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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

**Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF  
THE COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015**

**Summary of discussion of the Roundtable on Changes in Institutional Design**

**16-18 June 2015**

**Paris, France**

*The attached document is an annex to the Summary Record of the meeting held on 15-19 June 2015.*

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**By the Secretariat**

The Chair of the Competition Committee, Prof. Frédéric Jenny, welcomed delegates and participants to the Roundtable on ‘Changes in Institutional Design of Competition Authorities’ and recalled that this discussion is the continuation of the roundtable on the changes in institutional design which took place at the last Committee meeting in December 2015.

To start the discussion the Chair briefly summarised the topics which were covered in December 2015. The discussion at the last meeting focused on competition agencies with both regulatory and competition enforcement functions (‘multifunctional agencies’). Delegates discussed specific experiences with the combination of 1) competition and consumer protection function and 2) competition and regulatory functions. The December discussion also addressed the question of the agencies’ independence from the Government.

The Chair explained that there was one outstanding issue to discuss from the December discussion: the internal governance of the institution. The country contributions identify three main topics for discussion: 1) prioritisation of cases, 2) staffing strategies for cases and 3) separation of investigative and decision-making functions.

**1. Prioritisation of cases**

On case prioritisation, the Chair proposed the following questions for discussion:

- What is the level of discretion that competition authorities should enjoy in setting up their priorities?
- What prioritisation criteria should competition authorities rely on?
- Should these criteria be made publicly available?

The Chair first turned to Greece and asked to share its experiences with the recently introduced prioritisation process in Greece. The Chair asked in particular how the new pointing system works and how public interest considerations are assessed within the new framework.

Greece indicated that before the enactment of the new law in 2011 the Hellenic Competition Commission (‘HCC’) could not reject claims based on priority grounds. The HCC was obliged to investigate all claims received in a chronological order. The new law allowed the HCC to set strategic goals and to prioritise important cases, with a view to increase the effectiveness of its enforcement action in light of the scarce resources available. The 2011 law specifies that the HCC Board must identify rules (in the form of a ‘notice’ or a ‘decision’) outlining the prioritisation criteria for cases and for the setting of strategic goals. The HCC issued two notices so far. The first notice (‘Notice on Enforcement Priorities’) was inspired by similar experiences in other countries (e.g. France and the United Kingdom) and includes a general description of the Hellenic prioritisation policy and the public interest criteria considered by the HCC. The second notice (‘Point System’) quantifies the criteria set out in the Notice on Enforcement Priorities and gives points (1 to 10) to cases according to their nature, their geographic impact, the relevance of the evidence and the importance of the sector of the economy affected by the infringement. The Point System helps the HCC focussing on important cases, while promoting a more coherent and targeted policy of prioritising pending cases. It also allows the HCC to reject complaints with a low priority ranking (i.e. less than 3 points).

Greece also indicated that although the system sounds rigid, it includes a number of criteria (e.g. if the claim deals with a novel issue or a new type of infringement) which provide the HCC with certain degree of flexibility. The introduction of the new system resulted in the reduction of the backlog by more than 50% (from 670 to 237 pending cases). The HCC is convinced that the new system is based on objective criteria, that it complies with due process considerations and that it is in line with the prioritisation practice of the European Commission as confirmed by the case law of the Court of Justice. Decisions to reject claims based on the new prioritisation system are currently being tested in front of the administrative courts and the HCC indicated that the result of these court procedures will enable it to fine-tune and further elaborate the criteria and the pointing system.

The Chair asked the delegation of Greece to elaborate a little more on the criteria set by the pointing system in more detail. Greece replied that these criteria are based on the agency enforcement experience. For example, the nature of the alleged infringement, its geographic scope and the relevance of the sector concerned can account for a maximum of 2 points, while the relevance of the evidence in possession of the HCC, the likelihood to substantiate the infringement, the emergence of a novel issue or the fact that the case has an EU relevance can account for a maximum of 1 point.

The Chair turned to Hungary which has a somewhat similar experience to Greece. Since 1996 the competition authority ('GVH') has continuously strived to have some degree of discretion in setting its priorities. This effort led to institutional reforms in 2005 and more recently in 2014. The Chair invited Hungary to present the recent changes in the institutional design of the GVH.

Hungary underlined that the GVH started to operate 25 years ago and the first competition act (which was in force between 1991 and 1996) did not provide the authority with the possibility to set priorities. In 1997 a new competition act entered into force and provided the investigators of the GVH with the discretion to decide whether to initiate a case on the basis of a complaint or to reject the complaint in question. The new law clearly identified the factors that had to be analysed by the investigators when they were exercising their discretion: 1) if the practice in question was likely to violate the competition law, 2) if the GVH had the powers to proceed and 3) if the case was necessary to safeguard the public interest. If these conditions were not met and the GVH could reject the case, but complainants could always challenge this decision in court.

