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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**

Key points of the Roundtables 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

1. Institutional design is an important element of a successful competition law and policy system. However, decisions regarding institutional design are complex because there are myriad options; many competition authorities have found success with very different designs; and what works well in one jurisdiction may not always work well in another. Recognising that there is no “optimal” or “one-size-fits-all” model, this document is intended to help jurisdictions identify some of the options available, as well as some of the issues and trade-offs involved, when considering a change in institutional design. It is not intended to be prescriptive nor exhaustive. It focuses on the three issues discussed in the two roundtable discussions held on Changes in Institutional Design of Competition Authorities (December 2014 and June 2015), namely: (1) Multifunction agencies, (2) Independence from Government and (3) Internal governance of agencies.

1. Multifunction agencies

2. Competition authorities are sometimes assigned additional economic policy functions beyond the enforcement of competition laws. Examples include: responsibility for consumer protection and unfair competition laws, sectoral regulation, public procurement control, etc. The integration of these additional functions within a competition agency can offer both challenges and opportunities. Some of these challenges and opportunities might be expected from any amalgamation, while others will depend on the nature of the functions that are combined.

3. This section outlines some of the general considerations relating to multifunction agencies (Part A) before moving to considerations that are specific to combinations of competition and consumer protection functions (Part B), and competition and sectoral regulation functions (Part C), respectively.

A. General considerations

- **Career opportunities and recruitment:** Authorities that offer a possibility to switch between different policy areas (e.g. because those areas require similar skills or expertise) may be considered more attractive, and therefore may find it easier to recruit and retain high-quality staff. Staff mobility may enhance the recruitment process, but could also make staff more motivated in pursuing every-day enforcement activity and provide the competition agency with the opportunity to build on specific expertise by reducing staff-turnover. This may be particularly relevant for smaller economies or economies drawing from a relatively limited talent pool. These benefits may also be available in single-function agencies that are part of larger government entities (e.g., part of a justice ministry).
- **Efficient scale of operations:** Integration of various responsibilities in a single authority may be necessary to achieve a minimum efficient scale of operation. At least one multifunction authority has noted that their institutional model stems in part from concerns in their jurisdiction about the sustainability of small standalone regulatory bodies.
- **Mixing different cultures:** Merging previously distinct institutions may result in a clash of different cultures, arising from the mixture of different professional backgrounds, pay grades, management structures, work processes, etc. Some multifunction agencies that have undergone mergers have found it helpful to have one overarching objective and vision that unifies different parts of the institution; to involve employees in the merging process from the very start; and to encourage dialogue, joint projects and possibly movement within the organisation.
- **Priority setting:** Setting priorities may be more complex in a multifunction agency than a single function one. For instance, a multifunction agency must allocate resources across a broader range of

activities, some of which may involve obligatory (e.g. regulatory) tasks, while others may be more discretionary but nevertheless important. A multifunction agency must therefore expend effort to ensure that adequate resources are allocated to each of its various functions without detracting from its important competition mandate. This may be viewed as both an opportunity and a challenge since while specialisation may bring greater focus to the competition agency's work, a combination of functions may bring economies of scope and greater resource flexibility during peaks and troughs in workload.

