

**Comments by the
Business at OECD (BIAC) Competition Committee
to the OECD Competition Committee**

Competition and Democracy

December 6, 2024

I. Introduction

1. *Business at OECD* (BIAC) is pleased to contribute to the OECD Competition Committee discussion on the topic of competition and democracy.

2. Open market competition and democracy are each founded on the rule of law, and competition laws are a reflection of the democratic process. The goals of competition, e.g., promoting economic efficiency, is consistent with democracy and should be fostered in a manner that maintains the confidence of businesses and citizens alike, thereby ensuring the legal, economic, and political legitimacy of competition law. While BIAC acknowledges the ongoing debate over the political power of large enterprises, it fundamentally believes that broad input to decision making – including by business – must be encouraged to promote the marketplace of ideas. Indeed, private enterprise can act as a bulwark against abuses of state power in the hands of non-democratic actors and autocratic regimes. When considering whether to create a greater role for democracy in competition policy, policy makers must carefully consider whether the challenges they seek to address are indeed competition problems or non-competition problems that require other forms of resolution. Ultimately, the solution to promoting greater democracy does not lie in silencing or stifling the input or viewpoint of any party, including the voices of business.

3. BIAC’s contribution will focus on two key trade-offs articulated by the Secretariat in the Annex to the Call for Contributions and in the Secretariat’s Policy Paper.¹

- Potential links between democratic decision making and competition law enforcement; and
- Key trade-offs involved in attempting to create a greater role for democracy in competition policy.

4. Before turning to these questions, BIAC will briefly address the relationship between competition and democracy.

II. Competition and Democracy

5. Democracies are founded on the rule of law, which provides both commercial and legal certainty to companies, investors, and consumers. In its 2017 contribution on competition and democracy, BIAC noted:

The ability for economic entities to compete freely is a key pillar of free and open markets. Open market competition is not only a theoretical underpinning of

¹ OECD, The Interaction between Competition and Democracy (Competition Policy Paper No. 316, Nov. 7, 2024), <https://doi.org/10.1787/20758677>.

democracy; it is a barometer of how solid the foundations of democracy are. Indeed, a transparent, predictable, objective and effective competition regime is a litmus test for a democratic state, as such a regime reflects respect for economic and other basic rights.²

6. At a high level, therefore, competition laws reflect the democratic intent of the legislature. This is also true for the institutional design, process, and substance of competition law enforcement, which takes its legitimacy from the democratic principles that they encapsulate. As BIAC noted in 2017:

Economic activities engage a whole host of fundamental rights and freedoms that require respect, non-interference and protection by the state. These include the respect for property, including intangible property rights; that also includes non-interference (absent judicial authority) in the rights of economic actors to conduct a business and choose business partners; freedom of association; freedom of expression; the right to privacy; and, of course, the right to a fair trial, in the context of administrative and judicial proceedings. These rights are many of the core rights that well-functioning democratic societies need to uphold.³

The fundamental tenet of the rule of law – embodying such bedrock principles as non-discrimination, transparency, representation, due process, and judicial oversight – is central to the legitimacy of any competition law enforcement regime.

7. Just as properly functioning competition enforcement regimes depend on democratic principles, so too do democracies benefit from open market competition.⁴ Investment, innovation, development and the diffusion of new products and services generate social welfare. This has enabled economic benefits to reach more people, providing evolution of technologies permitting secure online government services have enabled an increasing number of citizens, especially disadvantages ones. This allows them to access government resources and participate in democratic processes.⁵ These developments are positive. Any reassessment of competition policy through a “democracy” lens, therefore, needs to ensure that such positive elements, and future innovations are not undermined.

² OECD, Competition and Democracy – Contribution from BIAC, DAF/COMP/GF/WD(2017)1, ¶ 1 (Nov. 16, 2017), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2017\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2017)1/en/pdf) [hereinafter BIAC 2017 Submission]. BIAC noted three additional connections between competition and democracy: (i) the goal of competition in promoting efficiency in ensuring socially-desirable outcomes, notably furthering broader public interest goals in emerging economies, and achieving objectives, such as poverty alleviation, job creation and economic growth; (ii) that institutional design of competition authorities should maintain the confidence of businesses and citizens alike, to ensure legal, economic and political legitimacy; and (iii) the role of competition law and enforcement in fighting corruption, through measures against bid-rigging and bribery in public sector procurement. *Id.* ¶¶ 4-6.