Although the GVH enjoyed some discretion in evaluating complaints, the increasing number of complaints received resulted in a heavy workload and required a new institutional reform. In 2005, the complaint system was completely revised by introducing a distinction between formal complaints and informal complaints. The former required from complainants to fill in a specific form and to provide the GVH with a relatively broad set of information. An informal complaint, on the contrary, can be made without any formal requirements (e.g. by e-mail or phone call). Another significant difference between the two types of complaints is that in the case of a formal complaint the complainant has the right to challenge a rejection by the GVH in court, while this is not the case for informal complaints. A few years ago, the GVH decided to set up a Customer Service Section whose task is to filter complaints. The GVH receives around 2000 complaints per year and that 2/3 of these complaints is dismissed by the Customer Service Section. This filtering function proved to be very efficient as it releases investigators from a significant workload and makes the GVH enforcement more focused and effective.

At this point of the discussion the Chair noted that two problems can be identified in relation to prioritisation:

- Prioritisation can lead agencies to focus on 'larger' national cases rather than on 'smaller' local ones.
- Rigid prioritisation criteria can make co-operation between agencies on cross-border cases more difficult especially if the jurisdictions involved use different prioritisation criteria.

The delegation from Mexico explained that because the media and the public are very interested in the cases of the Federal Economic Competition Commission ('COFECE'), the agency has developed a system to provide information to the media on pending cases. Thanks to this system, the public is informed on the opening of an investigation by COFECE. COFECE, however, does not disclose its prioritisation to the public.

The Chair gave the floor to India which underlined that any person, consumer, consumer association or trade association can file information in a specified format before the competition authority, subject to a fee. Any information or complaint received by the Competition Commission ('Commission') must be reviewed by the Secretary to check whether it conforms to the competition regulations. Therefore, only a limited number of

complaints reach ultimately the Commission. If the Commission decides to dismiss these complaints, complainants can file an appeal to the Competition Appellate Tribunal. If the Commission establishes that there is a *prima facie* case, the Commission must ask the Director General to investigate the matter and produce a report for the Commission within a certain period of time. India concluded that due to the institutional design of the authority they are not facing many problems stemming from the large amount of complaints submitted to the authority.

Following the interventions from India, Egypt asked for the floor to point out that competition is not an objective, but only a tool that can be used to increase growth and to create jobs. To achieve these objectives, competition should be incorporated into a broader national strategy. The delegate from Egypt invited delegates to share their views on the question of whether other Governmental institutions/public bodies should be involved in setting the competition agencies' priorities and if yes, to what extent.

The Chair turned to delegates and participants to see if anyone would like to share their views on the question from Egypt.

Australia indicated that they are setting strategic priorities every year based on 1) priority factors (e.g. size of the market, international aspects) and 2) strategic priorities (e.g. identifying strategically important sectors from a competition law perspective). Australia receives around 200.000 complaints every year and enjoys a relatively wide discretion regarding whether to initiate an investigation or not. On the question of how the agency sets its strategic priorities, the Australian delegation emphasised that the agency conducts a survey among business, consumer groups and law societies with a view to integrate their comments into the annual strategic priorities which are later published on the website of the agency.

The Chair noted that Australia mentioned in their contribution the possibility of receiving a 'strategic steer' by the Government. The Chair asked whether such strategic steering is also a relevant factor that should be taken into consideration while setting priorities in Australia. In response to this question Australia added that the Minister has power to give the ACCC directions connected with the performance of its functions or the exercise of its powers, but this is uncommon and many matters are excluded (such as those relating to restrictive trade practices). The ACCC is an independent statutory authority. 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.

After the intervention of Australia the delegation from the United Kingdom ('UK') noted that that the Competition and Markets Authority ('CMA') operates independently from the Government. However, the Government provides the CMA with a strategic steer to which the CMA must have regard, but is not bound. This public document sets out the Government's high-level priorities and expectations for the CMA in an open and transparent way. The UK delegation emphasised that the Steer is not binding on the CMA and it is subject to public consultation. In light of this very high-level document, the CMA draws up its own general priorities. Before finalising its prioritisation principles, the CMA conducts a public consultation.

With regard to the questions by the Chair and by Egypt, the delegation from United States ('US') indicated that they would like to provide answers from the Federal Trade Commission's ('FTC') perspective. The FTC is an independent agency and it generates its own strategic plan. Priorities are set based on activities that the FTC thinks will generate the most benefits to American consumers. The strategic plan typically focuses on sectors that have significant importance from an economic perspective (e.g. technology, health care). In response to the questions by the Chair, the FTC pointed out that the strategy leaves room for smaller cases, in particular if they have the potential of establishing a legal precedent on an important or novel issue. On the second point raised earlier by the Chair, the FTC also underlined that so far prioritisation criteria have not resulted in a barrier to case co-operation in their experience. The US system does not give other parts of the Government a formal role in steering the FTC's strategic planning. However, there is room for accountability vis-à-vis the Government through various mechanisms: 1) the appointment process (i.e. FTC Commissioners are nominated by the President and confirmed by Congress) which ensures a certain alignment of economic priorities of the administration; and 2) the FTC is subject to Congressional oversight.