- **Staffing strategies:** Staffing strategies could significantly differ depending on whether the agency at hand is a multifunctional or a single function agency. Staffing challenges are exponentially more relevant in multifunctional agencies where the institution brings together different expertise and different professional backgrounds.
- **Complementary vs. conflicting policy objectives:** Integrating complementary functions can result in policy synergies. For example, by bringing together relevant cross-functional expertise (e.g. specialised sectoral or regulatory expertise, demand- and supply-side market expertise, etc.), agencies may obtain a better understanding of how markets function and of the root causes of market problems. They may also be able to better tailor their interventions to the problem at hand, using a broader range of tools. All of this may lead to better outcomes. If the functions are potentially conflicting, it is useful to consider how often such conflicts are likely to occur in practice, whether they are avoidable, and whether they would be better resolved internally in a single institution or through a dialogue between two distinct institutions. To some extent policy conflicts may be inevitable; the important thing is to have mechanisms in place, whether within a multifunction agency or across separate agencies, so that these potential conflicts can be identified and managed effectively.
- **Information sharing:** Multifunction authorities may realise synergies from sharing information and market intelligence across sectors/policy areas. This may be encouraged by stakeholders who would prefer to avoid providing duplicative information to multiple regulators (i.e. they might prefer a “one-stop shop”). However, in some circumstances such free flow of information may raise concerns, and legal rules may not permit the use of information gathered under one piece of legislation to enforce another piece of legislation. Where necessary, these concerns may be addressed through the establishment of internal firewalls, although this will necessarily limit synergies to an extent.
- **Cost savings:** The integration of multiple functions in a single institution is likely to result in at least some administrative and overhead savings relative to a situation where they are housed in separate standalone bodies. However, merging previously separate bodies will also give rise to integration costs (e.g. associated with consultations, amendments, staff uncertainty, distraction of senior officials, relocation, re-training, etc.). The balance may depend on the time horizon considered. Moreover, some cost savings may be achievable in other ways short of a merger, for example by assigning common administrative functions (e.g. travel, procurement, salary) to a centralised body.
- **Internal organisation:** Organisational structure will also affect how a multifunction authority balances the pros and cons of policy integration. At one extreme, where the functions are not closely related, the authority may decide that it is best to manage them separately. At another extreme, the authority may consider that the functions are so complementary that it is useful to have fully cross-functional or “horizontal” divisions (e.g. organised by sectors or market types) where the same staff work across different policy areas. Most multifunction authorities appear to lie somewhere in between, having separate operating divisions across policy functions (e.g. consumer division, competition division, energy regulation division) but with a variety of mechanisms to help co-ordinate those functions, such as: interaction at management/decision-making levels (e.g. senior management committees, common decision-makers), sharing a common pool of economic or legal expertise, assembling cross-functional teams to work together on specific cases or projects when the situation calls for it, etc.
- **Alternative models / Separate but co-operating institutions:** Creating a multifunction authority is not the only way of co-ordinating different policy areas. For example, jurisdictions can put in place formal/informal mechanisms to encourage dialogue and co-operation between the competition authority and related policy bodies. Indeed, separate-but-co-operating institutions may achieve greater policy coherence than a multifunction agency that operates in “silos”. While there are likely some practical limits to how closely co-ordinated two independent agencies can be, some jurisdictions may consider co-operation within such limits to be adequate to achieve their policy goals.

B. Competition and Consumer Protection

4. This part outlines a number of considerations that are specific to the combinations of competition policy and consumer protection functions within a single institution (see also OECD, 2008).

- **Complementarity of objectives vs. differences in substance and implementation:** Competition policy and consumer protection are often viewed as complementary because they share a common objective: consumer welfare. However, it is also acknowledged that there are differences in substance and implementation across these functions. For instance, some aspects of consumer protection (e.g. product safety, labelling, spam) may not be closely related to competition policy. Consumer protection cases may also require different legal or economic analyses and expertise, as well as co-ordination with other consumer bodies. Thus, a degree of specialisation is still likely required to advance particular cases. On the other hand, certain cases or advocacy initiatives may benefit from a joined-up approach to ensure that consumer welfare goals are effectively considered, whether at the case selection, investigation, or decision-making stage or regarding the design of remedies or policy recommendations. For instance, it has been noted that a combined authority may be more cognizant of potential collusion risks that could arise from a consumer protection remedy aimed at increasing market transparency; or, conversely, may be more aware of potential misleading advertising strategies that could be exploited in response to pro-competitive market liberalisation efforts.
- **External visibility:** An integrated authority may benefit from a stronger, more unified voice and greater external visibility among the public. Consequently, it may be easier for the merged authority to gain attention from elected officials and the media and to raise awareness concerning its activities. For instance, it has been said that goodwill generated from high-profile consumer protection work may have positive spill-over effects when the agency engages in less popular or harder-to-understand competition work. Consumers may also come to view an integrated agency as a one-stop shop for market complaints.
- **Resource allocation:** Some agencies that have merged competition and consumer protection functions report that they confronted initial staff concerns that either competition enforcement would dominate consumer protection work (e.g. because competition cases tend to be larger, more costly or more complex); or the opposite, that consumer protection would dominate the work of the agency (e.g. because consumer protection issues tend to resonate more with the public). It appears that such imbalances have generally not materialised in practice, and agencies have dealt with those concerns by involving staff in the integration process, and including them in discussions about priorities and vision for the combined agency. This can help demonstrate the benefits that each side can bring to the others work. However, at least one jurisdiction has noted that the separation of competition and consumer protection responsibilities has made them more efficient in their competition policy activities by bringing greater focus and goal-orientation to their work.