³ *Id.* ¶ 2.

⁴ See, e.g., European Comm’n, *A Dynamic and Workable Effects-Based Approach to Abuse Of Dominance* at 1, Competition Policy Brief No. 1/2023 (Mar. 2023), https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf (“The enforcement of competition rules also contributes to achieving objectives that go beyond consumer welfare, at least when the latter is defined strictly in economic terms. As stated by Executive Vice President Vestager: “By basing our policy intent and action on principles that stem directly from the Treaties, EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, **and ultimately plurality and democracy.**” (emphasis added)).

⁵ See, e.g., Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, art. 11 (emphasis added):

1. Everyone has the right to freedom of expression. **This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.**
2. The freedom and pluralism of the media shall be respected.

8. Well-functioning markets can also be one of the antidotes to anti-democratic trends that are emerging in different countries, where autocracies seek to coalesce economic and political power by undermining democratic institutions, including competition authorities and courts, and use state-controlled enterprises for undemocratic purposes, or to unduly influence industrial policy. Indeed, as Ceres notes:

The breaking down of checks and balances of democratic legal and political systems facilitates the accumulation of economic power and its dangerous connection with the accumulation of political power. Hence, systematic dismantling of the democratic legal and political systems also affects economic freedoms of market actors, and the welfare of EU citizens in local markets.⁶

For example, vibrant and independent media are of key importance if public media has been captured by autocratic governments who typically use media to steer the public debate in their favour.⁷ Maintaining a competitive market therefore contributes to the non-efficiency goal of decentralizing economic and political power – key pillars of functioning democracy.

9. Ceres also notes that in the case of Hungary:

[T]he rule of law backsliding enabled the Hungarian government to intentionally use economic regulation to restructure markets and to override market mechanisms. By increasing state intervention in certain segments of the economy the room for competition and equal opportunities for market actors was severely decreased and in certain cases eliminated altogether.⁸

Such backsliding, Ceres points out, weakens or even harms competition across the whole EU and affects enforcement of competition law in Europe. Competition law enforcement demands a high level of independence and autonomy from political influence, especially where governments seek to politicise competition policy as a means to consolidate political power.⁹

10. These considerations demonstrate the importance of maintaining a robust competition policy framework, legal certainty, cogent and evidenced theories of harm, transparent processes, and the independence of authorities. They also demonstrate how any debate on competition and democracy needs to be considered from a number of angles.

III. Competition Policy and Democratic Engagement

11. A further example of the relationship between competition policy and democracy can be found in the process of consultation and engagement with interested parties during competition policy developments. Broad participation is a hallmark of the democratic process. Indeed, in order to ensure that the U.S. Constitution's First Amendment rights of freedom of speech are protected, under the *Noerr-Pennington* doctrine, U.S. private parties are immune from antitrust law liability for joint conduct if they seek to

⁶ KJ Ceres, *Defending the Rule of Law Through EU Competition Law: The Case of Hungary 1* (2024), <https://www.sipotra.it/wp-content/uploads/2024/07/Defending-the-rule-of-law-through-EU-competition-law-the-case-of-Hungary.pdf>.

⁷ Maciej Bernatt, *Democracy and Competition Law: Exploring Substantive and Procedural Links* (Working Paper of the Centre for Antitrust and Regulatory Studies, University of Warsaw, No. 1-2024, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4757822.

⁸ Ceres, *supra* note 6, at 1-2.

⁹ Discussing the independence of competition authorities, Ceres also notes that “competition authorities need not just ‘pure’ independence but rather ‘embedded autonomy,’ that enable them to challenge anti-competitive practices of not just private actors, but also the anti-competitive practices of state-owned enterprises, and take on entrenched interests within the government and the state.” *Id.* At 7.

influence governmental action, whether through the executive, judicial or the legislative branches of government.¹⁰ In fact, it is both appropriate and essential for a democratic process to allow interested parties to engage on issues where competition authorities are exercising their enforcement discretion, particularly where non-competition factors may weigh on the minds of decision-makers. Limiting participation or dialogue in competition policy formulation and law making would not reflect democratic principles, specifically freedom of expression.