The Netherlands asked for the floor in order to share a practical tip stemming from the practice of the Dutch Authority for Consumers and Markets ('ACM'). Instead of establishing a certain set of criteria every year, the ACM decided to set priorities only every two or three years. The delegation from the Netherlands added that setting priorities every year can be very burdensome and difficult for an agency, especially in the case of younger agencies.

The Netherlands also pointed out that they are conducting public surveys when establishing strategic priorities. Recently the ACM conducted a public survey via an online website where they provided the public with the opportunity to engage into an online discussion on the particular policy areas. The online discussion was a huge success in the Netherlands and therefore, the ACM is planning to continue to engage in an active dialogue with stakeholders.

Lithuania asked to answer the question posed by Egypt and indicated that the competition authority is empowered by law to set its own priorities. Before 2012 when such powers of prioritisation were introduced, the Competition Council was forced to allocate significant resources to investigating complaints that were not necessarily dealing with important cases. However, Lithuania emphasised that they do not receive any strategic steering from other government agencies. Lithuania also agreed with Egypt on the point that competition law cannot exist in a 'vacuum', but also stressed that agencies should be cautious in their approach as politicians would like agencies to use competition law also in cases where competition enforcement might not be the best available tool.

Greece took the floor to describe the safeguard mechanisms which are incorporated into their new system. These safeguards are meant to accommodate the concerns raised by the Chair:

- The HCC is formally supervised by the Minister of Development and Competitiveness and is subject to parliamentary control and reporting. However, according to the Greek delegation the oversight of the Parliament rarely qualifies as a strategic steer in a practice.
- Similarly to what happens in Australia, the relevant minister could draw the attention of the HCC to a certain case. The HCC, however, is not obliged by law to follow the suggestion of the minister.
- When setting its strategic goals, the HCC can also identify sectors (currently these are retail, food and energy) which could be later reflected in the pointing system with the inclusion of sector-specific criteria, e.g. the importance of that sector for the economy.

Slovak Republic indicated that prioritisation was introduced in Slovak Republic two years ago. Their experience confirms that having a joint prioritisation system with other public agencies or Governmental institutions is very useful. This can facilitate the co-operation between agencies and it can enable different agencies to join forces to deal with a common problem. Moreover, as the competition authority in Slovak Republic is not allowed to propose legislative changes directly to the Parliament, a proposal presented by the different public agencies jointly with the Government has a much higher chance to be accepted. The experience of Slovak Republic shows that joint action by public authorities can be an extremely successful strategy to address enforcement challenges due to the availability of a wider portfolio of instruments.

To conclude this part of the discussion the Chair noted that there was a strong consensus that prioritisation is a necessary strategy for competition authorities and that it can be very useful. Experiences around the table confirmed that there are many different (formal/informal, direct/indirect) ways to channel the opinion of stakeholders and the Government into the priority-setting process. Interventions suggested that competition authorities are in favour of co-operating with other agencies and institutions when setting their priorities, but ultimately they should preserve the right to set their own criteria independently.

## **2. Staffing strategies**

The Chair moved to the second part of the discussion on the issue of staffing. As an introduction, the Chair indicated that staffing strategies could significantly differ depending on whether the agency is a multifunctional agency or single-function agency. Before opening the floor for interventions the Chair identified two questions that could serve as a basis of further discussion, namely 1) which are the different methods to ensure sufficient co-operation between lawyers and economists, and 2) how to combine skills in a case-team to ensure the effective functioning of the agency.

To start the discussion, the Chair turned to the Netherlands which has recently become a multifunctional agency and asked it to share its experiences on the effectiveness of the ACM's staffing strategy.

The delegation from the Netherlands confirmed that the ACM is a multifunctional agency and indicated that an important challenge for the agency is how to mix staff expertise in a way to ensure that problems are analysed from a broad perspective. The *first issue* which was mentioned by the Netherlands is staff mobility. The ACM has created a

working environment which promotes staff mobility. Having staff switching from time to time from a regulatory to the competition department, or vice versa, creates added value in terms of knowledge transfer. Experiences from the past two years show that employees are satisfied with the opportunity to work for different departments within the agency. Based on this initial feedback, the ACM intends to continue its staff mobility policy within the agency. The ACM has also introduced a flexible system for work, or 'hot-desking', according to which no one has got its own desk, but can use any free desk in the premises. This system facilitates the co-operation and ensures that people are aware of the ongoing activities in other departments. The *second issue* mentioned by the Netherlands is the fact that horizontal teams exist at management level, including for ACM's international work. The ACM has also established knowledge networks whereby certain groups that are interested in legal or economic issues, could find each other by using the internal website. And finally, the *third issue* mentioned was the importance of establishing mixed case teams on individual projects.