C. Competition and Sectoral Regulation

5. This part outlines a number of considerations that are specific to combinations of competition policy and sectoral regulation functions (see also OECD, 2005).

- **Inconsistencies/Compatibilities:** There are a number of differences between competition law enforcement and sectoral regulation. For example, it is often said that competition law *proscribes* while regulation *prescribes* certain behaviours and that competition law generally applies *ex-post* while regulation applies *ex-ante*. Sectoral regulation by definition applies to specific sectors (usually network industries or natural monopolies) and can involve activities like setting prices or access rules, granting licenses, and engaging in ongoing monitoring of the industry; whereas, competition laws generally apply economy-wide and place emphasis on market-driven solutions involving minimal ongoing oversight. Some have argued that sectoral regulation requires arms-length yet collaborative interactions with industry whereas competition enforcement is naturally more adversarial; although others feel this is a false distinction. Regardless, these actual or perceived incompatibilities may partly explain why there are relatively fewer combinations of competition authorities with sectoral regulators. Sectoral regulation and competition policy co-exist in nearly all jurisdictions; housing these functions in the same institution may allow the combined agency to take advantage of internal technical/sectoral expertise in its competition investigations, make use of competition principles in its regulation/de-regulation activities, and avoid potential jurisdictional conflicts in matters implicating both. In other models, this is achieved

without merging the functions, for example, by setting up formal/informal mechanisms for information sharing, co-operation and division of responsibility between the competition authority and the relevant sector regulators.

- **Regulatory capture:** It has been said that combining competition policy and sectoral regulation responsibilities in a multifunction authority may reduce the risk of regulatory capture as the organisation will be less connected to particular sectors or interest groups, and staff may have more flexibility to move within the organisation.
- **Benefits from a multi-sectoral regulator:** The Committee did not express a view on whether multifunctional agencies are to be preferred to single-function agencies. Agencies that are responsible for both competition policy and sectoral regulation, are often responsible for regulation across multiple sectors (e.g. energy, telecommunications, etc.). This may afford even greater flexibility in staff allocation, further reduce risk of regulatory capture (see above), and allow for greater coherence of regulation across sectors. The latter may be particularly relevant where sectoral convergence is occurring. However, arguably, many of these benefits could be achieved by creating a multi-sectoral regulator without competition powers.

2. Independence from Government

6. Independence is considered a highly desirable institutional characteristic for competition authorities. An independent agency exercises its powers and applies, interprets and enforces competition rules on the basis of legal and economic arguments, grounded in sound competition policy principles, free from political influence or pressure. This enhances the consistency and predictability of decisions and creates an environment where market players and the general public have confidence in the process by which the authority selects, investigates and decides its cases.

7. There are many factors that influence a competition authority's independence from government, some of which cannot be attributed to the presence or absence of a particular institutional design feature, but arise instead from historical, political and/or cultural values that shape attitudes towards independence (and to competition policy more generally). Put differently, an agency with institutional safeguards for independence may still be susceptible to political influence if those safeguards are not respected. Conversely, just because an institutional design permits political influence in theory does not mean that such influence will be exercised in practice, particularly where the jurisdiction has established a culture of respect for the independence of the agency's decisions. This is sometimes referred to as the distinction between *de jure* and *de facto* independence.

8. With this in mind, this section considers institutional aspects of independence from four dimensions: (A) Governance; (B) Decision-making; (C) Budget; and (D) Accountability. The last may be considered an important "trade-off" that cuts across all aspects of independence, as well as a desirable institutional characteristic itself.

