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

**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Note by BIAC --

**17-18 December 2014**

*This document reproduces a written contribution from BIAC submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.*

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

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## BIAC

### 1. Introduction

1. The Business and Industry Advisory Committee ("BIAC") of the OECD appreciates the opportunity to contribute to the OECD Competition Committee's Roundtable on Changes in Institutional Design of Competition Authorities. In BIAC's view, the institutional design of competition authorities is critically important to the effectiveness of a jurisdiction's competition law. The design of agencies should focus on ensuring the most pro-competitive outcomes possible; but it must do so in a manner that will maintain the confidence of businesses and citizens alike, without which the enforcement of competition laws will ultimately lack political, legal and economic legitimacy. A successful design must also reflect the increasing reality that government agencies operate within strict budgetary constraints.

2. In this paper, organized under the principal headings of "Multifunctional Competition Authorities", "Independence from Government" and "Separation of Investigative and Adjudicative Functions", BIAC puts forward certain considerations in the institutional design of competition authorities from the perspective of trying to meet and balance these goals of effectiveness, legitimacy and efficiency. The examples and discussion provided are taken primarily from experience in the United Kingdom, European Union, United States and Canadian systems.

### 2. Multifunctional Competition Authorities

3. One of the fundamental issues to consider in designing the institutional structure of a competition authority is the scope of its mandate, specifically, whether it will be confined to "core" competition/antitrust issues, such as regulating mergers and preventing cartels and abuses of dominance, or whether the authority will have broader responsibilities that extend, for example, to consumer protection and sector-specific matters.

4. In the current environment of increased budgetary scrutiny, cost reduction is often cited as a key factor in combining multiple functions into a single agency.<sup>1</sup> Such combinations can bring administrative efficiencies as resources are shared and duplicative efforts are minimized. A number of European jurisdictions, including the Netherlands, Denmark, Finland and Ireland, have undertaken institutional reorganizations driven largely by cost considerations.<sup>2</sup>

5. In addition to improving efficiency, creating a multifunctional competition authority can also enhance the entity's overall effectiveness. Integrating multiple functions within a single authority can generate synergies as experts from related fields are brought together to analyze problems collectively. In BIAC's view, the best example of this is the significant complementarity between the areas of competition and consumer protection<sup>3</sup>, both of which share the common goal of promoting consumer welfare.<sup>4</sup> They aim to ensure that consumers have access to a wide range of competitively priced products in well-functioning markets free from unfair practices.<sup>5</sup> Protecting the integrity of information in the marketplace ensures both a

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<sup>1</sup> K.J. Cseres, "Integrate or Separate. Institutional Design For the Enforcement of Competition Law and Consumer Law" (2013) Amsterdam Law School Legal Studies Research Paper No. 2013-03.

<sup>2</sup> *Ibid* at 5 and 36.

<sup>3</sup> William E. Kovacic & David A. Hyman, "Competition Agencies with Complex Policy Portfolios: Divide or Conquer" (2013) GW Law Faculty Publications & Other Works, Paper 631 at 37.

<sup>4</sup> *Ibid* at 38.

<sup>5</sup> Cseres, *supra* note 1 at 12.

level playing field for competitors and adequate information for consumers, thereby contributing to a more robust and efficient marketplace.<sup>6</sup>

6. Integrating these two functions can promote consistent outcomes. Segregating competition law, which primarily focuses on correcting supply-side market failures, from consumer protection law, which focuses more on the demand-side<sup>7</sup>, can result in inconsistent results, such as “spill-over effects”<sup>8</sup>, ultimately weakening their ability to achieve the shared goal of promoting a properly functioning marketplace.<sup>9</sup> Bringing the two functions together in a single entity can give the agency a more holistic view of market problems and further, can result in cross-fertilization of ideas and expertise between the two functions, thereby stimulating new and better solutions.<sup>10</sup>

7. Combining multiple functions – including sector-specific reviews – within the exclusive purview of a single authority creates a “one-stop shop” for market participants; it avoids the problems associated with subjecting businesses to different regulatory regimes in respect of the same conduct, thereby addressing the significant concern that a business may be subject to conflicting rules or rulings.<sup>11</sup> In extreme cases, such overlap can lead to one agency requiring, or at the very least permitting, the very type of behaviour or transaction sought to be enjoined by another.<sup>12</sup>

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<sup>6</sup> *Premier Career Management Group* at para. 63; OECD, *Policy Roundtables: The Interface between Competition and Consumer Policies*, Doc. No. DAF/COMP/GF(2008)10, (2008) at 75, online: <http://www.oecd.org/regreform/sectors/40898016.pdf>.

<sup>7</sup> Kovacic & Hyman, *supra* note 3 at 37.

<sup>8</sup> *Ibid* at 33.

<sup>9</sup> Cseres, *supra* note 1 at 34.

<sup>10</sup> Annetje T. Ottow, “Erosion or innovation? The institutional design of competition agencies – A Dutch case study” (2014) 2:1 *Journal of Antitrust Enforcement* 25 at 31 and 43.

<sup>11</sup> It is not the purpose of this brief paper to address the complex legal issue of immunity from competition law that may be created by an overlap.

