



Business and Industry Advisory Committee to the **OECD**

Comité Consultatif Economique et Industriel Auprès de l' **OCDE**

“The Roles and Tools of Competition Authorities: Fundamental Considerations”

BIAC Presentation to the OECD Global Forum on Competition

October 17, 2001

I. INTRODUCTION

An effective competition law regime is essential to developing economies experiencing rapid and significant deregulation, trade liberalisation and privatisation. When moving from a closed to an open economy, ensuring the continued viability of domestic industries must be carefully balanced with attaining the benefits of foreign investment and increased competition.

Building a competition culture is of the essence. Sufficient awareness of competition principles has to be created and maintained among other government agencies, academia, business, and the general public.

This being said, a key component of any competition regime is an institutional and procedural framework ensuring due regard is given to the fundamental fairness of enforcement actions. Essential internal procedural safeguards available in the jurisdiction concerned should include transparency of the process, and non-discriminatory application of laws, regulations, policies and procedures, without reference to the nationality of the parties concerned.

The dramatic growth in multijurisdictional business activity in the last decade has increased the pressure on domestic competition authorities to work more closely with their foreign counterparts. As business concerns have pursued global trade and investment opportunities on a wider scale, antitrust authorities have been obliged to increase the efforts at co-ordination in order to prevent or manage possible conflicts arising from the application of antitrust laws to international business conduct.

International convergence is a pressing issue for the private sector, most particularly in the area of merger control. With over 60 jurisdictions now having some form of merger regulation in place, parties to international transactions of any consequence are finding themselves subject to merger controls in multiple jurisdictions as a matter of course.

II. THE ROLES AND TOOLS OF COMPETITION AUTHORITIES

BIAC submits that the following fundamental considerations should be taken into account in the establishment and operation of competition authorities:

1. Independence of the Authority

Competition authorities in as far as possible, should be functionally independent as to the administration and enforcement of competition law. Related to the independence of the authority is the adequacy of funding for the authority. The amount of resources devoted to competition enforcement should be consistently re-evaluated to account for changes in markets, government action (e.g., deregulation) and other factors.

Advocacy of competition principles by the competition authority towards other government departments and agencies, to the business community, academia, and the general public, is essential.

2. Providing Certainty

Certainty is critical to business planning. Conversely, uncertainty can have a serious chilling effect on potentially pro-competitive business activity. This holds true worldwide.

The possible consequences of uncertainty in enforcement policy may include:

- the inhibition or prevention of innovation and the achievement of potential efficiency gains;
- impeding the creation of new businesses;
- distortions in international investment;
- the prevention of the creation of new standards;
- the inhibition of technology transfers; and
- the distortion of the forms and structures used to carry on business (e.g., uncertainty with respect to the competition law treatment of joint ventures and the possibility of civil or criminal liability may tend to encourage companies to merge rather than create joint ventures.)

3. Transparency

Transparency as to views, policies, and resolution of cases by competition authorities is necessary to promote certainty with respect to the authority's likely approach in a particular case. To that end, the authorities should among other things, issue news releases regarding important decisions, and publish information bulletins, enforcement guidelines, and speeches. This is all the more important regarding competition regimes which involve a "public policy override."

Ensuring the transparency of the investigative and enforcement functions of the authority by the publishing of normative standards is also an effective means of holding accountable the exercise of the decision maker's discretion, while maintaining a flexible system that facilitates negotiated solutions to potential competition law problems.

4. Non-Discrimination

Competition laws should not discriminate between firms on the basis of nationality.

Competition laws, regulations, policies, practices and procedures should not be applied in a discriminatory manner to further the interests of local firms or industries.

5. Due Process

Competition law procedures should operate within a framework that ensures that the fundamental due process rights of the parties concerned are respected, and that appropriate safeguards, including effective appeal procedures, are in place to ensure the enforceability of those rights by the parties concerned.

Mechanisms should be established to ensure decision making is based strictly on facts and legal standards applied objectively in each case.

6. Compliance Oriented Approach

Competition law regimes should be compliance oriented and proceed on the assumption that:

- Most business persons wish to comply with the law;
- A more adversarial or less co-operative approach has a chilling effect on activity which may either be pro-competitive or competitively neutral;
- A more adversarial approach typically results in far greater cost for the authority as well as private parties;
- Effective enforcement can often be achieved through a consultative approach by making it clear that legal proceedings will be commenced when co-operation is not forthcoming or when undertakings are not honoured; and
- Increasing certainty of process and substance is better for all concerned.