A. Governance

9. This category refers to the position or legal status of the competition authority vis-à-vis government, as well as the manner in which the head of the agency (or board, or Commissioners, as the case may be) is/are appointed and dismissed.

- **Position of the Competition Authority vis-à-vis Government:** Some competition authorities are not part of, or subject to supervision by, a ministry or other state body, and consider this to offer the best guarantee of independence. Other jurisdictions have opted to place their competition authorities under the responsibility of a ministry, yet those agencies find they maintain functional independence because the ministry does not unduly interfere in the agency's day-to-day operations (indeed, in some cases this may be explicitly set out in legislation, see below). Others have purposefully made changes to separate the competition authority from a ministry to enhance the authority's actual or perceived independence. One consideration to keep in mind is that complete institutional autonomy may not always be desirable or practical. For instance, it has been argued that accountability can be well served by having the competition authority subject to the administrative oversight of a responsible ministry. There may also be certain competition policy functions for which the competition authority would prefer not to be totally detached from the political process. For instance, to engage in effective competition advocacy, the authority may need to be aware of proposed regulations or legislative reforms, and be able to approach elected officials who in turn need to understand what the authority does. This may be easier where there

are opportunities for dialogue between the competition authority and other branches of Government, which some have argued can be facilitated by having the authority housed within a ministry or having the agency head sit on government committees or boards, for example. Of course, other mechanisms can be employed to achieve these aims without requiring such linkages (e.g. laws requiring mandatory competition assessment of new regulations). The important point is that the competition authority may not want to be so isolated from Government (whether as a result of institutional design or other factors) that it loses “relevance” in the policy-making process.

- **Appointment, dismissal, terms and obligations of top management:** These factors may also impact independence to the extent that they can provide scope for Government influence over the authority’s key leaders and decision-makers. This can be broken down into several sub-issues:
 - **Appointment:** Most jurisdictions consider it important to have a clear and transparent process for the selection of top management to ensure that highly-qualified individuals are selected. Some have considered it preferable for the head of the authority to be appointed (or confirmed) by a Parliamentary committee or the Senate rather than appointed unilaterally by the head of state to help ensure that such appointments are based on merit rather than political ties (or at least to avoid a perception otherwise). However, others have not found this to be a limiting factor on independence, particularly in light of other safeguards.
 - **Dismissal:** Where the head of the authority can be dismissed at the will of the head of state there may be concerns about their ability and incentive to act independently (i.e. make decisions without fear of reprisal). Thus, many jurisdictions have rules that only permit dismissal in certain limited and prescribed circumstances, e.g. due to gross misconduct, an impossibility to perform assigned duties, criminal conviction, breach of confidentiality or conflict of interest rules, etc.
 - **Mechanisms to ensure a diversity of political affiliations:** In authorities with multi-member boards or multiple Commissioners, some have considered it desirable to expressly limit the number of members belonging to the same political party. Some have also considered it desirable to stagger the terms of board members/Commissioners to limit the possibility of abrupt changes in policy that could occur if all were replaced at the same time.
 - **Term length:** Some have considered it preferable for terms of top management to be longer than (i.e. extend across) political terms. For example, in a multi-member system with staggered terms this helps ensure that a head of state cannot replace all members in a single term of office. If the terms of top management are too short (e.g. 2 years), it may also be inefficient given the value of expertise accumulated throughout a term and the length of complex investigations/projects which top management may be expected to follow. The possibility of renewable terms can enhance continuity of leadership; however, some have considered that a non-renewable term may be preferable as it limits incentives (actual or perceived) to shade behaviour to win re-appointment, particularly where the term length is short.
 - **Conflict of interest rules:** These are typically used to ensure that senior management abstain from activities that may be incompatible with the exercise of their mandate, including political activities.

B. Decision-making

10. It is widely understood that independence will be compromised if politicians can exercise undue influence over the competition authority’s enforcement decisions. This has been described as the “inner core” of independence that a competition authority must protect at all costs.

