanctioning powers. Also, in the past decade, the funding from fines accounted only for 4 per cent of the budget. Moreover, the revenue from fines has been rather volatile and consequently, it is not something that the authority can predict every year. This is also because most of the authority's decisions are challenged before courts and the exact amount of fines to be collected is known only after courts' decisions. Courts actually have full jurisdiction on fines, meaning that they can uphold, lower or increase the fines imposed by the authority. Therefore, the authority does not have an incentive to impose fines that are disproportionate and that risk being overruled or altered by courts. Given the volatile nature of revenues coming from fines, the competition authority does not plan its operational activity on the basis of this revenue. Of course, it wishes to have strong enforcement record and level of fines that are sufficiently

deterrent. However, it fines do not influence the authority's priorities or the way in which the authority chooses to investigate its cases.

Concerning the question whether competition authorities should advocate for their own budgets, the delegate started by explaining that one of the main discussions in the reform of the Portuguese bylaws was actually to guarantee adequate and sufficient resources for the competition authority to enable it to fulfil its mission. Most of the discussion revolved around the question of how much sectoral regulators should contribute to the competition authority's budget. The delegate said that the authority carried out an exercise that concerned the level of expenses it had over the last decade. To justify its level of resources it developed two scenarios: what the authority needs to function as it functions today and what it actually needs to fully fulfil its mission. The delegate explained that the government has set an interval of the rate of transfer that should come from the revenues of sectoral regulators. While this mechanism seeks to ensure a certain level of predictability, in practice there may be a significant difference in the amount transferred to the competition authority, depending on the level of the rate that is applied. Consequently, one of the concerns of the EU and of the competition authority is that the authority may face problems if it, for example, chooses to hire new staff and then the revenues from the regulators are reduced because the rate of transfer is reduced. The delegate concluded by stating that in light of this concern, competition authorities should be able to advocate for the resources they need.

The **Chair** thanked Professors Alan Fels and William Kovacic for their papers and presentations, and all the participants for their contributions to this very interesting discussion.

He invited the Secretariat to produce a non-prescriptive document that would describe the issues and trade-offs raised during the discussion, for the Committee review at its June 2015 session.

The delegate from the **US** (the FTC) remarked that there was a subset of issues concerning the internal organisation of the institution, which could not be addressed in the discussion due to a lack of time. He suggested that should there be enough interest, this could be added to the list of possible future work.

The **Chair** concluded the Roundtable by agreeing that this discussion as initially planned could indeed be continued in June as well.