<sup>12</sup> In Canada, for example, more than one government agency may review the merger of a communications undertaking: the Canadian Radio-television and Telecommunications Commission (the “CRTC”), Industry Canada, the Competition Bureau, and potentially the Minister of Heritage. These multi-track reviews give rise to significant fairness concerns and can produce inconsistent rulings. See: Monique McAlister, “Double or Triple Jeopardy: Satisfying Three Potential Masters in Ownership and Merger Reviews” (Paper delivered at the Law Society of Upper Canada 15<sup>th</sup> Biennial Conference: New Developments in Communications Law and Policy, 23-24 April 2010). These issues were brought into sharp relief in Astral Media Inc.’s 2001 acquisition of Télémedia Radio Inc. In that case, the Competition Bureau determined that the proposed transaction would result in a substantial lessening of competition in certain French-language radio markets in Quebec. The Bureau then sought an order prohibiting the transaction. In response, Astral Media asked the Federal Court of Canada to declare that the Competition Act did not apply to the proposed transaction and, accordingly, the Competition Bureau lacked jurisdiction. Five months later, the CRTC approved the transaction (subject to certain conditions), indicating in its decision that the Competition Bureau’s determination and the pending appeal did not affect its ability to do so. The matter was ultimately settled by way of a consent agreement between the Competition Bureau and the parties to the transaction. The Federal Court therefore never issued a decision delineating the respective jurisdiction of the CRTC and Competition Bureau. However, the conflicting decisions of the CRTC and the Competition Bureau illustrate the uncertain situation businesses face when subject to the overlapping oversight of multiple agencies. Consolidating the merger review function within a single entity would ensure that telecommunications undertakings answer to only one master in respect of their merger transactions.

8. Including sector-specific mandates within a multifunctional competition authority may also help to avoid the risk perceived by some of “regulatory capture”<sup>13</sup>, that is, where a regulator becomes responsive to the industry group being regulated rather than the public interest.<sup>14</sup> Although this is a possibility, it is BIAC’s view that this risk has been sometimes overstated. In any event, creating a competition authority with a broad mandate may reduce susceptibility to pressure from any one interest group, helping to ensure that agency staff are exposed to various voices and viewpoints.<sup>15</sup>

9. However, there are also drawbacks to multifunction agencies. First, vesting a single competition authority with multiple functions can still, in some instances, lead to conflict between the different policy goals. When policy goals conflict, disagreements may arise over which should be given primacy.<sup>16</sup> Even in the absence of direct conflict in policy objectives, there is a concern that a multifunctional authority charged with implementing a wider array of policies may result in a lack of focused enforcement.<sup>17</sup> Combining responsibility for a wider array of policy objectives into one body can also compromise accountability: as the number of policy objectives increase, it becomes more difficult to measure performance against a clear set of evaluative criteria.<sup>18</sup>

10. There is a limit on how broadly the mandate of a competition authority can be drawn to include sector-specific considerations. Proper oversight of regulated industries often requires specialized expertise, and a multifunctional competition authority may be unfit to fulfill these specialized tasks. Taking the telecommunications market as an example, while regulators often perform functions that would normally fall to competition authorities, such as the definition of markets and the assessment of market power<sup>19</sup>, on the other hand there are complex technical aspects of regulating the telecommunications industry such as managing network interconnection and costing of essential facilities, which are arguably more appropriately dealt with by a sector-specific regulator with highly specialized expertise.<sup>20</sup> In addition, regulating ex-ante or ex-post frequently requires different skills and a different mindset. The competing considerations at stake have given rise to a continuing debate over where responsibility resides for policing competitive conduct in the Canadian telecommunications market.<sup>21</sup>

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<sup>13</sup> Cseres, *supra* note 1 at 39.

<sup>14</sup> Rachel E. Barkow, “Insulating Agencies: Avoiding Capture Through Institutional Design” (2010) New York University School of Law Working Paper No. 10-82 at 21.

<sup>15</sup> *Ibid* at 39.

<sup>16</sup> Kovacic & Hyman, *supra* note 3 at 11.

<sup>17</sup> Ottow, *supra* note 10 at 30.

<sup>18</sup> Cseres, *supra* note 1 at 27.

<sup>19</sup> Iain C. Scott, “Competition Law in the Canadian Telecommunications Industry” (2002) 37 Can. Bus. L.J. 249 at 262.

<sup>20</sup> The competing considerations at stake have given rise to a continuing debate over where responsibility resides for policing competitive conduct in the Canadian telecommunications market. See, for example, John S. Tyhurst, “Monopoly Lost? The Legal and Regulatory Path to Canadian Telecommunications Competition, 1979-2002” (2001-2002) 33 Ottawa L. Rev. 385 at 421-424; Iain C. Scott, “Competition Law in the Canadian Telecommunications Industry” (2002) 37 Can. Bus. L.J. 249 at 262; Scott, *ibid* at 263.

<sup>21</sup> Bohdan S. Romaniuk & Hudson N. Janisch, “Competition in Telecommunications: Who Polices the Transition?” (1986) 18 Ottawa L. Rev. 561; H.N. Janisch, “From Monopoly Towards Competition in Telecommunications: What Role for Competition Law?” (1994) 23 Can. Bus. L.J. 239; and Arlan Gates, “Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector” (2000) 58 U. Toronto Fac. L. Rev. 83.

11. Perhaps of less concern is the impact that expanding an agency's substantive mandate can have on its leadership and staff's sense of the agency's capacity, or a tendency to "over-promise and under-deliver".<sup>22</sup> Commentators note that the United States Federal Trade Commission (the "FTC"), a competition agency with broad responsibilities, exhibited this tendency as its powers expanded and Congress continually urged it to use its new authority aggressively.<sup>23</sup>

12. Beyond the substantive merits and demerits of integrating multiple functions within a single competition authority, there may also be practical constraints on institutional design, such as the constitutional division of powers in a federal state.<sup>24</sup>

13. Finally, it is worth noting that complete separation and complete integration of functions are not the only alternatives available in designing a competition authority. An oft-employed middle-ground involves cooperation between distinct agencies. Such cooperation can run the full width of the spectrum from formal arrangements, as provided for in U.K. legislation, to more informal arrangements, as employed in Canada.