12. This is notably reflected by the process designed by the OECD at its founding, which ensures that its working committees can avail themselves of expert input from various perspectives, including organizations representing trade unions, consumers, and business.¹¹ Such input informs and enriches OECD discussions and allows for better decision making. Of course, BIAC supports the importance of transparency and the disclosure of interests, notably when third parties are acting on behalf of their clients. However, BIAC would stress that it should be the substance of the arguments, and the robustness of the analysis provided, that should be weighed, not who delivers the message.

IV. Key Trade-Offs Between a Greater Role for Democracy in Competition Policy

13. The Call for Contributions implies that an “increased role for democracy” may be needed (and is possible) in competition policy and decision-making. The introduction of broad public policy considerations into competition policy, such as “democracy,” can create an opportunity for distortions and bias in decision making and present a challenge to legal certainty and predictability. As BIAC previously noted in 2017, “where broader public interest factors can be taken into account under competition legislation, defining these clearly with a complete and exhaustive listing of such factors is desirable and allows for predictability in the process.”¹²

14. If competition authorities were to increasingly consider how their interventions can protect not only consumer welfare but also “democracy,” a clear understanding of what precise elements of democracy are in play is needed. If competition policy were used to see consumers as voters or citizens, factoring in a concept of “anticompetitive impact on democracy,” what would the relevant legal scope and standards be for new or expanded theories of harm?¹³

¹⁰ The doctrine takes its name from the first two cases that the U.S. Supreme Court considered in this jurisprudential line. See *E.R.R. Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

¹¹ See *How We Work*, OECD, <https://www.oecd.org/en/about/how-we-work.html>

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Representatives from governments, parliaments, other international organisations, business, labour, non-governmental organisations and academia all bring a unique perspective to guide change. While some 4 000 meetings and other events take place each year at the OECD, our experts are present where the debates are happening, working directly with governments and broader civil society in countries and through consultations.

¹² BIAC 2017 Submission, *supra* note 2, ¶ 30.

¹³ It is also likely that there would be significant divergence between jurisdictions, who may have different conceptions of democracy and which elements to prioritise. The lack of consensus on what democratic principles, and how it may be protected in a competition law context, would likely also affect the ability of authorities to cooperate in multi-jurisdictional cases.

15. As noted above, the broader an authority’s discretion is – notably where it is unclear what the precise scope of the theory of harm is – the more the authority invites policy advocacy and political rent-seeking, with the concomitant threat to authorities’ independence and the rule of law. In other words, unless these criteria are clearly defined and tied to sound antitrust underpinnings, the concept could create a system where flag-waiving substitutes for sound legal, factual, and economic analysis.

16. A well-defined set of factors to which the competition authority may refer in its decision-making diminishes the ability of government and politicians from attempting to use competition policy as a means of achieving ulterior industrial or political goals. The granting of powers to competition authorities to address anti-democratic impacts of commercial activity would require equivalent enforcement of rules against government-controlled or quasi-governmental enterprises.¹⁴

17. Indeed, in certain jurisdictions, such as the European Union, governments can, in exceptional circumstances, veto transactions that have been granted clearance by the European Commission in order to protect interests related to public security, media plurality, prudential rules or other exceptional national security interests relating to goods intended exclusively for military purposes.¹⁵ If political overrides exist, in order for governments to protect critical elements related to a democratic society, how would this mesh with a competition jurisdiction increasingly factoring in the protection of democracy?

18. Another way of looking at the question of competition and democracy is to ask to what extent are our democratic challenges caused or exacerbated by sub-optimal levels of competition? Concerns about media concentration, resulting in a few firms controlling information flow, and which can be influenced by un-democratic governments, is not a new phenomenon. BIAC acknowledges the debate around digital platforms and big data, targeted and predictive news services, and misinformation that can shape opinion and affect the public discourse. It should also be recognised that some companies that have been talked about as negatively affecting democratic processes, e.g., Palantir, Cambridge Analytics or Telegram, are companies that may well be below the traditional dominance threshold. This would indicate that concerns about corporate activity affecting democracy is not contingent on market power, and solutions should therefore be found in other, more appropriate, regulatory instruments.

19. Ezrachi and Robertson consider three approaches to integrating democracy into competition law.¹⁶ First is the “Competition Dynamic Approach” where democracy is considered an indirect benefit of healthy competition but is not a direct objective of antitrust enforcement. Second is the “Integrated Approach” embedding democratic values directly into competition law assessments. Third is the “External Benchmark Approach” which contemplates using external benchmarks to assess the impact of market power on democracy. Instead of altering the core principles of competition law, regulators would use external criteria, such as the level of media pluralism or the diversity of viewpoints, to guide their decisions. As noted above, BIAC believes that even if “democracy” can be sufficiently defined, a theory of harm articulated, and the necessary level of evidence met, competition authorities are not best placed to undertake such delicate political assessments, as evidenced in the existence of political overrides in merger review.