- **Case initiation:** Most jurisdictions have autonomy over the cases they choose to investigate. In some jurisdictions, a responsible minister may instruct the competition authority to investigate a particular case, examine the need for interim measures, carry out sector inquiries or competition studies or analyses, but without, however, directing the outcome. This may be seen as a mechanism to ensure that the competition authority is responsive to significant competition concerns or matters of public importance by obliging it to investigate. However, if such powers are over-used they may limit (or be seen as limiting) the agency’s ability to prioritise and ultimately may influence its ability to exercise its enforcement powers.
- **Enforcement:** In some jurisdictions, decision-making independence is foreseen in legislation by explicitly excluding interference by, or instructions from, state bodies or other persons when the competition authority investigates and decides on individual cases. Some jurisdictions provide some

exceptional grounds under which the government can veto/override the agency's decisions, usually based on overriding public interest considerations (e.g. national security, financial stability, etc.) rather than competition grounds. However, where these mechanisms exist they are narrowly defined and very rarely, if ever, invoked. The normal recourse for challenging an enforcement decision is through judicial review or merits-based litigation in the courts.

- **High-level strategic steer:** In some jurisdictions, competition authorities may receive general, non-binding policy instructions or a 'strategic steer' from their respective governments (e.g. setting out how Government sees competition policy fitting within broader economic priorities). This might be seen as affecting the level of independence enjoyed by the authority. However, if used correctly, steering may offer the advantage of bringing the inevitable dialogue between the competition authority and elected officials into the public domain, as part of a broader accountability framework. On the other hand, if this process is not transparent, or if the guidance provides specific enforcement directions or directs the authority to consider issues not related to competition, it can clearly be seen as limiting independence.

C. Budget

11. Competition authorities require sufficient financial resources and autonomy over how to spend those resources to effectively enforce competition rules and operate independently. The ability of government to unjustifiably reduce, or threaten to reduce, an authority's funding may influence independence. Many authorities have a separate budget allocation in the overall state budget for which they have budgetary autonomy to spend. Some authorities may also generate their own revenues by collecting user fees (e.g. from merger filings) or by retaining a portion of fines imposed.

- **Level of budget/resources allocated to the authority and degree of spending autonomy:** Sufficient financial and human resources are key to independent and effective enforcement of competition rules and to attracting and retaining highly qualified staff. However, opinions as to what constitutes sufficient resources may vary among interested parties, and competition authorities may be required to justify the level of public funds that should be dedicated to their activities (e.g. with reference to the economic impact of their activities and value for money considerations).
- **Funding:** Independent sources of funds can offer a degree of insulation from the political process. For example, the authority's power to collect fees may eliminate or reduce the need to ask the national legislature or government for more resources. However, certain sources of funding can also raise concerns if they are not properly calibrated:
 - **Variability:** Revenues from fines, merger filing fees or transfers from sector regulators may be highly variable, and consequently the authority may not be able to carefully plan its budget. This problem may be less pronounced when these revenue sources account only for a fraction of the agency's total budget or if shortfalls can be readily replaced from other sources.
 - **Bias:** When the authority's budget is partially funded from fines that it seeks/imposes, there may be a perception that the authority has perverse incentives or a bias. This may be less problematic if this accounts for only a small proportion of the authority's budget, if the authority follows a transparent fining policy and if the courts have full jurisdiction to reduce or overturn fines.
- **Persistence during economic downturn and budgetary constraints:** While countries may be tempted to cut resources of their competition authorities in times of economic crisis, it is important that these authorities continue to be adequately equipped to effectively perform their duties. Indeed, these may be precisely the periods where effective competition law enforcement is needed to prevent further harm and to spur economic growth.

D. Accountability

12. While it is important for competition authorities to be independent, it is also important for them to be accountable to the public and subject to checks and balances that force them to operate within the boundaries set by relevant laws. This enhances the credibility of the agency's activities. In general, the demands for accountability increase as a competition authority's powers increase. A variety of measures can be implemented to ensure that

competition authorities are accountable. It is important to strike a balance between having sufficient safeguards to ensure accountability, but not subjecting the authority to so much oversight that it loses its ability to operate independently, or is hamstrung by unnecessary or overly burdensome requirements.