14. In the U.K., legislation provides for concurrent enforcement of competition law by its competition authority, the Competition and Markets Authority ("CMA") and sector regulators<sup>25</sup> and the sector regulators are obliged to consider use of competition rather than regulatory powers. The Concurrency Regulations<sup>26</sup> prevent multiple authorities from exercising those powers simultaneously by providing for coordination and giving the CMA power to decide which body will lead on a case, applying the principle that the best placed authority should do so and aiming to ensure that both technical expertise and competition law expertise is available.

15. Canada has taken a much less formal, inter-agency approach to cooperation. In the telecommunications industry, for example, the Competition Bureau and the CRTC have adopted an inter-agency agreement identifying certain areas where each agrees to cede authority to the other, areas where they will have concurrent authority, and areas where they will continue to exercise exclusive authority.<sup>27</sup> The agreement serves to clarify, to some extent, how the two agencies will exercise their overlapping jurisdiction. However, this is not a complete solution, as this agreement has not prevented conflicts in certain cases.<sup>28</sup>

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<sup>22</sup> Kovacic & Hyman, *supra* note 3 at 21 and 50-51.

<sup>23</sup> *Ibid* at 50-51.

<sup>24</sup> In Canada, for instance, full integration of consumer protection matters within the competition authority is not constitutionally permissible. Under the Canadian Constitution, the responsibility for consumer protection and policy is shared between the federal and provincial governments. The Constitution does not specifically assign consumer affairs to either level of government. Rather, each level of government has the authority to regulate certain aspects of consumer affairs through other, more broadly stated, constitutional powers. The federal government may regulate certain consumer affairs matters through the *Competition Act* under its trade and commerce and criminal powers. As a result, the *Competition Act* cannot regulate, and the federal Competition Bureau cannot enforce, consumer affairs laws that, in pith and substance, concern a matter of property and civil rights, such as product quality standards and warranties. However, the provinces have exclusive jurisdiction over property and civil rights.

<sup>25</sup> *Competition Act 1998* (U.K.)-covering regulators for communications, gas, electricity, water and sewerage, railways, air traffic, airport and healthcare (in respect of England only) services. The Financial Services (Banking Reform) Act 2013 gives the FCA concurrent powers in respect of financial services.

<sup>26</sup> *Competition Act 1998 (Concurrency) Regulations 2014 SI 2014/536*.

<sup>27</sup> Canada, Competition Bureau, *CRTC/Competition Bureau Interface*, Bulletin (2001), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01598.html>

<sup>28</sup> See, for example, the Astral-Télémedia affair, discussed above in footnote 12.

### 3. Independence from Government

16. An important issue in the institutional design of competition agencies is the level of independence from government political considerations that is afforded to the agency. Indeed, in an OECD survey, “greater independence” was the factor most frequently identified as likely to lead to better promotion of competition law’s objectives.<sup>29</sup> The independence of competition agencies varies considerably across jurisdictions, and influences their manner of operation.

17. Independence from government politics is an important element of any competition agency as it “de-politicizes enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political term to the next”.<sup>30</sup> Further, independence from government, or lack thereof, can have a considerable impact on market stability, the facilitation of investment, and the efficient operations of competitive agencies. The relative independence of a competition agency can also impact the extent to which government industrial policy is considered within the decision-making process, which, in turn, can also impact incentives for investment and innovation.<sup>31</sup> Independence is important to avoid competition law being used by politicians to achieve political or industrial goals that have little to do with competition law, as we have seen in some countries. Unfortunately, the risk is present in many countries, including European ones, where politicians have in the past called on competition authorities to break up companies, such as banks in the UK, or to find an infringement in areas such as petrol or energy prices which have recently been investigated or regulated. Independence means that a competition authority does not need to act in these instances if it does not believe there is an issue or if a previous inquiry or investigation has already shown that there are no problems. Independence also means that if the authority acts, its remedy is more likely to be based on evidence and sound economics.

18. There are a number of criteria for measuring independence, including the way members of competitive agencies are elected or appointed, budgetary independence and the role of the state in the selection and prioritization of cases and the decision making process.<sup>32</sup>

19. The concept of accountability is closely linked to independence. It is generally accepted that institutional independence cannot be defended without a requisite level of accountability.<sup>33</sup> Ideally, agencies will be both autonomous from political pressures with respect to their investigations and simultaneously

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<sup>29</sup> OECD, Global Forum on Competition, *The Objectives of Competition Law and Policy: Note by the Secretariat*, Session 1, Doc. No. CCNM/GF/COMP(2003)3, (2003) at 8, online: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/34375749.pdf>

<sup>30</sup> Calvin S. Goldman & Navin Joneja, “The Institutional Design of the Canadian Competition Law: The Evolving Role of the Commissioner” (Paper delivered at the Loyola University Chicago School of Law Symposium, A Comparative Analysis of Antitrust Law Regimes: Designing Better Institutions for Deciding Antitrust Issues, 11 September 2009) at 7.

<sup>31</sup> Note there is also some support in competition circles for increasing the dependence of government on competition bureaus by placing high-ranking officials of competition agencies within Cabinet so as to allow these individuals to drive legislation based on competitive concerns, rather than vice versa. See: Calvin S. Goldman, Robert E. Kwinter & Crystal L. Witterick, *Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change* (Remarks delivered at The Law and Economics Programme, University of Toronto Institute for Policy Analysis, University of Toronto, 13 December 2002) at 11.