The Chair noted that the approach of the Netherlands seems to represent a different model from the traditional organisation in competition agencies which tend to have separate sector units. The Chair asked whether the flexible approach described by the Netherlands is only feasible in larger agencies as opposed to agencies that operate with more limited human resources. The Chair added that in the case of the Netherlands the multifunctional structure seems to be a crucial element which calls for diversity and flexibility. The Chair asked how the work was organised before the institutional change in the Netherlands took place and especially, whether there were already mixed case teams before or if this feature was directly linked to the fact that the ACM became a multifunctional agency.

In response to the Chair's questions, the Netherlands pointed out that before the structural change there was certainly an attempt to ensure that all the directorates had an overview of the ongoing cases. There were strong incentives to channel both the economic and the legal perspective into case procedures. As far as telecom mergers were concerned, there was already a certain degree of co-operation with the regulator even before the structural change. The delegation concluded however that the level of flexibility and mobility which can be experienced now was not present before the structural change.

The Chair turned to the delegation from the United States and noted that the US FTC is also a multifunctional agency as it is formally responsible for both consumer protection and antitrust enforcement since 1938. The Chair asked how the FTC staffs its competition cases.

The United States emphasised that economic analysis is fundamental in all of the FTC's work. The FTC internal structure is designed in a way to ensure the participation of at least one economist from the Bureau of Economics in each of the competition law cases. By participating in the same case team, lawyers and economists develop together the theories of harm, assess evidence and propose remedies jointly. However, there is not as much mobility within the institution as the one described by the Netherlands. Lawyers and economists submit separate recommendations to their managers and their managers also write separate recommendations that are submitted to the Commission for decision. The FTC was originally designed this way and therefore, the current structure is not a result of recent institutional changes.

The US also referred to a paper on 'The Economics of Organising Economists' which evaluated the main advantages and disadvantages of the functional and divisional institutional models:

- The *functional model* (where lawyers and economists work in separate departments) produces higher quality and more independent economic analysis and economists are more up-to-date and can develop more in-depth knowledge in their fields compared to the divisional model. However, in the functional model the co-ordination between the departments could be very problematic in practice to the detriment of the overall case analysis.
- The *divisional model* (where lawyers and economists are integrated in the same departments) produces analyses which are more focused on issues that could serve the interest of the agency decision-makers. This model results also in a higher level of co-ordination, better building of institutional expertise and provides attorneys and economists with strong incentives to take into account each other's views. However, as economists are often subordinated to attorneys in this model, their independence is reduced and therefore, the quality of the economic analysis is not as high as in the functional model.

The representative of the Department of Justice ('DOJ') underlined that one of the most important goals of the DOJ was to create a system where the decision-makers can benefit from results of a rigorous analysis in respect of both the legal and economic aspects of cases. The DOJ has a separate division for economists, but they are also involved in case investigations as members of case teams. As far as case teams are concerned there is typically a mix of lawyers and economists working on most matters. Lawyers and economists are working in co-operation through the whole process in order to ensure a most rigorous legal and economic analysis. Sometimes they submit joint memos at the end of the investigation, but that is not always the case.

The Chair pointed out that it seems that the DOJ is more favourable to an integrated approach, while the FTC benefits more from the competition of the ideas from lawyers and economists. The Chair turned to the representative of the FTC and asked to clarify whether he would agree with the above-mentioned categorisation. The Chair also asked to clarify whether the statement that integrated case teams of lawyers and economists are dominated by lawyers stems from the FTC structure and practice or is a general proposition of the article referred to in the FTC intervention.

In response to the Chair's questions the FTC representative first stressed that the structures of the FTC and DOJ are similar in the sense that both institutions have separate functional units for economists. The FTC representative also emphasised that the FTC experience with the integrated model is drawn up by the article. The idea was that in integrated teams economists are generally supervised by lawyers who are more frequently appointed as team leaders and this could have an effect on the role of economic analysis (compared to models where there are separate units of economists reporting to fellow economists). The representative of the DOJ confirmed that there are many commonalities in the structural approach of the DOJ and the FTC. To conclude, the US delegation emphasised that the main goals of both agencies is that the legal and economic perspectives have to be taken into consideration and that this goal can be achieved in a number of different ways.

The Chair gave the floor to Chile to share its experiences with staffing issues. Chile underlined that the National Economic Prosecutor's office ('Fiscalia') is a very small agency with 50 professionals overall. The model that they are following separates professionals according to their specialisation. For example, Fiscalia has a separate unit for mergers, cartels, abuses and for litigation. Chilean competition law is operated in a dual system: the Fiscalia is an independent body that conducts case investigations, while the decisions are taken by the Competition Tribunal ('Tribunal').