13. Common examples of accountability measures that agencies can adopt include:

- Report annually to Government on performance against targets
- Appear before oversight committees and/or respond to periodic Governmental requests
- Conduct public consultations on the authority's choice of programs/priorities
- Publish an annual plan and priorities for the upcoming year
- Subject the authority's spending to oversight/scrutiny/audit
- Carry out impact assessments of activities
- Publish guidelines and issue statements explaining specific enforcement decisions

3. Internal governance of agencies

14. Agencies have implemented different measures to improve the effective functioning of the agency in each phase of the enforcement procedure:

- **Case initiation:** When deciding whether to initiate a case, agencies tend to apply filters to select complaints and optimise the use of scarce resources. Prioritisation also helps directing the competition authority's actions to strategically important sectors.
- **Investigation:** The combination of different skills within case teams can significantly contribute to the effective handling of investigations and it has a direct impact on the quality of the final output of the agencies. Agencies have developed various staffing strategies to effectively allocate the agency's human resources throughout pending investigations.
- **Decision-making:** Decisions of the agency represent the most visible result of the agency's work and the quality of final decisions could be heavily influenced by the internal organisation of the agency.

A. Case prioritisation

15. **Independence in setting priorities:** The large amount of complaints competition authorities receive can create a heavy workload. The importance of prioritisation is overall well-recognised by competition authorities. The level of discretion enjoyed by the competition agency in setting priorities varies from one jurisdiction to another, depending on the political/social environment in which the agency operates. Independence ensures that the competition agency sets its priorities focussing on strategically important sectors from a competition law perspective. However, agencies have recognised that there is merit in allowing other public institutions to participate in the priority-setting process of competition authorities, as long as the agency safeguards the right to set its own criteria independently.

16. **Transparency in setting priorities:** According to most agencies, two questions are relevant when assessing transparency in priority setting: first, whether the prioritisation criteria should be made publicly available, and second, how transparency can be increased through the involvement of interested third parties.

- **Publicity:** Priorities which are made available publicly (e.g. on a website, in annual plans or reports) generate greater awareness of the competition authority's work and can play an important advocacy function for the role of the competition authority. Some jurisdictions take the view that publicly available priorities may usefully serve as a reference in court proceedings where the complainant has challenged the rejection of his complaint. Some jurisdictions, however, decided not to publish their prioritisation criteria to preserve their flexibility in deciding which cases to pursue.
- **Involvement of third parties:** There are many different (formal/informal, direct/indirect) ways to engage in a dialogue with private stakeholders (business and consumer groups) or with public institutions in the priority-setting process. Seeking the opinion of interested outside parties contributes to conveying a signal that the priorities set by the authority enjoy public support and gives the whole process greater legitimacy. Engaging in an active dialogue with other public institutions not only

enhances future co-operation between the competition authority and these institutions, but strengthens their ability to engage in joint advocacy efforts.

17. Elaboration of criteria: Setting prioritisation criteria can take many forms, including the establishment of a detailed scoring mechanism, the identification of priority factors or the setting of more general strategic plans and priorities. Some jurisdictions review priorities regularly, e.g. every year, whilst others only set priorities over a longer period of time, e.g. every two-three years. Having specified priorities is viewed as a public safeguard that the competition authority focuses its (financial and human) resources on strategically important sectors and issues. However, if not used correctly, prioritisation could constrain the competition authority's discretion in exercising its enforcement powers. Authorities could ensure that priorities are based to the largest extent possible on objective criteria in order to avoid due process criticisms relating to impartiality and/or unpredictability.

- **Possible beneficial outcomes:** Making priorities publicly available helps i) limit the number of complaints the agency has to deal with and therefore, ii) optimise the workload of the competition authority and iii) increase the efficiency of the enforcement action.
- **Possible detrimental outcomes:** On the other hand, setting predetermined criteria could i) result in a limitation of the competition authority's discretion in the exercise of its enforcement powers and ii) lead to the outcome of shifting the competition authority's main focus from smaller local cases towards larger national cases.

B. Staffing strategies of competition authorities

18. Flexibility: The experience of competition authorities shows that different measures can be put in place to make the best use of legal, economic, and/or sector expertise existing within the institution. The skills involved in cases could require expertise that goes beyond legal and economic expertise, to include also management, communication, public policy, business and accountancy expertise. These skills can be very useful in facilitating the effective functioning of the agency.