20. Ezrachi and Robertson also note that antitrust enforcement must be complemented by other regulatory measures, such as data protection, content moderation and media regulations. BIAC supports

¹⁴ See Cseres, *supra* note 6.

¹⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1, art. 21(4). However, the European Commission can reject a government’s arguments and approve transactions. See Press Release, European Comm’n, Mergers: Commission finds that Hungary’s veto over the acquisition of AEGON’s Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation (Feb. 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1258.

¹⁶ Ariel Ezrachi & Viktoria H.S.E. Robertson, Can Competition Law Save Democracy? Reflections on Democracy’s Tech-Driven Decline and How to Stop It, at 6-8 (May 16, 2024), <https://ssrn.com/abstract=4830305>.

efforts across multiple jurisdictions for increased dialogue between regulators whose jurisdiction touches on safeguarding democratic health, such as data protection and media regulators. The 2023 judgment by the Court of Justice of the European Union in *Meta Platforms Inc and Others v Bundeskartellamt*¹⁷ is instructive. The court held that a national competition authority can find, when examining the potential abuse of a dominant position, that that undertaking’s general terms on the processing and implementation of personal data are inconsistent with the EU’s General Data Protection Regulation 2016/679.¹⁸ However, the court made it clear that regulatory authorities are bound by the principle of sincere cooperation and competition authorities cannot depart from the decision by the competent supervisory authority on the relevant data processing terms.¹⁹ The court was therefore drawing clear boundaries between the jurisdiction of various regulatory authorities, maintaining the competence of the European data protection regulators. Competition authorities function within a broader constellation of democratic organs, including the legislature and courts. In their function, authorities should be willing to exercise “regulatory humility” if a competition analysis calls for an assessment of rights and obligations regulated by another competent authority.

21. Competition law is one tool that helps to protect the competitive process. But competition law should not be distorted beyond recognition to serve this or other ends. BIAC considered that other institutions and laws are often better placed to protect the democratic process. For example, the Digital Services Act has as one of its aims to ensure that manipulated or misleading information is detected, flagged and, if need be, removed.²⁰ The European Media Freedom Act aims to increase support for and protection of independent media and journalists, clamping down on acts of pressure and unethical behaviour.²¹ The new European Commission aims to propose a new “European Democracy Shield” that will aim to counter foreign information manipulation interference online and espionage, increasing the EU’s situational awareness by detecting, analysing and proactively countering disinformation and information manipulation.²² It will include increasing digital and media literacy and creating a European network of fact-checkers to debunk fake news.²³ The “European Democracy Shield” will also rely on the enforcement of the Digital Services Act.²⁴ Whether competition policy has a supportive role to play in the constellation of measures and regulators in existence or being instituted is questionable. There are numerous additional approaches outside competition law to address these concerns,²⁵ which would indicate that solutions to the negative impact of markets on democracy can be dealt with.

V. Conclusion

22. Democracy and competition are already integrally related in their common reliance on the rule of law to support social welfare. Any efforts to integrate democracy more directly into competition policy

¹⁷ Case C-252/21, *Meta Platforms Inc. and Others v. Bundeskartellamt*, ECLI:EU:C:2023:537 (July 4, 2023).

¹⁸ *Id.* ¶ 51.

¹⁹ *Id.* ¶ 53.

²⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

²¹ Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), 2024 O.J. (L 2024/1083).

²² Ursula von der Leyen, *Europe’s Choice, Political Guidelines for the Next European Commission 2024–2029*, at 23 (July 18, 2024), https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., Rupprecht Podszun, *News Ecosystems: Tackling Unfinished Business*, 12 J. ANTITRUST ENF’T 314 (2024), available at <https://doi.org/10.1093/jaenfo/jnae015> (discussing broader non-competition related proposals).

must not to undermine the many benefits of open market competition to economic pluralism or the legitimacy of competition enforcement. Particular consideration should be given to whether the democratic principles can be clearly defined in a competition context, whether a theory of harm can be coherently articulated, and whether remedies can be fashioned that will achieve these goals in a manner that other regulatory solutions are not capable of.