<sup>32</sup> *Ibid.*

<sup>33</sup> Michael J. Trebilcock & Edward M. Iacobucci, “Designing Competition Law Institutions” (2002) 25(3) *World Comp.* 361 at 364.

accountable “for the exercise of its powers and expenditure of public resources”.<sup>34</sup> The means to ensure accountability are broad and at times can conflict with the criteria for independence. Such mechanisms can include subjecting budgetary appropriations to government approval, the involvement of the executive branch or Parliament in the appointment of agency members and agency-published enforcement guidelines.<sup>35</sup>

20. While the response to issues of accountability and independence varies in different countries, independence is generally considered desirable and is strongly supported by BIAC.<sup>36</sup> The World Bank suggests that, in order to ensure sufficient independence, members of competition agencies should not be appointed directly by the head of state, and the competition agency should be separate from a government ministry and have its own budget.<sup>37</sup> Many jurisdictions have adopted measures to ensure the independence of their competition authorities: yet in only 63% of industrial countries, the competition authority is considered independent from government ministries.<sup>38</sup> This is an area to which BIAC would support further attention being paid. BIAC would also emphasize the importance for the competition authority to have an adequate budget and resources to meet its responsibilities in an efficient manner.

21. Institutional design in the U.S. is motivated in part by a strong belief that merging government industrial policy and competition agency decision-making processes can lead to anti-competitive results.<sup>39</sup> The independence of the U.S. competition agencies from government helps maintain the separation between industrial policy and competition analysis.

22. The FTC is a formally independent agency. Although the FTC’s commissioners are appointed by the President and Congress controls its budget,<sup>40</sup> the FTC conducts its own investigations and Commissioners cannot be removed from their position merely because the government disagrees with their decisions.<sup>41</sup> The executive branch exercises no control over the agency beyond the President’s power to appoint commissioners.<sup>42</sup> Furthermore, the Congressional appropriations committee that sets the FTC’s budget

<sup>34</sup> William E. Kovacic & David A. Hyman, “Competition Agency Design: What’s on the Menu” (2012) GW Laws Faculty Publications & Other Works, Paper 628 at 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> See Giorgio Monti, “Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network” (2014) EUI Working Paper No. 2014/1 at 4-5.

<sup>37</sup> *Ibid* at 365.

<sup>38</sup> *Ibid.*

<sup>39</sup> Bill Baer, “International Antitrust Enforcement: Progress Made; Work To Be Done” (Remarks delivered at the 41<sup>st</sup> Annual Conference on International Antitrust Law and Policy, Fordham University School of Law, 12 September 2014) at 7.

<sup>40</sup> J. Thomas Rosch, “Thoughts on the FTC’s Relationship (Constitutional and Otherwise) to the Legislative, Executive and Judicial Branches” (Remarks delivered at the Berlin Forum for EU-US Legal-Economic Affairs, 19 September, 2009) at 1.

<sup>41</sup> Sheila F. Anthony, “Remarks” (delivered at the Columbia University International Journalists Seminar, 21 March 2000), online: <http://www.ftc.gov/public-statements/2000/03/remarks>. The FTC has also demonstrated a reluctance to render decisions based on government policy rather than competition considerations. For example, in 2013, when Motorola Mobility breached its commitment to license certain patents, the FTC responded by prohibiting the subsequent owner of the patents (Google) from disregarding the commitment: Edith Ramirez, “Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective”, (Speech delivered at the 8<sup>th</sup> Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center, 10 September, 2014) at 6.

<sup>42</sup> Peter C. Ward, *Federal Trade Commission: Law, Practice and Procedure* (Law Journal Press, 1986) at §2.07[1], 2-23.

typically does not concern itself with the “wisdom or utility of agency programs” but merely responds on budget increase requests and uses prior year budgets as guidelines.<sup>43</sup>

23. In contrast to the FTC, the Antitrust Division of the DOJ is not formally independent from government: it is part of the executive branch and is responsible for representing the U.S. in court proceedings.<sup>44</sup> Further, both the head of the DOJ and its specific Antitrust Division are appointed by the President.<sup>45</sup> Nevertheless, the Antitrust Division of the DOJ is considered to “exercise its powers largely independently of the executive branch to which it belongs”.<sup>46</sup>

24. In both agencies, there is a strong focus on decision-making based on competitive factors rather than government policy goals. Bill Baer, the Assistant Attorney General of the DOJ’s Antitrust Division, for instance, has stressed the need to “commit to making enforcement decisions based solely on competitive effects and consumer benefits” lest these organizations “risk losing the trust and confidence of business”.<sup>47</sup> Similar to the European Commission, the DOJ sees this issue as particularly relevant in the area of intellectual property, where monopolistic market power can sometimes be confused with a breach of antitrust laws.<sup>48</sup> Baer notes the importance of ensuring that “antitrust enforcement involving intellectual property, for example, should not be used to implement domestic or industrial policies” as this approach “undermines the integrity and credibility of an agency’s decisions”.<sup>49</sup>

25. In other jurisdictions, however, there is concern over the seepage of government industrial policy into competition authorities’ decision-making processes. In the U.K., for example, *in* the CMA’s infancy, there are questions regarding its independence from government. When the CMA was formed, the government outlined a non-binding ministerial statement of strategic priorities for the CMA, or a “steer”, which essentially outlined how the government thought the new body would fit within its broader economic policies.<sup>50</sup> Further, the CMA possesses broad new investigative powers regarding issues of ‘public interest’, such as national security, and the government recently called upon it to intervene in the energy and financial services sectors.<sup>51</sup> While the CMA has emphatically stated that it will make its own decisions on which markets to investigate, there are nevertheless questions regarding its independence from government<sup>52</sup>.