19. Regarding staffing strategies, most agencies seem to favour a flexible case-by-case approach according to which the involvement of lawyers, economists and other specialists depends on the needs in the case at hand. The majority of agencies follow the traditional model grouping expertise in specialised units dealing with a certain competition issue (e.g. restrictive agreements, mergers & acquisitions). Jurisdictions where the competition authority has multiple functions tend to follow a more flexible approach by creating "mixed" case teams with experts across different policy areas (e.g. competition, consumer protection, sector regulation) in order to leverage the available internal expertise. In agencies whose main function is to enforce competition law, however, this model could be used more successfully by larger agencies with a broader base of human resources.

20. Mobility: To pursue effective management of the competition authority and to provide staff with opportunities to gain horizontal expertise, many agencies ensure internal mobility at different levels and in different forms: i) mobility in a physical sense (e.g. within the physical premises of the institution or "hot-desking") and ii) mobility between functions (e.g. regulatory and enforcement departments), enforcement functions (e.g. competition and consumer protection) or different aspects of competition law enforcement functions (e.g. merger control and antitrust law).

21. Integration of staff: There is general agreement among competition authorities on the importance of integrating economic analysis into the enforcement activities of the agency. Rigorous economic analysis can be ensured through mixed teams with the participation of lawyers and economists. However, the most challenging task is to ensure the effective co-operation between lawyers and economists. The majority of jurisdictions either follow a model in which economists are separated in dedicated units (e.g. Chief Economist unit), or follow a structure where economists are assigned to the "traditional" units alongside lawyers and staff with other qualifications.

- **Separation of economists:** In some agencies economists work in separate departments from lawyers. This model has the advantage of strengthening their independence in conducting economic analysis and brings flexibility into the system. According to some agencies, separation also helps economists perform better quality analyses. Separation, however, could raise challenges where co-ordinating with other parts

of the agency and can lead to internal tensions if the conclusions reached by economists differ significantly from those reached by others in the agency.

- **Integration of economists:** Some agencies apply a more integrated model whereby economists and lawyers work together in the same units. In this model, daily co-operation between the staff is clearly less challenging and lawyers and economists are more likely to take into account each other's views in their every-day work. However, some agencies have pointed out that concerns could arise if this model leads economists to conduct their analysis in a less independent way. Others solve this concern by having economists work as part of the case team as well as part of a specialised unit. Some agencies use a mixed model where economists work as members of the case team with additional support from a specialised economist unit. Some jurisdictions highlighted that competition law cases – if appealed – are ultimately decided by courts, thus it is important that the final decision is checked by someone with a legal background which puts a greater emphasis on the quality of the legal reasoning. This may influence the scope and independence of the economic analysis.

C. Separation of investigation and decision-making powers

22. **The administrative and the prosecutorial models:** Competition authorities are designed to be both effective and fair. Jurisdictions have adopted either the administrative or the prosecutorial enforcement model. There is no 'one-size fits all' solution, but rather the choice of model by jurisdictions depends on many factors, in particular, the legal and constitutional context in which agencies operate.

- **Administrative model:** In the administrative enforcement model, the administrative agency in charge of competition law enforcement conducts an investigation of the facts relevant to a possible violation of the law, and subsequently adopts a decision based on the results of its investigation. In some jurisdictions, a hearing takes place before an independent adjudicator within the administrative agency. In the administrative model, the investigative and decision-making functions are integrated within the same institution. In some jurisdictions these functions are performed by different parts of the institution. There may be an administrative appeal; administrative decisions are then subject to review by independent courts or tribunals.
- **Prosecutorial model:** In the prosecutorial model, the agency conducts an investigation and then prosecutes the case in an adversarial setting before an independent court or tribunal. In this model, the investigative function is formally distinct from the adjudicative function. In some jurisdictions, the final decision is taken by courts of general jurisdiction, while other jurisdictions have established specialised judicial bodies to deal with competition law matters.