A compliance program should include communication, providing confidential advice to business persons contemplating transactions and adopting a flexible approach to resolving cases that warrant intervention.

7. Case Selection Criteria

The authority cannot investigate every potential meritorious case – there are not adequate resources to do so. Authorities should focus on those cases of anti-competitive behaviour which have caused or which have the greatest potential to cause harm to the local economy. Case screening criteria are needed to ensure those cases that merit the devotion of scarce resources receive careful investigation.

Principal screening factors may be the scale and strategic importance of the conduct in question relative to the jurisdiction concerned; whether enforcement action by the authorities would support government policies which encourage economic efficiency; and whether national, international, or major regional participants are involved in the matter. The size of the market is obviously a key factor where the market is large, because the economic impact of even a small price increase or reduction in innovation or service would be very considerable.

8. Information Gathering Tools

It is essential that an enforcement agency be able to conduct its analysis based on facts.

To that end, fact-gathering should be facilitated by providing an incentive for parties (i.e. speed, less expense and certainty) to provide as much information as possible voluntarily.

Apart from formal processes to gather information, authorities should make extensive use of “field interviews,” in which it telephones or meets with members of industry to gather their views on issues such as market definition, barriers to entry and effective remaining competition.

Bringing in “outside people” with significant experience in the field or with specialised expertise (such as economists) has proven to be a cost efficient manner of performing through field investigations. It has helped authorities to focus on the most significant practical issues and has also helped them to increase their own industry specific expertise more quickly.

9. Protection of Confidential Information

A significant amount of information submitted to the authority is highly sensitive commercial information which, if improperly disclosed by the authority, could potentially cause substantial harm to the party submitting the information. Thus, the success of an enforcement regime depends to a substantial extent on the degree to which firms feel comfortable that information they give the authority will remain confidential. Given its importance, confidentiality should be statutorily protected.

The increasing globalisation of markets brings with it not only benefits, but also an increased risk of anti-competitive conduct that spans borders. In the last few years, the number of cross-border investigations is increasing and information sharing and co-operation are accordingly becoming more important.

There is plenty of room for agencies to benefit from the exchange or “cross-pollination” of ideas with other antitrust organisations around the world with respect to non-confidential information, such as general industry analysis.

Representatives of business internationally have expressed growing concern about the adequacy of the safeguards for confidential information in the world of increasing co-operation. The business community has made a number of specific proposals to the OECD and elsewhere to address these issues in a fair and balanced manner.

10. Competition Challenges in Dynamic Markets

The unique characteristics of the new economy and the increasing importance of knowledge based products, require that competition law authorities carefully consider the implications of their actions for future investment, research and innovation. Traditional assumptions underlying competition policy are increasingly being questioned in the new economy. For example, a key aspect of competitive analysis under competition laws around the world is the definition of the size and scope of a relevant market. However, market definition poses substantial challenges as markets are increasingly globalised and new competitors rapidly appearing.

Competition law authorities must keep in mind that overly static efforts to promote competition within the framework defined by existing markets may pre-empt or inhibit innovation and future competition for the development of new markets.

BIAC suggests that antitrust enforcement in developing countries should focus on horizontal and other unambiguous anti-competitive conduct. We advocate similarly that competition authorities should be careful to ensure that the conduct in question is clearly anti-competitive, especially in high technology industries which are undergoing rapid transition. Similarly, competition authorities must be certain that enforcement action is necessary to protect consumers. This is crucial because the cost of interfering too quickly and perhaps too aggressively can inhibit innovation and future competitive growth. Competition law enforcement must try to find the right balance on a case by case basis, as the facts of each case will necessarily differ.

III. INPUT OF THE PRIVATE SECTOR IS ESSENTIAL

In our view the participation of the private sector is necessary to the success of any global initiative on competition policy. Private sector input is necessary to ensure that the work done is realistic, potentially effective, balanced, and stands a greater chance of acceptance. While the private sector should not drive the train, it must have a seat on one of the cars of the train. We are grateful for the ticket received today.

The business community represented by BIAC, looks forward to continued discussion on competition issues started today at the OECD Global Forum on Competition.