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<sup>43</sup> *Ibid* at §2.07[6], 2-23. However, there have been instances where both the FTC and DOJ have withdrawn proposals to share work between them for fear that their respective budgets would be cut. See: Monti, *supra* note 40 at 5, citing W.E. Kovacic, “Competition Agencies, Independence, and the Political Process” in J. Drexler, W. Kerber and R. Podszun, eds., *Competition Policy and the Economic Approach* (Edward Elgar, 2011) at 292.

<sup>44</sup> Harry First, Eleanor M. Fox & Daniel E. Hemli, “Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System” (2012) New York University Law and Economics Working Papers at 9.

<sup>45</sup> *Ibid*.

<sup>46</sup> Monti, *supra* note 40 at 4.

<sup>47</sup> Baer, *supra* note 43 at 5.

<sup>48</sup> It is the position of the DOJ that “the exercise of monopoly power, including the charging of monopoly prices, through the exercise of lawfully gained monopoly position will not run afoul of the anti-trust law: *ibid* at 6.

<sup>49</sup> *Ibid* at 7.

<sup>50</sup> Samantha Mobley & Farin Harrison, “UK Competition Regime: New Measures in Force”, *PLC Magazine* (June 2014) 27 at 29.

<sup>51</sup> *Ibid*.

<sup>52</sup> For clear statements from the CMA dismissing these concerns, see for example the speech by Alex Chisholm, CEO of the CMA: “CMA Update: Changes to the UK Competition Regime”; 26 September

26. In some emerging economies, there are fears that competition agencies may have the authority to intervene in cases based on industrial policy and not competition grounds.<sup>53</sup> These countries' relatively young anti-monopoly laws may not only formally leave the door open to industrial policy considerations and include the national interest as an element to be considered when assessing the impact of a merger or an antitrust case.<sup>54</sup> BIAC would support efforts to extend not only the understanding of the desirability of independence for the competition authority but its implementation in all competition regimes and would suggest that the OECD can have an important role to play in these efforts.

27. In Canada, although the Commissioner of Competition (the head of the Competition Bureau) is appointed by the Governor in Council (ie. Cabinet) and reports on a limited basis to the Minister of Industry, the Bureau is nonetheless an independent law enforcement authority. The Bureau's reliance on the Department of Industry for budgetary direction has raised questions regarding the Bureau's efficacy, particularly when a lack of funding has resulted in insufficient enforcement resources.<sup>55</sup> Some have suggested that the Bureau adopt a self-funded model (similar to other Canadian agencies such as the Ontario Securities Commission) in which it would obtain revenues from merger notifications, filing fees, and fines from criminal prosecutions.<sup>56</sup> The Bureau's affiliation with the Minister, while not affecting its independence in respect of substantive matters, may nonetheless have an effect on the timing of its decisions.<sup>57</sup>

28. Canada's Competition Bureau has taken a strong stance on an issue closely intertwined with agency independence: the role of government industrial policy in competition agency decision-making. Canada's approach to this issue is similar to that in the United States and the European Union: it continues to promote "the important principle that competition policy should be an independent voice to assure welfare is maximized."<sup>58</sup> As observed by Commissioner Pecman, focus on industrial policy by a competition agency can lead to "sub-optimal outcomes".<sup>59</sup>

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2013 available at <https://www.gov.uk/speeches/cma-update-changes-to-the-uk-competition-regime>, and the speech by Lord David Currie, Chairman of the CMA: "The new CMA: how will it promote competition?"; 7 November 2013 Beesley Lectures available at <https://www.gov.uk/speeches/the-new-competition-and-markets-authority-how-will-it-promote-competition>.

<sup>53</sup> Ramirez, *supra* note 45 at 8.

<sup>54</sup> See, for example: Mario Mariniello, "The Dragon Awakes: Is Chinese Competition Policy A Cause For Concern?", *Bruegel Policy Contribution* (October, 2013) at 5.

<sup>55</sup> Calvin S. Goldman, Robert E. Kwinter & Crystal L. Witterick, "Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change" (Paper delivered at The Law and Economics Programme, University of Toronto Institute for Policy Analysis, University of Toronto, 13 December 2002) at 7.

<sup>56</sup> *Ibid* at 8.

<sup>57</sup> For example, when the Minister of Industry issued an interim rejection, under the Investment Canada Act, of BHP Billiton's \$40 billion hostile bid to acquire Potash Corporation of Saskatchewan in 2010, the Competition Bureau responded shortly after by announcing that it would not block the proposed merger.<sup>57</sup> The timing of this announcement suggests that the Bureau, despite its independence, may nonetheless have been reluctant in that case to be perceived as getting out ahead of the Minister. Calvin S. Goldman & Michael S. Koch, "The Interface between Competition Law and Foreign Investment Merger Reviews: Flying Blind or with Radar?" (Paper delivered at Foreign Investment Controls and Competition Law, Fordham University School of Law, 11 September 2014) at 18. Contrast this with Australia and ADM's bid for Australian GrainCorp, where Australia's Foreign Investment Review Board recommended and the Treasurer then rejected the bid *after* the Australian Competition and Consumer Commission had announced it would not block the merger.

<sup>58</sup> *Ibid*.

<sup>59</sup> John Pecman, "Remarks by John Pecman, Commissioner of Competition" (delivered at George Mason University Pharma Conference, 23 September 2014) at 3 [unpublished].