23. **Checks and balances:** In order to increase independent and objective decision making, agencies have adopted various safeguards:

- **Procedural safeguards:**
 - *Increasing transparency:* Transparency contributes both to the quality of enforcement and to its legitimacy. It can be achieved through public hearings, public consultations, and with the publishing of decisions, press releases and annual reports. Another important element is providing parties with the opportunity to respond to the agency's competition concerns.
 - *Peer reviews:* Involving economists and lawyers external to the case team can be a way to include a variety of agency perspectives in the investigation phase, which can further improve the quality of decisions. Internal peer review systems can contribute to the strengthening of due process in the enforcement procedures and increase the credibility of the competition authorities' decisions. From a practical point of view, an effective peer review system can reveal substantive and procedural errors before the case is challenged before the courts.
- **Judicial review:**
 - *Standard of judicial review:* The existence of effective judicial review is a fundamental part of the competition enforcement process in both systems. In the administrative model courts usually engage

in a “full” judicial review of the decision, i.e. an in-depth review of facts and law, as opposed to a review only of legal points.

- *Specialised tribunals/chambers*: When the final decision in a competition case is either taken or reviewed by courts of general jurisdiction, jurisdictions have to ensure that the court is equipped to deal with the complexity of competition law cases, particularly when complex economic theories are involved. Some jurisdictions have created specialised courts responsible for assessing competition law cases. In some cases, these specialised courts might be distinct from the general court system. Other jurisdictions have retained the powers of the general courts in competition cases, but have allocated the review powers to a specific court or to one of its chambers, or have adopted procedural rules that allow courts to access necessary expertise.

4. Concluding remarks

24. There is no “one-size-fits-all” solution to the institutional design of competition authorities, as this is heavily influenced by the economic, social, and legal context of the jurisdiction.

25. Two main principles are generally relied on when designing effective competition institutions: fairness and efficiency. The various considerations presented in this document suggest that building a system to satisfy both these principles can be quite challenging. Hence, this document attempts to provide competition authorities with “balancing” considerations in order to make it easier for them to establish an institutional model that fits their domestic needs, but at the same time, meets the standards of efficiency and fairness.

26. Taking into account the experiences on institutional design discussed in the Competition Committee, the following key points emerge:

- Many agencies recognise the benefits of a multifunctional structure (e.g. agencies entrusted with both regulatory and competition functions). These include greater career opportunities, combination of complementary expertise, better information sharing, administrative and cost savings and policy synergies. However, single-function agencies may avoid difficulties arising from this model (e.g. clash of different internal cultures, differences in legal and economic analyses and required expertise, difficulties in setting priorities, emergence of conflicting policy objectives).
- Political influence could appear at various stages of the process (e.g. case initiation, enforcement and decision making) and in several forms (e.g. instructing the authority, vetoing or overruling the authorities’ decision, providing strategic steer). Independence of competition authorities’ vis-à-vis the government is a highly desirable characteristic though complete institutional autonomy could also carry its own difficulties (e.g. isolation, less effective advocacy).
- Accountability is a key element of an authority's functioning which might increase the overall credibility of the agency. This document provides a non-exhaustive list of examples – such as publishing annual plans/reports/guidelines, conducting public consultation, carrying on impact assessment evaluations, appearing before oversight committees – which might be taken into consideration to improve accountability.
- Sufficient financial resources and autonomy are essential to pursue effective enforcement activities. For this reason, some jurisdictions have opted for forms of self-funding of competition authorities. Self-funding, however, can raise concerns in terms of self-sufficiency (e.g. fines/filing fees may be highly variable) and in terms of bias in the agency’s activity (e.g. there could be a perception that the authority has perverse incentives to collect fines for its own budget).
- The importance of prioritisation is well-recognised: it limits the number of complaints to be processed, it optimises the agency’s workload, and it increases the transparency of the system. However, there are disadvantages that agencies should be aware of: it can limit flexibility and it might hamper co-operation with other public institutions.
- There are important differences (e.g. in terms of management, costs, due process, length of the procedures) between agency models where the investigative and decision-making functions are performed by the same institution (administrative model) or are separated in different institutions (prosecutorial model). Recognising that there is no “optimal” solution, some authorities might find it advantageous to include checks and balances in their system in order to address the potential trade-offs (e.g. internal separation, procedural safeguards, peer reviews and effective judicial review).