The European Union intervened at this point of the discussion, particularly on the role of economists in the competition procedures. DGCOMP introduced the function of Chief Economist around twelve years ago and the Chief Economist's team has been expanding ever since. Case teams in DGCOMP are mixed and include lawyers, economists and statisticians. Case teams are not necessarily 'dominated' by lawyers. In more complex cases, members of the Chief Economist's team are integrated directly into the case team from the beginning of the investigation. In less complicated cases (at least as far as the economic analysis goes) the Chief Economist's Team is consulted at different stages in the procedures.

Following the intervention of the EU, the United Kingdom described the UK model underlining the importance of recognising that legal and economic skills are not the only qualifications necessary for conducting investigations, but that competition cases also require business, accountancy and case-management skills. The key challenging factor is how to integrate all these skills together. The CMA adopted a structure similar to a professional consultancy which operates in a very flexible manner. The UK emphasised the importance of the role played by the CMA's project management office which manages the matrix of professional staff and ensures that staff are allocated in a flexible way to cases and teams. The only exceptions are criminal prosecutions which require a different and very specific set of skills.

Italy commented at this point of the discussion on two topics. The first comment touched upon the issue of the interaction between economists and lawyers, while the second comment focused on the multiple functions carried by the same agency. In relation to the first point, the Italian delegations indicated that Italy does not operate a flexible system like the one described earlier by the Netherlands. However, enforcement teams are quite diversified in terms of professional background. Like DGCOMP in the EU, the Italian competition authority has a separate Chief Economist team which generally contributes to cases where complex economic analysis is required. As regards the role of lawyers in case investigations, Italy emphasised that decisions which are challenged in court shall ultimately be presented and defended before judges. As a consequence, the final decision on the merits of the case needs the

involvement of someone with a legal background. This feature of the system leads enforcement agencies to put more emphasis on legal arguments. However, Italy is convinced that mixing legal and economic skills in the case teams is very useful from the perspective of conducting effective case investigations.

As far as the multifunctional approach of the authority is concerned, Italy indicated that the competition authority has not had much success so far in relation to the design of a multifunctional structure. The two functions (competition law and consumer protection) are equally important in the authority's view, but this view is not shared by the employees which regard the competition enforcement more important than consumer protection. This approach plays an important role in the staffing strategy of the authority because people are more motivated to contribute to the work of the competition divisions than to consumer protection cases.

Ireland also intervened on the topic of the intersection between economists and lawyers and indicated that the key aspect is to get people involved from the beginning of the case. Ireland agreed with the UK regarding the importance of skills other than legal and economic. Ireland has an integrated agency model and found that investigative skills are very much in demand and that they are quite similar across the competition, consumer protection and product safety parts of the agency. As a consequence, project management is absolutely essential. Another set of skills which needs to be emphasised are communicational skill which is getting more and more appreciated now that the agency is a multifunctional agency. Outbound communication could also result in the decreasing of the number of complaints as people will be more familiar with the role of the agency.

Mexico agreed with the previous interveners on the involvement of lawyers and economists and stressed that this very much depends on the expertise that is required by the case. In Mexico, the first review of a case is always done together by a lawyer, an economist and by a specialist in the sector concerned. After setting up the hypothesis of the case, the authority decides on the case team that should deal with the case going forward. For instance, if the authority conducts a straightforward merger investigation then presumably a team with an economist and a corporate lawyer would be regarded as appropriate. However, if the authority predicts that the case might require some form of intervention (e.g. remedies) then other specialised lawyers might be added to the team. Mexico also agreed with the Netherlands on the need to create mixed teams to support a complex case investigation, but it emphasised that – in line with Italy's comment – the judicial review requires in most cases an appropriate legal reasoning.

Spain emphasised the similarities of its system with the Dutch system. The Spanish National Authority for Markets and Competition ('CNMC') is also in charge of both competition enforcement and sector regulation. The CNMC has two offices (located in Barcelona and Madrid), each of which has a lot of flexibility in their staff-management system. Case teams generally include both lawyers and economists, but as far as the regulatory directorate is concerned, they also have engineers (e.g. with expertise in energy or telecom). For instance if the CNMC reviews a merger in the telecom sector, a horizontal case team is set up, including competition law experts, but also experts from the telecom directorate. There are also units providing general services (e.g. IT) in support of the investigative teams. The mix of skills among the staff reflects the multiplicity of functions carried on by the authority.

According to Poland the Polish Chief Economist's team is involved in the review of all the decisions from an economic point of view before they are finally adopted. To avoid last minute conflicts, there are strong incentives for the case teams to involve economists all along the investigation. In practice, the Chief Economist's team is participating in most of the cases where economic analysis is required. By doing so, there is always a lower risk that there will be problems arising at the end of the procedure when they are reviewing the decision.