29. The European Commission has been described as a “political and administrative hybrid”<sup>60</sup> because its Commissioners are commonly politicians and its members are proposed by Member States.<sup>61</sup> These structural characteristics have caused certain commentators to question the Commission’s independence<sup>62</sup> However, much of the Commission’s work is considered “reasonably well insulated from politics and private interests”<sup>63</sup>, although internationally there is concern that this may be further tested by the recent vote of the European Parliament concerning online search.<sup>64</sup> Under E.U. law, there are no minimum standards or requirements for the independence of national competition authorities (“NCAs”): member states have complete freedom in designing the institutional structure<sup>65</sup>, but there are discussions underway regarding the means to guarantee that NCAs are independent and sufficiently resourced. Important aspects of independence are seen to include separate budget with budgetary autonomy, clear and transparent appointment procedures on the basis of merit, guarantees ensuring that dismissals can only take place on objective grounds and rules on conflicts of interest for the management/board<sup>66</sup>.

30. Ultimately, competition agencies’ ability to resist anti-competitive integration of government industrial policy will depend on the relative level of independence afforded to these agencies. The manner in which agency members are appointed or elected, budgetary systems, and decision-making power all play important roles in an agency’s independence. These elements require consideration if competition agencies are to achieve the goal of promoting pro-competitive practices.

#### 4. Separation of Investigative and Adjudicative Functions

31. A third major design feature of competition authorities is the degree of separation or integration of investigative and adjudicative functions. Like the considerations involved in multifunctional agency design, housing both investigative and adjudicative functions “under one roof” can lead to significant cost benefits. However, as with a lack of independence from government, the lack of separation between the investigative and adjudicative functions can raise significant concerns over the perception of fairness or bias, rising to the level of legal concern in certain jurisdictions.<sup>67</sup>

32. There are a few prevalent models for the degree of separation between investigative and adjudicative functions. The different institutional structures adopted in the U.S. for the FTC and the DOJ, reflect a highly integrated model and a completely separate model, respectively, while the Canadian model is one of bifurcated responsibility for these functions.

33. The FTC employs an integrated approach in which the full array of investigative and adjudicative functions are performed under one roof.<sup>68</sup> Once the FTC has investigated a potential violation, the matter proceeds to the adjudication stage if a majority of the five presidentially-appointed FTC Commissioners

<sup>60</sup> N. Nugent, *The European Commission* (Basingstoke, Palgrave, 2001) at 326.

<sup>61</sup> Monti, *supra* note 40 at 8.

<sup>62</sup> “European Parliament Approves Google Breakup Resolution”, Wall Street Journal, November 27, 2014, available at: <http://pm.ome/wsj.com/articles/european-parliament-approvs-google-breakup-resolution>.

<sup>63</sup> *Ibid.*

<sup>64</sup> “European Parliament Approves Google Breakup Resolution”, Wall Street Journal, November 27, 2014, available at: <http://pm.ome/wsj.com/articles/european-parliament-approvs-google-breakup-resolution>.

<sup>65</sup> The relative independence of the European Commission has allowed it to avoid introducing significant government industrial policy into its competition analyses. See for example *Ramirez*, *supra* note 45 at 8.

<sup>66</sup> See paragraphs 26-29 Commission Communication of 10 Years of Regulation 1/2003, 9 July 2014; available at [http://ec.europa.eu/competition/antitrust/legislation/antitrust\\_enforcement\\_10\\_years\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf).

<sup>67</sup> *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 60.

<sup>68</sup> Trebilcock & Iacobucci, *supra* note 37 at 380.

have reason to believe a violation has occurred and authorize the issuance of a complaint.<sup>69</sup> A trial on the merits is then conducted before an Administrative Law Judge (“ALJ”). Appeals from the ALJ’s decision can be taken to the full Commission.<sup>70</sup>

34. In contrast, the DOJ only performs investigative functions; it does not adjudicate. To obtain either criminal sanctions or a civil remedy, the DOJ must initiate formal enforcement proceedings before federal courts.<sup>71</sup>

35. The FTC’s integrated approach raises some bias concerns as Commissioners can be involved in both investigations and appellate review of the legal findings resulting from those investigations. As a result, some commentators report a perception of bias among FTC adjudicators, stemming from their actual or potential involvement in prior investigative and enforcement decisions.<sup>72</sup>

36. The FTC also represents a valuable model for structural separation aimed at responding to such concerns within an integrated approach, however.<sup>73</sup> Any involvement the FTC Commissioners may have had in the investigation of a matter ceases as soon as a complaint is issued. From this point forward, the Commissioners are isolated from the prosecutorial staff and precluded from considering any material that is not on the public record.<sup>74</sup> Since these procedural safeguards do not completely eliminate the risk of confirmation bias in the FTC process, where a Commissioner does exhibit that she or he may have prejudged a matter “in a way that casts doubt on their ability to render an impartial decision,” the parties may request her or his disqualification.<sup>75</sup> The FTC extensively trains its staff and vigilantly monitors compliance with these strictures.<sup>76</sup>

37. The institutional design of the European Union’s competition authority follows an integrated approach: the European Commission acts in each case as “police, prosecutor and judge.”<sup>77</sup> The choice of this approach is largely attributed to the influence of the civil law tradition, and its reliance on inquisitorial rather than adversarial modes of decision-making.<sup>78</sup>

38. Proceedings before the European Commission are partitioned into two phases: in the preliminary phase, investigations are carried out to determine whether there is a prima facie case; if so, the matter proceeds to the formal stage, in which formal allegations are made, a hearing is held and a decision is

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<sup>69</sup> First, Fox & Hemli, *supra* note 48 at 8-9.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid* at 7; Trebilcock & Iacobucci, *supra* note 37 at 368.