The Chair concluded that this part of the discussion revealed that there are many ongoing efforts to integrate different functions and expertise into the management of cases. He noted that there is no one model that would fit to all the agencies. It is important however that agencies design their own structure in a way to efficiently pursue their main objectives and achieve their goals, taking into consideration also the cultural and social environment in which the agency operates.

### **3. Separation of investigation and decision-making powers**

At this point, the Chair moved to the last part of the discussion dealing with the separation of investigation and decision-making powers within a competition authority. This is an issue that is more relevant for jurisdictions which have an administrative enforcement model where both these functions sit in the same institution. The first question that should be addressed is how to ensure fairness and neutrality of the process when the same institution must

ultimately decide on its own investigation. The country contributions revealed two ways in which countries handle the potential trade-offs: 1) to have an internal separation within the authority between the investigation and decision-making phases (e.g. different teams and Chinese walls) or 2) to rely on procedural checks and balances incorporated into the system to ensure fairness.

In Belgium the authority has recently merged the two functions within the agency and the Chair invited Belgium to describe the reactions of the Bar and of the business community to this structural change.

Belgium stressed that the most important factors in the system are effectiveness and legitimacy which are not necessarily in conflict with each other. There was a broad agreement in the country on maintaining the separation of the decision-making and investigative functions, but at the same time there was pressure to merge the two bodies in charge of each phase by maintaining the separation of the functions. Belgium aimed at ensuring effectiveness and legitimacy by imposing very strict time limits on decision-makers. The Bar had some concerns that the very strict time period may lead the decision-maker to simply follow the recommendations in the report by the investigators. However, Belgium underlined that the track record of the authority has showed that in reality, these concerns were ungrounded, even in the more complex cases. The agency had quite positive experiences and never faced problems in complying with deadlines and with ensuring the independence of the decision maker.

The Chair invited BIAC to elaborate on the question of the possible trade-offs between effectiveness and fairness mentioned in the Belgian intervention. The Chair raised especially the issue of the speedy resolution of merger cases which can be of a major interest of the business community.

As the Chair indicated at the beginning of this part of the discussion, BIAC noted that this question primarily concerns administrative systems where there are two possible solutions: 1) the unified agency solution and the 2) dual solution. The business community prefers the dual system though they presume that the unified model certainly has some advantages (especially in terms of saving costs, managing cases and avoid duplications in the process). BIAC is convinced that the lack of separation of the two functions may raise significant due process concerns. According to BIAC, the fundamental problem with the unified system is that the structure hinders the decision-makers in their ability to reach a fair and impartial decision. Internal peer reviews and other checks and balances are very welcomed by the business community. However, as far as reviews by internal peer are concerned in most of the cases the quality of the peer review cannot be measured especially because it is hard to say whether the ‘right’ issues were raised by the team in front of the peers.

BIAC clarifies that it prefers the dual system for the following reasons: 1) it leads to better-quality decisions and 2) it embeds a greater degree of procedural fairness. Regarding the traditional argument according to which if effective judicial review follows the administrative procedure this addresses the structural bias within the agencies’ procedure, BIAC indicated that 1) one should not rely on courts to take the right decision, if this could be done by the competition authority itself; and 2) different courts apply different standards and this differentiation has an impact on the results of the review. BIAC concluded that the business community expects a fair treatment by a competition authority with fair procedural standards and separate investigative/decision making powers. BIAC also drew attention to the fact that even if there is a separation within the same authority between the investigative and decision-making powers, one still needs to have checks and balances.

The Chair asked BIAC to clarify its statement according to which the separation of the investigative and decision-making powers within an agency not only prevents confirmation bias, but also ensures better decisions. BIAC agreed with the Chair that separation is not necessarily followed by better decision. However, this statement stems from the experience of the business community. BIAC also emphasised the importance of an effective internal peer review system which can lead to higher quality decisions as arguments that could come up later in the court might already have been addressed in the framework of internal peer review.

The Chair turned to Mexico, where there have been recent changes in this area. The 2013 reform required the separation of the investigation from the resolution of the decisions by COFECE. The Chair invited Mexico to share its views on the effectiveness and fairness of its new system.

Mexico pointed out that the Mexican system is an administrative system mandated by the Constitution. In line with the 2013 Constitutional reform, Mexico has now two agencies – with full constitutional autonomy – responsible for competition matters: the IFT, for broadcasting and telecommunications, and the COFECE, for all other sectors. In

order to guarantee impartiality and objectivity, the reform required the separation of the part of the authority in charge of the investigation from the part of the authority in charge of the resolution of the case. Mexico emphasised that before taking any final resolution on illegal practices, the investigative authority and the companies involved in the investigation are parties in a process in which they can submit evidence and arguments. Decisions are made by the Board of Commissioners based on this evidence and arguments. Mexico is firmly convinced that there is more fairness in the process as it is structured today than before the reform. The investigation and decision-making process is now designed in a way which seems in line with what BIAC suggested. Investigators are more cautious in drafting their report due to the fact that their conclusions will be reviewed by another part of the authority.

The Chair turned to Italy and asked to describe the main findings and implications of the Menarini<sup>1</sup> case.

Italy indicated that following the terminology used by the BIAC Italy has got an administrative unified system. Decisions are adopted by a Board on the basis of the non-binding proposals by the investigative divisions. The Menarini decision was adopted in 2011 by the European Court of Human Rights ('ECHR'). Following a procedure conducted by the authority ('ICA') the pharmaceutical company, Menarini lodged an appeal against the ICA before the ECHR. One of the most important findings of the Court was in relation to the nature of the fine. Although the authority is an administrative institution the ECHR concluded that the sanctions are so serious and high that competition cases have a quasi-criminal nature. In line with this, competition authorities should guarantee the due process rights defined in Article 6(1) of the European Convention on Human Rights within the course of the administrative procedure. The ruling also established that to satisfy Article 6(1) the decision-making entity must not only be independent and impartial, but must also have full jurisdiction to examine and determine all questions of fact and law relevant to the dispute before it. The second part of the ruling highlighted that parties to an antitrust case in Italy enjoy a 'full' judicial review (in the sense that it also addresses questions of fact and law, includes the possibility to annul the decision and to decrease the amount of the fine), which confirms that the functioning of the ICA system complies with the requirement of due process under Article 6 of the European Convention on Human Rights.

The European Union wanted to follow up on the intervention from Italy on the Menarini case and stressed that the integrated administrative system is not only in line with Article 6 of the ECHR, but also with Article 47 of the Charter on the Fundamental Rights on the EU level. The Charter does not make a distinction between investigation and decision-making as long as there is a full judicial review available for the parties (and the review which is carried out by the Court of Justice is confirmed to be a full judicial review). Moreover, DGCOMP has incorporated many internal checks and balances and safeguards into its system. For instance, as regards the priority setting the case-teams are subject to a strict scrutiny. Moreover, the Chief Economist team participates in the investigation and checks whether the analysis can be regarded as economically sound. DGCOMP also has peer review panels which look at cases from a legal, economic, procedural and consistency point of view.

DGCOMP is also subject to checks and balances at the level of the Commission, whose fair and transparent functioning is ensured by the Legal Service and by the Hearing Officer. In addition to that, national competition authorities are invited to participate and to comment on DGCOMP cases. The EU concluded its intervention by adding that there is no single universal model that fits to all agencies, but there are certain requirements that have to be met in all systems. These essential requirements include the respect of rule of law and the guarantee of the rights of parties in all stages of the proceedings. The model should anyway be designed in a way to allow effective and credible enforcement.

The Chair then turned to Germany which also has an integrated system and asked to present their experiences.

Germany indicated that the Bundeskartellamt ('BKart') deals primarily with competition law enforcement, but it also incorporates two procurement tribunals. The authority was established in the 1950s and it follows an administrative model. The BKart has divisions responsible for reviewing cases by industries and three divisions focusing on cartel enforcement. Every division operates with both lawyers and economists, so integration is already present at this level. Decisions are taken by majority vote in a panel composed by a chairman and two other members (rapporteurs). The chairman and the other members of the divisions are civil servants appointed for life and must be qualified to serve as judges or senior civil servants.

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<sup>1</sup> Menarini v. Italy, No 43509/08., Article 6 (1), 27/09/2011

The BKart has evaluated carefully its institutional design and concluded that the advantages of the current system clearly outweigh the disadvantages and potential risks. As regards the advantages, sector specialisation means that divisions are gathering a lot of sector information and a deep understanding how sectors work. The system prevents duplication of work and ensures independence from political influence. The parties' rights of defence are fully respected and the procedures conducted by the BKart are complying with the principle of transparency. The system allows very fast decision-making, particularly in merger cases. Employing lifetime officials ensures continuity and the gaining of in-depth knowledge and longterm experience, with little loss of staff to the private sector. Processes within the BKart have many safeguards: the agency is obliged by law to investigate all the facts and decisions are subject to full judicial review. Court review procedures with regard to fines even apply the high standards of criminal procedures. In view of the high responsibility of the decision divisions the BKart has also set up internal safeguards ("checks and balances") and the BKart regularly revises them and fine-tunes the system. Divisions work in a very close co-operation with each other, all the divisions participate in horizontal discussions and a general policy division provides advice and support on investigations and cases. The German delegation concluded that this model is widely accepted by the business community in Germany.