<sup>72</sup> Trebilcock & Iacobucci, *supra* note 37 at 383, citing Terry Calvani, *Lessons to be Avoided: The Experience South of the Border*, May 2001.

<sup>73</sup> UNCTAD, Fifth Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, “Submission by the United States of America: The Combination of Prosecutorial and Adjudicative functions at the United States Federal Trade Commission” (2005), online: [www.unctadxi.org/Sections/AntalyaConference/.../tdrbpayt05108\\_en.pdf](http://www.unctadxi.org/Sections/AntalyaConference/.../tdrbpayt05108_en.pdf).

<sup>74</sup> *Ibid* at 3-4.

<sup>75</sup> *Ibid* at 4.

<sup>76</sup> *Ibid* at 4.

<sup>77</sup> Ioannis Lianos & Arianna Andreangeli, “Institutional Design and Decision-Making Processes in European Competition Laws and Policy” (2011), Law and Governance in Europe Working Paper Series at 10, online: [http://www.academia.edu/1294230/Institutional\\_Design\\_and\\_Decision-Making\\_Processes\\_in\\_European\\_Competition\\_Laws\\_and\\_Policy](http://www.academia.edu/1294230/Institutional_Design_and_Decision-Making_Processes_in_European_Competition_Laws_and_Policy)

<sup>78</sup> Eleanor M. Fox, “Antitrust and Institutions: Design and Change” (2009) 41 Loy. U. Chi. L.J. 473 at 475.

rendered.<sup>79</sup> Unlike the procedure at the FTC, however, there is no separation of functions once formal allegations are made: the same individuals who conduct the investigation and make formal allegations are also responsible for preparing a decision.<sup>80</sup> This lack of separation between the investigative and adjudicative functions has given rise to significant criticism.<sup>81</sup> Commentators argue that the decision-makers' prior involvement in a given matter hinders their ability to make an objective, impartial consideration of the evidence.<sup>82</sup>

39. In light of these concerns, the European Commission has attempted to maintain the integrity of its decisions through internal safeguards. For example, in certain cases, a peer review panel of officials who have not been directly involved in the case review the decision before it is finalized.<sup>83</sup> Their comments and conclusions, however, are not publicized and are not available to the parties. As a result, the extent to which this procedure is used is unclear.<sup>84</sup> Perhaps more importantly, a Hearing Officer is now involved in the proceedings to "safeguard the effective exercise of procedural rights"<sup>85</sup> in competition proceedings before the Commission, and ensure that the hearing is conducted fairly and objectively.<sup>86</sup> This position was created in direct response to concern over perceived unfairness in the European Commission's process, but it appears to have done little to satisfy critics. Commentators point out that the Hearing Officer remains a Commission employee and he or she has no power to halt proceedings where the procedure was unfair; he or she only completes a report after the event.<sup>87</sup> The perception of unfairness that stems from having the same individuals investigate and adjudicate allegations has remained intact despite the introduction of the Hearing Officer role.<sup>88</sup> Suggestions for further improvement have been made<sup>89</sup> and BIAC would support consideration of additional measures to bolster the actual and perceived fairness of the process and hence its legitimacy in terms of institutional design.

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<sup>79</sup> Lianos & Andreangeli, *supra* note 77 at 11-2 (re: competition investigations) and 17 (re: merger reviews).

<sup>80</sup> John Temple Lang, "Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003" in *C.E.P.S. Special Report: Thinking Ahead for Europe* (2011) at 194, 198 and 201.

<sup>81</sup> See e.g. *ibid*; Frank Montag, "The Case for Radical Reform of the Infringement Procedure under Regulation 17" (1996) 8 E.C.L.R. 428; Donald Slater, Sébastien Thomas & Denis Waelbroeck, "Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?" (2008) College of Europe Global Competition Law Centre Working Paper No. 04/08; David Anderson & Rachel cuff, "Cartels in the EU: Procedural Fairness for Defendants and Claimants" (2010), *Int'l Antitrust Law & Policy*, Fordham University School of Law at 198; Ian S. Forrester, "Due Process in EC Competition Cases: A Distinguished Institution With Flawed Procedures", *The European Law Review* (2009) at 817.

<sup>82</sup> For a high-level review of this argument, see Maria Barroso Gomes, "Administrative Adjudication in Antitrust: Still a Controversy?" (2013) American Antitrust Institute Working Paper No. 13-03 at 25-26.

<sup>83</sup> Temple Lang, *supra* note 80 at 199.

<sup>84</sup> *Ibid*.

<sup>85</sup> E.C., *Decision of the President of the European Commission 2011/695/EU of 13 October 2011 on the function and terms of reference of Hearing Officers in certain competition proceedings*, [2011] O.J. L. 275/29 at Art. 1(2).

<sup>86</sup> *Ibid* at Art. 10; see also Wouter P.J. Wils, "The Role of the Hearing Officer in Competition Proceedings before the European Commission" (2012) 35 *World Comp.* 431.

<sup>87</sup> Lianos & Andreangeli, *supra* note 77 at 32.

<sup>88</sup> Temple Lang, *supra* note 80 at 201.

<sup>89</sup> For example, Temple Lang, *supra* note 83 and Forrester, *supra* note 84.

40. The U.K. approach has historically involved a more distinct separation of functions. Like the European Union, the U.K. employs a two-tiered process. At Phase 1, an initial assessment is conducted to determine whether the merger raises *prima facie* competition concerns; if so, the review proceeds to Phase 2 for a more in-depth inquiry. Historically, separate agencies performed these two functions. Recent amendments to the U.K. competition law, discussed above, brought both of these functions under the jurisdiction of a single body: the CMA.<sup>90</sup> The integration of these functions into a single agency predictably raised bias concerns. To maintain the integrity of the two-tiered process, CMA staff will be responsible for Phase 1 reviews, while an independent panel of experts will be responsible for Phase 2 reviews. However, some members of the Phase 1 case team will transfer to the Phase 2 team, in a clear move to promote efficiency. Despite this, the CMA has committed to ensuring that the independence of Phase 2 will be respected.<sup>91</sup>

41. Canada has a bifurcated structure under which one agency – the Competition Bureau – is responsible for investigation and enforcement, while a separate agency – the Competition Tribunal – is responsible for adjudication of non-criminal matters. The Competition Tribunal has both judicial members (selected from the Federal Court) and experts (appointed by the Governor in Council), with only the judicial members hearing questions of pure law. With respect to criminal competition claims, a model similar to the DOJ in the U.S. applies, where the Competition Bureau investigates and takes enforcement action together with the Director of Public Prosecutions, but provincial superior courts adjudicate.

42. Much of the debate over institutional design in Canada has centered on “finding an appropriate balance between an effective competition law enforcement regime and due process”.<sup>92</sup> The bifurcated model achieves a high degree of transparency and accountability, as well as independence between the adjudicative and investigative elements.<sup>93</sup>

43. In respect of civil matters, the Canadian model is cited for its potential to strike a “reasonable balance” between a number of competition law’s competing goals.<sup>94</sup> The Competition Tribunal serves as an independent adjudicative body that allows for due process while still maintaining a level of efficiency that is lost in the courts. Furthermore, separating investigative and adjudicative functions minimizes the perception of bias that can arise when the decision-maker is also involved in the investigative aspects of a case. Similarly, the goals of predictability and flexibility are both theoretically respected due to the presence of a relatively stable membership of both judicial representatives and experts on the Competition Tribunal, who are cognizant of changing business practices and economic conditions.<sup>95</sup>

44. On the other hand, the criminal model, with its distinct adjudicative process means that decisions are made by judges who may not have the requisite level of industry expertise and the process is considerably slower than if the functions were combined, and the predictability of outcomes is diminished.<sup>96</sup>

45. Even in light of the official separation of the investigative and adjudicative elements of Canadian competition regulation, the role of the Competition Bureau has evolved considerably over the years. Since 1986, the Commissioner’s role has taken on increased importance because of the desire of many parties to

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<sup>90</sup> Mobley & Harrison, *supra* note 54 at 27.

<sup>91</sup> Currie, *supra* note 57.

<sup>92</sup> Goldman & Joneja, *supra* note 34 at 2.

<sup>93</sup> Trebilcock & Iacobucci, *supra* note 37 at 370.

<sup>94</sup> *Ibid* at 373.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

reach negotiated resolutions, particularly in the merger context, legislative changes to the consent order process, and the proliferation of agency enforcement guidelines.<sup>97</sup> This evolution has resulted in a system in which investigative and adjudicative functions are more intertwined. In some respects, this integration is beneficial. For instance, it allows parties to reach negotiated, rather than adjudicated, solutions. This is particularly relevant in a merger review context, as businesses desire the sort of certainty and expedited resolutions that are lost with an adjudicative process and engage in negotiation with the Competition Bureau rather than face the uncertainty associated with potential adjudication.<sup>98</sup> On the other hand, with the introduction in 2009 of amendments to Competition Act permitting the Competition Tribunal to impose significant administrative monetary penalties (“AMPs”), there is a concern, given the Commissioner’s role in referring matters to the Competition Tribunal, that these AMPs will be used as leverage during the Bureau’s negotiation process.<sup>99</sup> This concern that the Bureau’s ability to determine the direction of a given case provides it with “de facto” decision-making power<sup>100</sup> is equally present in respect of criminal matters. This demonstrates that even in a model where the functions are separate, there can be a blurring of the lines.

## 5. Conclusion

46. Identifying the appropriate institutional structure for a given jurisdiction’s competition authority will ultimately depend on that jurisdiction’s particular political and regulatory context. Surely, no one solution will fit all. In general, however, BIAC would suggest that an appropriate approach may be to vest jurisdiction over all competition matters and consumer protection matters in a single competition authority, while leaving non-competition matters in the hands of sector-specific regulators. This would diminish the extent of overlapping jurisdiction and therefore help create a business environment less fraught with uncertainty.

47. Resisting the integration of non-competition sector-specific matters would help ensure the competition authority remains focused on its core goals and accountable for them. The major challenge in this approach would be to develop sufficient technical expertise to properly handle competition matters in certain regulated sectors.

48. Independence from government and industrial policy, permitting competition authorities to focus on consumer welfare without being watered down by industrial policy is generally accepted to be a desirable design feature for competition agencies and is strongly supported by BIAC. Agencies must nonetheless be accountable in order to earn their independence and the importance of adequate funding and resources for their work should not be underestimated.

49. As indicated at the outset, it is important to business and public confidence in a jurisdiction’s competition laws that the agency not only be independent, but be seen to be so. This confidence in the fairness of the process is also closely linked to the separation of investigative and adjudicative functions. This is an area where there are many models to choose from, and very specific design features can have a significant impact on both the actual and perceived fairness of any design chosen. BIAC would respectfully suggest that this is an area where there is scope for improvement in respect of the design and operation of some authorities.

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<sup>97</sup> Goldman & Joneja, *supra* note 34 at 14.

<sup>98</sup> *Ibid* at 16.

<sup>99</sup> *Ibid* at 30.

<sup>100</sup> *Ibid* at 14.