The Chair noted that the discussion so far was mainly focusing on jurisdictions that adopted the administrative model. In the last part of the discussion the Chair turned to those jurisdictions which follow the so-called prosecutorial system in order to hear experiences also with the functioning of this model. First, the Chair called on Chile where there is a clear separation of the investigative power (Fiscalia) from the decision-making power (Competition Tribunal). The Chair asked Chile to describe its system and to comment on whether the system can be regarded as effective.

The delegations from Chile replied that the question of how to manage the conflict of interest is answered by a functional separation into two separate institutions. The investigative function is entrusted to the Fiscalía Nacional Económica ('FNE') which is an independent body with its own budget and staff. The Competition Tribunal ('TDLC') takes the decisions and imposes fines. The TDLC is independent from any other public offices; however, its decisions can be reviewed by the Supreme Court. The TDLC is composed by 5 judges or commissioners (3 lawyers and 2 economists). There are three main immediate advantages from the allocation of the two functions in separate bodies:

- Both bodies enjoy stronger political independence, which is something very important for companies;
- Conflict of interest is less likely to arise if investigation and sanctioning powers are not in the same institution; and
- Fairness and transparency require the judge to be fully informed which can be better guaranteed when the investigative and decision-making functions are separated.

The Chair turned to South Africa which moved in 1999 from an administrative system to a prosecutorial system. This seems to have been a model for other African countries. The Chair invited South Africa to describe its system and to comment on whether this system can be regarded as effective to enforce competition law.

South Africa confirmed that the current system came into force in 1999 when the Competition Act established three independent bodies from each other and from the Government:

- The Competition Commission, who is responsible for investigating mergers and prohibited practices.
- The Tribunal which is the decision-making body, i.e. the court of first instance in competition matters. The Tribunal takes decisions following the investigations of the Competition Commission.
- The Competition Appeal Court which hears appeals from the Competition Tribunal.

Prior to the 1999 reform, only the Competition Board was allowed to make recommendations to the relevant Minister who would ultimately decide whether to declare a conduct prohibited or not (while mergers were not notifiable at all). Today the Minister can only participate in merger hearings on public interest grounds which clearly demonstrate how much the system has changed. A second important change concerns transparency. Before 1999 the system was subject of heavy criticism due to the lack of transparency, while today all hearings are public.

Today, economists are involved in all aspects of the system (both at the investigative and decision-making level) ensuring rigorous analysis. One of the criticisms that the current system is facing is that the process can be very time-consuming, particularly regarding mergers which are time-sensitive. However, the experience of the agencies does not seem to support this criticism. In 2014, 97 mergers were brought to the attention of the Tribunal by the Competition Commission, and 86% of these mergers was ultimately decided within the statutory time periods. Another criticism relates to the fact that two institutions cost more to the state than one institution. However, according to the delegation of South Africa the advantages realised through the effectiveness of the current dual system appear to clearly outweigh the costs of keeping two separate institutions.

The Chair noted that one element which could presumably make the Chilean and the South African system effective is that they both rely on a specialised tribunal. Some jurisdictions are reluctant to introduce specialised courts as they fear that this would probably open the floodgate for similar requests for specialised courts in other fields. Before closing this part of the discussion, the Chair turned to the United Kingdom to share its experiences regarding to their system which also includes a specialised court.

The United Kingdom delegate confirmed that they have a court specialised in competition law matters, the Competition Appeal Tribunal. The UK, however, focused its remarks on the UK's experience with the merger of the Phase 1 (previously performed by the Office of Fair Trading, 'OFT') and of the Phase 2 (previously performed by the Competition Commission, 'CC') procedures under the single roof of the CMA. During the public consultation phase concerns were raised on whether merging Phase I and Phase II might result in procedural bias. The UK identified many efficiencies stemming from the new system. There are efficiencies and synergies that can be gained from, for instance, continuity of case team members moving from Phase I to Phase II. There have been timing efficiencies too – the issues paper following a Phase II referral is now generally released by the CMA much faster than previously.

Costa Rica took the floor to stress that Costa Rica has two separate agencies, the National Competition Authority ('COPROCOM') and the Telecom Regulator ('SUTEL'), both responsible for enforcing the competition law. These agencies have an administrative system which combines the investigative and the decision-making phases. They find this system to be effective as long as the agencies respect the parties' rights in each phase of the process.

The Chair concluded this part of the discussion underlining that most interventions concurred that there is no optimal or 'one-size-fits-all' model. Institutions are always based on the legal context of a country and these can differ from each other. The Chair also emphasised that there are two dimensions that have to be taken into consideration, fairness and efficiencies and that there may be trade-offs between these two objectives. The need to build a system that complies with these two dimensions can be especially challenging. Some jurisdictions have externalised the decision-making phase and conferred it to a specialised court, while other jurisdictions have decided to keep the investigation and decision-making phases into one institution, but to build safeguards into the system in order to ensure a sufficient degree of procedural fairness.

The Chair closed the roundtable discussion by thanking the delegates for their contributions and interventions.